UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAVID PARMETER; ANATOLY ROSINSKY; and ANDREW SHULMAN, Plaintiffs, vs. AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA; PROFESSIONAL MUSICIANS LOCAL 47, AMERICAN FEDERATION OF MUSICIANS, Defendants.	CASE NO. CV 07-07225 MMM (SSx) ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

David Parmeter, Anatoly Rosinsky, and Andrew Shulman commenced this action on November 2, 2007 against the American Federation of Musicians of the United States and Canada ("AFM") and the Professional Musicians Local 47, American Federation of Musicians ("Local 47"). AFM and Local 47 have filed separate motions for summary judgment, which plaintiffs oppose.

I. FACTUAL AND PROCEDURAL BACKGROUND [1]

A. The Parties

AFM is a labor organization within the meaning of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 et seq. It is comprised of approximately 242 local union affiliates ("locals") and an estimated 90,000 individual musician members.[2] Local 47 is one of AFM's subordinate local unions, with geographic jurisdiction over the majority of Los Angeles County and all of Riverside and San Bernardino counties.[3] Plaintiffs are freelance musicians and members in good standing of both the AFM and Local 47.[4]

AFM is governed by a set of bylaws ("AFM Bylaws"), which set forth, *inter alia*, the international union's governance structure, the relationship between the international union and its local affiliates, and the locals' obligations to collect work dues from member musicians and remit a portion of those dues to AFM.[5] The AFM International Executive Board ("IEB") is responsible for determining and announcing AFM policies, adopting rules supplementing the AFM

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[1]Unless otherwise noted, the facts recited in this order are undisputed. The factual background is drawn from a joint stipulation of undisputed material facts ("JSMF") submitted by the parties. (See Docket No. 101 (Mar. 27, 2009).) Additional information is derived from each defendant's separate statement of facts, and plaintiffs' statements of genuine issues in response thereto. (See Defendant AFM's Separate Statement of Uncontroverted Facts and Conclusions of Law in Support of Its Motion for Summary Judgment ("AFM Facts"), Docket No. 95 (Mar. 27, 2009); Defendant Professional Musicians, Local 47, American Federation of Musicians, AFL-CIO's Separate Statement of Uncontroverted Facts and Conclusions of Law; Declaration of Lewis Levy and Supporting Deposition Excerpts ("Local 47 Facts"), Docket No. 91 (Mar. 25, 2009); Statement of Genuine Issues in Opposition to Motion for Summary Judgment by Defendant AFM ("Plaintiffs' Issues Re: AFM"), Docket No. 114 (Apr. 10, 2009); Statement of Genuine Issues in Opposition to Defendant Local 47's Motion for Summary Judgment ("Plaintiffs' Issues Re: Local 47"), Docket No. 108 (Apr. 8, 2009).)

[2]JSMF, ¶ 1; AFM Facts, ¶ 1.

[3]JSMF, ¶ 4.

[4]*Id.*, ¶ 14.

[5]*Id.*, ¶ 2; see also JSMF, Exh. 1 (Bylaws of the American Federation of Musicians of the United States and Canada ("AFM Bylaws"), revised September 15, 2007.) This is the currently operative version of the AFM Bylaws. (JSMF, ¶ 2.)

Bylaws, and exercising discretion to address matters not addressed in the bylaws.[6] The IEB also has general supervisory authority over all AFM matters and "complete jurisdiction and power of disposition [over] all matters and questions relating to the AFM, any of its members, or any Local, as well as complete jurisdiction and power of disposition [over] all matters and questions in which the AFM or any of its Locals or members may be interested or which may affect any of them."[7] The IEB (or one of its subcommittees) has "complete power to make any rules or orders that, in its judgment, may be necessary or desirable regarding any matters concerning the AFM, its Locals or members"; this power includes "order[ing] any changes to the Constitution or Bylaws of any Local deemed necessary by the IEB as in the best interests of the AFM, the Local, or its members."[8]

Local 47's internal affairs are governed by a separate set of bylaws ("Local 47 Bylaws"), which, as noted, are subject and subordinate to the AFM Bylaws.[9] The day-to-day affairs of Local 47 are managed by a group of officers and an Executive Board; both the Board and the officers are elected directly by the local's members.[10]

AFM serves as the exclusive bargaining representative for union members in negotiating

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[6]AFM Bylaws, Art. 3, § 8(b).

[7]*Id.*, § 8(d).

[8]*Id.*, § 8(i).

[9]JSMF, ¶¶ 5-6; see also JSMF, Exh. 2 (Bylaws of the Professional Musicians, Local 47, AFM 2007 (with amendments through April 2007) ("Local 47 Bylaws").) This is the currently operative version of the Local 47 Bylaws. Under the AFM Bylaws, "[a]ny provision in the Constitution or Bylaws of a Local that is illegal or in conflict with AFM Bylaws shall be null and void." (AFM Bylaws, Art. 3, § 8(i); see also *id.*, Art. 5, § 1(a) ("Locals shall be required to adopt as part of their Local Constitution and Bylaws a provision to the effect that the Local Constitution and Bylaws shall be subject and subordinate to the AFM Bylaws and amendments and providing further that wherever conflict or discrepancy appears between the Local Constitution and Bylaws and the AFM Bylaws and amendments, the latter shall prevail").)

[10]JSMF, ¶ 7.

various electronic media agreements with employers wishing to hire AFM musicians.[11] AFM has an Electronic Media Services Division ("EMSD"), with offices in New York and Los Angeles, which administers electronic media contracts negotiated with employers by AFM.[12] AFM asserts that when it enters into an employment agreement as the collective bargaining representative of its members in the electronic media field, the agreement "is typically drafted using AFM resources, negotiated with the institutional and industry knowledge and experience that the AFM and its employees and officers possess, and enforced by the EMSD."[13]

B. Payment of Work Dues By AFM Member Musicians

1. History

The AFM first began assessing work dues[14] as a percentage of members' earned scale

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[11]AFM and Local 47 split collective bargaining responsibilities for professional musicians. (*Id.*, ¶ 8.) Locals, including Local 47, serve as the union members' exclusive bargaining representative for certain electronic media agreements, including "demos" and "limited pressings." (*Id.*, ¶ 9.) The only electronic media agreements at issue in this suit, however, are those for which AFM is the exclusive bargaining representative. (*Id.*, ¶ 13 ("With respect to the agreements at issue in this litigation, including all agreements on account of which work dues have been deposited into the Court registry, the AFM is the exclusive representative of the Plaintiffs and other members of Local 47").)

[12]AFM Facts, ¶¶ 6-7. The electronic media contracts "cover the whole communications spectrum including broadcast and non-broadcast recorded media." (*Id.*, ¶ 7.)

[13]*Id.*, ¶ 8. Plaintiffs dispute this fact, citing the deposition testimony of Savina Ciaramella, Associate Director of AFM's EMSD. (Plaintiffs' Issues Re: AFM, ¶ 8; see also Declaration of Michael Posner in Opposition to Motion for Summary Judgment by Defendant American Federation of Musicians ("Posner Decl."), Docket No. 115 (Apr. 10, 2009), Exh. C ("Ciaramella Depo.").) The cited portion of Ciaramella's testimony, however, establishes only that at least one version of one agreement was created either in whole or in part by a New York AFM local. This does not contradict AFM's statement that electronic media agreements are *typically* drafted using the international union's resources. Nor does it conflict with AFM's assertion that the agreements are enforced by its EMSD. Consequently, the court considers this fact undisputed.

[14]"'Work Dues' are union dues paid by members of AFM and its locals based on their earnings as professional musicians." (JSMF, ¶ 15.)

wages after the AFM Bylaws were amended at the union's 1980 convention.[15] From 1980 to 1991, AFM members who performed casual jobs (e.g., a one-time "club date" or "gig") were required to pay a percentage of their earnings as AFM work dues, even when the terms and conditions of their employment were *not* governed by an AFM or local collective bargaining agreement.[16] This system of work dues collection was difficult to enforce, since it required member musicians to report each engagement and pay work dues voluntarily to the appropriate local, which in turn remitted a portion of the dues to the AFM.[17] Because AFM supplied fewer support services for casual work (e.g., one-time engagements without formal or long-term contracts) than for other categories of musical employment (e.g., musical work performed for film and television recordings, symphonies, and/or touring shows), AFM member musicians expressed dissatisfaction that they were being assessed work dues for *all* musical employment, irrespective of the level of AFM benefits provided.[18] Musician dissatisfaction with the work dues structure contributed to a decline in AFM membership, which in turn pushed AFM to the brink of insolvency.[19]

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[15]AFM Facts, ¶ 14; Plaintiffs' Issues Re: AFM, ¶ 14; see also Declaration of Stephen Sprague in Support of Defendant AFM's Motion for Summary Judgment ("Sprague Decl."), Docket No. 98 (Mar. 27, 2009), ¶¶ 10-11 ("Prior to the 1980 Convention, the AFM did not assess, nor require its locals to assess, dues on members as a percentage of scale wages earned. At the 1980 Convention, the AFM adopted a bylaw provision which provided that all members of the Federation were required 'to pay dues based on earnings (hereinafter work dues) for all musical services performed . . . .' During this time, AFM local unions were required to collect a minimum of 1% of scale wages earned as work dues, of which [one-half of the minimum was payable to AFM]"). Sprague has been an AFM member since 1964 and served continuously as an AFM officer or employee from January 1980 through April 1999. (*Id.*, ¶¶ 2, 9.)

[16]AFM Facts, ¶ 15; Plaintiffs' Issues Re: AFM, ¶ 15.

[17]AFM Facts, ¶ 16; Plaintiffs' Issues Re: AFM, ¶ 16.

[18]AFM Facts, ¶ 17; Plaintiffs' Issues Re: AFM, ¶ 17.

[19]AFM Facts, ¶ 18; Plaintiffs' Issues Re: AFM, ¶ 18; see also Sprague Decl., ¶ 14 ("When I became Secretary/Treasurer, the AFM was in dire financial straits and in danger of insolvency. As Secretary/Treasurer of the AFM at the time, I understood that one of the primary reasons for the financial problems was the declining membership of the Union. I also understood that one of

In anticipation of AFM's June 1991 Convention, a series of committees were formed, including a Blue Ribbon Committee on Financial and Organizational Restructure ("Blue Ribbon Committee"). The Blue Ribbon Committee was charged with examining the financial condition of the international union and proposing viable alternative structures.[20] In a report published in the February 1991 *International Musician*,[21] the Blue Ribbon Committee recommended the elimination of work dues on casual or one-time work, ("non-[AFM] CBA employment")[22] as well as an increase in AFM work dues on electronic media employment from ½% to ¾%.[23] The

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the primary reasons for the declining membership was the work dues structure that existed at that time").

[20]AFM Facts, ¶ 19; Plaintiffs' Issues Re: AFM, ¶ 19; see also Sprague Decl., ¶ 15.

[21]The *International Musician* is the official journal of the AFM. (AFM Facts, ¶ 21; Plaintiffs' Issues Re: AFM, ¶ 21.)

[22]The parties dispute whether or not the Blue Ribbon Committee considered eliminating work dues on agreements for which the AFM *did* serve as the musicians' collective bargaining representative. (Compare AFM Facts, ¶ 25; Sprague Decl. ¶ 17 ("The Committee did not consider eliminating work dues on any agreements to which the AFM served as the collective bargaining representative of musicians") with Plaintiffs' Issues Re: AFM, ¶ 25; Declaration of Jason C. Marsili in Opposition to Motion for Summary Judgment by Defendant American Federation of Musicians ("Marsili Decl."), Docket No. 113 (Apr. 10, 2009), Exh. B (Declaration of Dennis Dreith ("Dreith Decl.")), ¶ 9 ("The issue of work dues as a means of financing the AFM was discussed by the Blue Ribbon Committee. Initially, there was strong sentiment against work dues among a majority of the Committee members, and a belief that work dues should be eliminated altogether as a means of financing the AFM. . . ."); *id.*, ¶ 11 ("Eventually, the majority concluded that work dues should be eliminated except for employment under AFM negotiated collective bargaining agreements, AFM touring Pamphlets and certain symphony, opera or ballet orchestras with regular seasons. It was discussed that with AFM negotiated collective bargaining agreements, as opposed to non-AFM negotiated agreements, the AFM would incur additional expense and perhaps reach an agreement not otherwise available").) Dennis Dreith is a member in good standing of both AFM and Local 47 who served on the Blue Ribbon Committee. (*Id.*, ¶¶ 2, 7.)

[23]AFM Facts, ¶ 23; see also Declaration of Lew Mancini in Support of Defendant AFM's Motion for Summary Judgment ("Mancini Decl."), Docket No. 97 (Mar. 27, 2009), Exh. 1 (February 1991 *International Musician*) at 4. Mancini has been an AFM member since 1967 and been employed by the AFM as Assistant Secretary to the Secretary Treasurer since late 1994 or early 1995. (Mancini Decl., ¶¶ 2-3.) In that capacity, Mancini has "day-to-day responsibilities

Committee also advocated increased per capita fees and annual dues, which were thought to be logistically easier to collect than work dues on non-AFM agreement employment.[24]

The financial recommendations published in the Report of the Blue Ribbon Committee were reflected in "Resolution No. 3" at the 1991 AFM Convention.[25] The first version of the resolution was defeated by a vote of 130,986 to 40,727, and referred to the convention's Joint Law and Finance Committee for reworking.[26] The next day, a substitute version of Resolution No. 3 was

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as a custodian of records for the Federation," including "the maintenance of all minutes of meetings and written records of the AFM International Executive Board [ ], the maintenance of records relating to AFM Conventions, and the maintenance of all issues of the *International Musician*." (*Id.*, ¶ 4.)

Plaintiffs purport to dispute these facts, but reference materials that do not contradict AFM's factual assertions. (Plaintiffs' Issues Re: AFM, ¶ 23.) The court therefore consider the facts undisputed for purposes of this proceeding.

[24]AFM Facts, ¶ 24; Plaintiffs' Issues Re: AFM, ¶ 24; see also Sprague Decl., ¶ 16 (detailing proposed increases in per capita fees and annual dues).

[25]AFM Facts, ¶ 28; see also Mancini Decl., Exh. 2 (Eighty-Ninth Convention American Federation of Musicians of the United States and Canada 1991 Official Proceedings ("Official Proceedings 1991 Convention"), June 17-20, 1991, Las Vegas, Nevada) at 59-66 (providing the text of Resolution No. 3 as discussed during the night session of the second day of the 1991 AFM convention).

[26]Official Proceedings 1991 Convention at 66 (recording vote and noting that Resolution No. 3 was referred back to the joint committee). Plaintiffs purport to dispute this history of events, but do not specify the precise nature of their objection(s). They rely primarily on Dreith's declaration, in which he states: "I have reviewed the Official Proceedings of the 1991 AFM Convention, which reads that the Resolution respecting Article 8 Section 8(b) as presented on the third day differs slightly from the Resolution presented on the night session of the second day. I have no recollection of any changes being made to that language between the second and third day of the Convention." (Dreith Decl., ¶ 17.) Plaintiffs also cite the February 1991 *International Musician*, which contained the Blue Ribbon Committee's report, referenced above, and the May 1991 *International Musician*, which they assert contained a copy of the resolutions to be presented at the June 1991 AFM Convention. (See Dreith Decl., Exhs. C and D.) The latter document is difficult to read, and plaintiffs do not specify how its contents contradict the record presented by AFM. Even if it did, there is no evidence that the version of the resolution published in the May 1991 *International Musician* was the version (or the only version) considered at the June 1991 convention. Neither Dreith nor plaintiffs challenge the authenticity of the official records of the June 1991 convention submitted by AFM. Accordingly, the court accepts the history detailed in

proposed to the AFM delegates[27] and passed by a roll-call vote of 95,797 to 77,776.[28] As reported in the August 1991 *International Musician*, "the Convention voted to eliminate Federation work dues on all casual engagements, once again making the issue of work dues on casual engagements a matter of Local autonomy."[29] To generate revenue, the AFM increased per capita dues and, "[s]ince collecting work dues from players who work under contract is inherently easier than collecting from casual players," delegates "voted to adjust the work dues payments made by musicians working under CBAs," by, *inter alia*, increasing work dues paid by "musicians rendering services for the electronic media."[30]

Although the initial version of Resolution No. 3 referenced work dues "for all musical services performed under Federation-negotiated Agreements,"[31] the version enacted by convention delegates referenced work dues "for all musical services performed under Federation Labor Agreements."[32] The AFM represents that the terms "Federation Labor Agreements," "Federation Agreements," "National Agreements," "International Agreements," and "Federation-Negotiated Agreements" have been used interchangeably, historically as they are currently, to refer to agreements with employers negotiated by AFM in its role as exclusive bargaining representative of the member-musicians.[33] As written in AFM's September 1991 Bylaws, the new provision

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those records as undisputed for purposes of this motion.

[27]Official Proceedings 1991 Convention at 88-99 (providing text of substituted Resolution No. 3 as discussed during the day session of the third day of the 1991 AFM convention).

[28]*Id.* at 99 (recording passing vote).

[29]Mancini Decl., Exh. 5 (August 1991 *International Musician*) at 1.

[30]*Id.* at 7.

[31]Official Proceedings 1991 Convention at 61.

[32]*Id.* at 93-94.

[33]AFM Facts, ¶ 33; Sprague Decl., ¶ 27; Declaration of Thomas F. Lee in Support of Defendant AFM's Motion for Summary Judgment ("Lee Decl."), Docket No. 96 (Mar. 27, 2009), ¶ 28. Lee, who is current AFM's current president, has served continuously as a member of the

referenced "Federation-negotiated Agreements."[34] Both the ratified and printed versions of the new bylaw provision provided for work dues on services rendered for electronic media (recordings, broadcasts, films, video, etc.) at 1% of scale wages, payable to locals; of this sum, ¾ % was due and payable by the local to the AFM.[35]

AFM IEB from 1991 to the present. (*Id.*, ¶¶ 2, 4.) Lee asserts that, in his capacity as AFM president, he has "personal knowledge of the structure of the AFM, the practices of the AFM, and the Bylaws of the AFM," and has express authority to supervise AFM's affairs. (*Id.*, ¶ 3.)

Plaintiffs purport to dispute this representation, citing generally the AFM Bylaws. (Plaintiffs' Issues Re: AFM, ¶ 33.) They also object to portions of the Sprague and Lee declarations as speculative and lacking foundation. (Plaintiffs' Evidentiary Objections.) Since both Sprague and Lee are current or former AFM officials who state that they have personal knowledge of the facts set forth in their declarations, the court finds these objections unavailing. AFM's representation regarding the interchangeability of the various terms is accepted as true for purposes of this motion.

[34]Mancini Decl., Exh. 3 (Bylaws of the American Federation of Musicians of the United States and Canada, Revised September 15, 1991 ("1991 Bylaws")) at 51-52; see also AFM Facts ¶ 34. Plaintiffs appear to dispute this fact, though the precise nature of their objection is unclear. (See Plaintiffs' Issues Re: AFM, ¶ 34 (citing the Dreith declaration and an excerpt from President Lee's deposition without further explanation).) The cited portion of the Dreith declaration does not mention the terms "Federation-negotiated Agreements" or "Federation Labor Agreements," much less assert that these terms are not interchangeable. The cited portion of the Lee deposition details the AFM's policies for converting delegates' actions at the convention into written bylaw provisions; President Lee acknowledged, however, that he learned about the conversion process only in 1999, eight years after the 1991 convention and bylaw revision. (Posner Decl., Exh. A (excerpts from Lee Depo.) at 171:10-174:25.) There is no evidence that the process in 1999 was the same as the process in 1991. In view of the fact that AFM has submitted authenticated copies of various documents showing slight changes in wording between the resolution presented at the convention through to the adoption of the international's 1991 Bylaws, the court accepts AFM's contention that there were such slight differences as undisputed for the purposes of this motion. Moreover, as discussed in note 33, the interchangeability of terms like "Federation Labor Agreements" and "Federation-negotiated Agreements" is undisputed for purposes of this proceeding. As a result, even if plaintiffs have raised factual issues as to whether there were slight changes in the wording of the new bylaws between the time they were ratified at the convention and the time they were formally published, the dispute is not material and cannot be used to defeat summary judgment.

[35]Compare Official Proceedings 1991 Convention at 93-94 to 1991 Bylaws at 51.

2. Modern Work Dues

Since the 1991 bylaw revisions, AFM has continuously assessed work dues on member musicians' qualifying earnings. In relevant part, Article 9 § 32 of the current bylaws states that "[a]ll AFM members, as a condition of membership, shall be required to pay dues based on scale earnings (Work Dues) for all musical services performed under AFM-negotiated agreements, AFM touring Pamphlets, and employment with any Symphonic Orchestra."[36] In turn, Article 9 § 32(b) provides:

> "For employment under AFM-negotiated Agreements covering services rendered for electronic media (recordings, broadcasts, films, video, etc.), Work Dues shall be no less than 1½% of scale wages and shall be payable to the Local in which the engagement takes place, except as otherwise provided by these Bylaws. Of this amount, 1¼% of scale wages shall be due and payable by the Local to the AFM as Federation Work Dues."[37]

For work performed under AFM-negotiated agreements covering services rendered for electronic media, therefore, locals collect and retain ¼% of scale wages as work dues.[38] Local 47 is authorized to impose additional work dues on scale wages via a referendum process pursuant to which Local 47 members can approve additional dues.[39] Under the AFM Bylaws, additional dues imposed by the local may not exceed 5% of scale wages for work performed under AFM-negotiated agreements covering services rendered for electronic media.[40] At present, the Local

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[36]AFM Bylaws, Art. 9 § 32; see also JSMF, ¶ 16.

[37]AFM Bylaws, Art. 9 § 32(b); see also JSMF, ¶ 17.

[38]JSMF, ¶ 18.

[39]JSMF, ¶ 19; see also AFM Bylaws, Art. 5 § 56(a) ("In addition to any Work Dues required pursuant to Article 9, Section 32, Locals may impose additional Work Dues on scale wages earned").

[40]JSMF, ¶ 20; see also AFM Bylaws, Art. 5 § 56(d) ("The maximum amount of Work Dues payable by any Local members for performing services within the jurisdiction of a Local of which they are members shall not be more than 5% of the scale wages earned. . .").

47 Bylaws set work dues at 4% of scale wages for electronic media employment in fields for which AFM-negotiated agreements exist.[41] For non-electronic media employment in fields for which AFM-negotiated agreements exist, the Local 47 Bylaws provide for work dues of 3% of scale wages.[42]

Each month, AFM locals collect work dues and remit the appropriate percentage to AFM.[43] Locals that refuse to abide by AFM's interpretation and application of the AFM Bylaws can suffer severe penalties, including the removal of locally elected officials, monetary fines, and/or trusteeship by the international union.[44]

From January 1992 through the present, AFM and its chartered local unions have consistently construed the AFM Bylaws to require locals to collect and remit work dues to AFM for scale wages earned on work under an agreement for which AFM has served as the musicians' collective bargaining representative.[45]

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[41]JSMF, ¶ 21. Local 47 has been charging 4% work dues for electronic media employment in fields for which AFM-negotiated agreements exist (e.g., motion pictures, television, sound recordings, etc.) since at least 1999. (*Id.*, ¶ 26; see also Local 47 Bylaws, Art. 4 § 12 (setting forth work dues rates).) This 4% rate includes the 1¼% work dues that are forwarded by the local to the international union.

[42]JSMF, ¶ 25; see also Local 47 Bylaws, Art. 4 § 12.

[43]*Id.*, ¶¶ 27-28 (citing AFM Bylaws, Art. 9 §§ 32(b) and 40(a)).

[44]AFM Bylaws, Art. 5 §§ 22(a), 46, 70-76.

[45]AFM Facts, ¶ 36; Sprague Decl., ¶ 25 ("Following the 1991 Convention, I served as Secretary/Treasurer of the AFM until April 1999. During the entire period of time following the 1991 Convention through the end of my tenure as Secretary/Treasurer of the AFM in 1999, the AFM consistently construed the AFM Bylaws to require the collection, by a local union, and the subsequent remittance to the AFM, of work dues for any scale wages earned on all work performed where the AFM has served as the collective bargaining representative of the musicians who are working under an agreement"); *id.*, ¶ 26 ("Following the 1991 Convention, I served as Secretary/Treasurer of the AFM until April 1999. During the entire period of time following the 1991 Convention through the end of my tenure as Secretary/Treasurer of the AFM in 1999, I believe that each and every AFM Local union consistently construed the AFM Bylaws to require the collection, by a local union, and the subsequent remittance to the AFM, of work dues for any scale wages earned on all work performed where the AFM has served as the collective bargaining

C. Negotiated Versus Promulgated Agreements

This action concerns a dispute regarding the difference in meaning, if any, between the term "AFM-negotiated agreement" and "AFM[-]promulgated agreement." In December 2006, the Recording Musicians Association ("RMA")[46] wrote a letter to President Lee,[47] which

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representative of the musicians who are working under an agreement"); Lee Decl., ¶ 20 ("From January 1, 1992, through the present, the AFM and each of its chartered AFM local unions, have consistently construed the AFM Bylaws to require the collection, by a local union, and the subsequent remittance to the AFM, of work dues for any scale wages earned on all work performed where the AFM has served as the collective bargaining representative of the musicians who are working under an agreement"). Plaintiffs object to portions of this evidence. (Plaintiffs' Evidentiary Objections, ¶ 6 (objecting to Lee Decl., ¶ 20, "on the grounds that it lacks foundation (**FRE 602**). Mr. Lee does not have personal knowledge as to how each of the chartered AFM local unions have consistently construed the AFM Bylaws"); *id.*, ¶ 11 (objecting to Sprague Decl., ¶ 26, "on the grounds that it is speculative and lacks foundation. (**FRE 602**). Mr. Sprague states that he 'believes that each and every AFM Local union consistently construed the AFM Bylaws' in a specific manner. Mr. Sprague's belief is speculative. There is no foundation as to how he knows how each and every AFM Local union consistently construed the Bylaws"). As noted, both Lee and Sprague served as AFM officers during the time period relevant to this dispute, and state that their observations are based on personal knowledge gained during their terms of service. The AFM Bylaws expressly require the international's secretary/treasurer to "collect all dues, fees, assessments, and fines levied upon Locals and AFM members in accordance with the Bylaws; [to] take charge of all AFM monies, securities and other property; and [to] keep true and complete accounts of them." (AFM Bylaws, Art. 3 § 7(c).) Carrying out these duties would give the AFM secretary/treasurer firsthand knowledge of the dues collected by each local and remitted to the international union. See, e.g., *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 206 F.3d 1322, 1330 (9th Cir. 2000) ("Personal knowledge can be inferred from an affiant's position" (citations omitted)); *Barthelemy v. Air Lines Pilots Association*, 897 F.2d 999, 1018 (9th Cir. 1990) (affiants' "personal knowledge and competence to testify are reasonably inferred from their positions and the nature of their participation in the matters" about which they are testifying). Finally, plaintiffs do not dispute Lee's or Sprague's testimony that *the AFM* has consistently construed Article 9 § 32 to require that locals collect and remit work dues on the disputed agreements. This is critical, insofar as AFM's interpretation of the Bylaws is at the core of plaintiffs' suit. For all these reasons, plaintiffs' objections are overruled.

[46]RMA is a Players' Conference of the AFM and serves as a membership organization that advocates for the interests of recording musicians. (JSMF, ¶ 38.)

[47]Michael Posner, who is one of plaintiffs' counsel, wrote the letter on behalf of the RMA. (See Amendment to JSMF, Docket No. 117 (Apr. 14, 2009) (copy of Posner's December 8, 2006 demand letter to AFM on RMA's behalf ("RMA Demand Letter").)

expressed its dissatisfaction with language approved by the AFM[48] to govern video game-related work done by union musicians for prospective employers.[49] Pursuant to Article 5 § 33(a) of the AFM Bylaws:

> "Any CBA negotiated or renegotiated by the AFM or a Local or any negotiated extension of an existing agreement for a period of more than six months based on its expiration date shall be subject to a secret ballot ratification by the eligible members who have worked under the previous agreement."[50]

RMA complained that the new language in the video game agreements had not been submitted to eligible members for ratification pursuant to § 33(a).[51]

AFM responded to RMA's letter on January 4, 2007.[52] Jeffrey Freund, AFM's General Counsel, explained that the contested provision "only require[d] ratification of agreements that are

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[48]AFM Facts, ¶ 58 (the IEB approved the use of a document known as "AFM Experimental Video Game Agreement Option 1" for AFM use in November 2006); *id.*, ¶ 60 (the IEB approved the use of a document known as "AFM Experimental Video Game Agreement Option 2" for AFM use in November 2006).

[49]From the contents of RMA's letter, it appears that while RMA supported the Experimental Agreement Option 1, it did not support Experimental Agreement Option 2. (RMA Demand Letter ("Considering that the new 'Experimental' Video Game Agreement was promulgated as a Federation-wide agreement with global application throughout the jurisdiction of the American Federation of Musicians, it is hard to fathom why a second option should be offered to employers that undercuts the Basic wages of option 1 by approximately $30 to $48 per three hour session, eliminates other wage components, and also fails to provide breaks and other benefits required under option 1. From an employer's perspective, if both agreements are available anywhere within the jurisdiction of the AFM, one would seriously question why anyone would agree to option 1 if they could save 25%-50% per session by exercising option 2. As a practical matter, the addition of option 2 to the AFM Video Game Agreement emasculates the wages and benefits that were heretofore earned by those musicians working in the Video Game Industry").)

[50]AFM Bylaws, Art. 5 § 33(a).

[51]RMA Demand Letter ("This [breach of the duty of fair representation] is exacerbated by the fact that the agreement will not be put to a vote of the bargaining unit membership for ratification").

[52]JSMF, ¶ 35.

'negotiated' with employers or employer groups."[53] Because the disputed agreement "was not negotiated with any employer [but was instead] simply created by the IEB and made available to any employer in the video game industry who desires to score a video game with union musicians," Freund explained, "it is no different from countless other AFM promulgated 'agreements,' including but not limited to the Basic Cable, Telethon, Syndicated Radio (Non-Symphonic), Cruise Ships, and Industrial Films 'agreements,'" none of which "has ever been subject to membership ratification."[54] Freund thus drew a distinction between negotiated and promulgated agreements, and concluded that the latter were "plainly outside the scope" of Article 5 § 33's membership ratification rules.[55]

Plaintiffs became aware of Freund's response in August 2007.[56] Given the distinction Freund drew between negotiated and promulgated agreements for purposes of *Article 5 § 33*, plaintiffs concluded that certain electronic media agreements were promulgated (i.e., "non-negotiated") and therefore not subject to work dues under *Article 9 § 32*.[57] On September 5, 2007, plaintiffs sent letters to President Lee and Local 47's then-president, Hal Espinosa, asking that AFM (1) immediately undertake an audit to determine the amount of work dues collected by the international union during the past four years for work under AFM-promulgated agreements, (2) refund those dues to Local 47 with appropriate interest, and (3) issue a formal announcement to all locals specifying that no local was to forward work dues to the international for employment under AFM-promulgated media agreements.[58] At no point prior to this time had any AFM member or local contended that the AFM Bylaws precluded the collection of work dues on work

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[53]JSMF, Exh. 3 (copy of Freund's January 4, 2007 response to RMA's demand letter ("Freund RMA Response").)

[54]*Id.*

[55]*Id.*

[56]Complaint, ¶ 10.

[57]*Id.*

[58]JSMF, ¶ 36; see also JSMF, Exh. 5 (copies of relevant correspondence).

performed under agreements for which AFM served as the exclusive bargaining representative, including agreements plaintiffs characterized as "promulgated" agreements.[59] The term "promulgated agreement" does not appear anywhere in either AFM's or Local 47's Bylaws; it is also not included in AFM instructions to local union officers regarding the collection of work dues.[60]

Espinosa forwarded plaintiffs' letters to AFM for review.[61] He noted that "[a] full and appropriate response to Parmeter and Shulman requires an interpretation and explanation of the AFM Bylaws, something that is not within the purview of Local 47. As such, it is respectfully requested that your office, and/or AFM counsel, provide to Local 47 the AFM's position, in writing, concerning the claims made by Parmeter and Shulman."[62] Espinosa indicated that, in the meanwhile, Local 47 would continue to remit work dues to AFM as required.[63]

On October 15, 2007, Freund sent a response to Espinosa.[64] He explained:

> "Mr. Shulman's and the RMA[ ]'s apparent contention is that agreements promulgated by the Federation are not 'negotiated' and, as a consequence, there is no Bylaw authority for the proposition that Work Dues are owed on work performed under these agreements. [¶] In our view, both the words of the Bylaw and the interpretation placed on it through years of application lead to the opposite conclusion. First, the operative word in the Bylaw is 'AFM-negotiated.' Although neither Mr. Shulman nor the RMA[ ] spell out why they believe that a 'promulgated

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[59]JSMF, ¶ 37. In its correspondence, the RMA did not assert that it was inappropriate for Local 47 to remit a portion of work dues collected on AFM-promulgated agreements to the international union. (*Id.*, ¶ 39.)

[60]JSMF, ¶ 34.

[61]*Id.*, ¶ 40; see also JSMF, Exh. 6 ("Espinosa Letter").

[62]Espinosa Letter at 2.

[63]*Id.*

[64]JSMF, ¶ 41; see also JSMF, Exh. 7 ("Freund Reply to Espinosa").

> agreement' is not negotiated, the implication is that it is because the IEB sets the terms of a 'promulgated agreement' rather than arriving at [such agreements] through across-the-table give and take. In our view, that approach places too narrow a meaning on the word 'negotiated.' The AFM is not in a position to impose the terms of a 'promulgated agreement' on an unwilling employer and until an employer agrees to the terms of a 'promulgated agreement,' it is nothing more than a set of proposals. At some point, the employer will have to agree to and execute a 'promulgated agreement' for it to become effective.[65] If the employer chooses not to agree, the agreement is not effective as to that employer. This means that, at the moment the employer agrees to become a party to a 'promulgated agreement,' the agreement as to that employer is in effect as a consequence of a negotiation between the Federation and the employer. It may have been a short negotiation that did not resemble what we are used to experiencing as a more typical labor negotiation, but it is a negotiation nonetheless. [¶] That view is entirely consistent with the longstanding application of Article 9, Section 32 (and its predecessors). It is fair to say that words to the same effect have appeared in the Bylaws for many years, perhaps decades. Throughout that time, members, locals and the Federation have demonstrated their understanding that work dues are payable on work performed under 'promulgated agreements' by billing, paying, collecting and forwarding these dues to the Federation. No one, until now, has raised a question concerning this Bylaw provision or the dues obligation created by it. While this consistent pattern would not, in and of itself, establish the obligation if there was absolutely no basis in the Federation's governing documents creating

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[65]Plaintiffs agree that "[a]ll agreements for which the AFM serves as the representative of musicians require an affirmation or acceptance by an employer, or group of employers, before the agreement can take effect. [¶] The AFM cannot unilaterally enter into an agreement on behalf of its members with an employer or group of employers without the consent, affirmation, or agreement by such employer or group of employers to the wages, hours, and working conditions in that agreement." (JSMF, ¶¶ 59, 60.)

it, the words of Article 9, Section 32 are surely sufficient to form a basis for that pattern and practice."[66]

On November 2, 2007, plaintiffs sued the AFM and Local 47.

D. Commencement of Suit and Subsequent Developments

The complaint pleads claims for breach of contract against both the AFM and Local 47;[67] breach of the duty of fair representation against AFM;[68] and breach of the duty of fair representation against Local 47.[69] Plaintiffs seek injunctive relief prohibiting Local 47 from remitting work dues to AFM for work performed under promulgated video game and other "non-negotiated, electronic media agreements."[70] In addition, they seek actual damages according to proof, prejudgment interest, and costs of suit.[71]

On December 7, 2007, Posner wrote Lewis Levy, Local 47's counsel, demanding that Local 47 escrow all dues paid by its members on work performed under certain "promulgated agreements."[72] Levy sought Freund's permission to place the contested work dues in an interest-bearing account while the litigation was pending.[73]

On December 26, 2007, President Lee sent a memorandum to the IEB, asking that the

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[66]Freund Reply to Espinosa at 1-2.

[67]Complaint, ¶¶ 14-19. Although this claim is alleged against both the AFM and Local 47, the body of the claim is directed only against AFM. (*Id.*, ¶ 18 ("[T]he refusal of Defendant AFM to account for and refund to Defendant Local 47 any and all Federation Work Dues paid under promulgated video game and other non-negotiated, electronic media agreements constitutes a breach by Defendant AFM of Section 32 of Article 9 of the Bylaws of Defendant AFM").

[68]*Id.*, ¶¶ 20-23.

[69]*Id.*, ¶¶ 24-27.

[70]*Id.*, ¶¶ 28-31. Plaintiffs' prayer for injunctive relief is pled as a fourth "claim for relief" though it is, in actuality, a prayer for a particular remedy.

[71]*Id.* at 8-9 (Prayer for Relief).

[72]JSMF, ¶ 42; see also JSMF, Exh. 8 (Posner's December 7, 2007 Letter to Levy).

[73]JSMF, ¶ 43; see also JSMF, Exh. 9 (Levy's December 14, 2007 Letter to Freund).

board vote on two issues: (1) whether Article 9 § 32(b) of the AFM Bylaws authorizes collection of work dues under AFM promulgated electronic media agreements, and (2) whether Local 47 should escrow the contested work dues until this action is resolved.[74] The IEB voted unanimously that "Article 9, section 32(b) of the Federation Bylaws authorize[s] the collection of Federation work dues on scale wages earned under Federation promulgated electronic media agreements."[75] It also voted unanimously that Local 47 should not escrow the contested work dues.[76]

In early January 2008, Freund advised Levy that "Local 47 should decline to escrow any portion of work dues paid to it by its members, and should forward the Federation's portion of those work dues in a timely manner to the Federation."[77] Local 47 subsequently filed an interpleader cross-claim against AFM and an interpleader counterclaim against plaintiffs.[78]

On February 4, 2008, the IEB reaffirmed its unanimous December 2007 vote regarding the collection of work dues on AFM-promulgated agreements during its quarterly meeting.[79]

In May 2008, the parties entered into a stipulation that permitted Local 47 to deposit all AFM work dues collected for work performed under certain specified electronic media collective

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[74]AFM Facts, ¶ 37; Lee Decl., ¶ 18; *id.*, Exh. 1 (copy of President Lee's December 2007 memo to the IEB seeking guidance). Plaintiffs do not contest this fact, which is considered undisputed for purposes of this proceeding. Instead, they assert, without elaboration, that the correspondence between President Lee and the IEB is "immaterial." (Plaintiffs' Issues Re: AFM, ¶ 37.) As discussed *infra*, the court cannot agree.

[75]AFM Facts, ¶ 38; Lee Decl., ¶ 19. Once again, plaintiffs contend that this fact is "immaterial." (Plaintiffs' Issues Re: AFM, ¶ 38.)

[76]AFM Facts, ¶ 39; Lee Decl., ¶ 21. Plaintiffs contend that this fact too is "immaterial." (Plaintiffs' Issues Re: AFM, ¶ 39.)

[77]JSMF, ¶ 44; see also JSMF, Exh. 10 (Freund's January 4, 2008 Reply to Levy).

[78]In each interpleader action, Local 47 seeks an order requiring plaintiffs and AFM to litigate their respective rights to the disputed work dues, discharging Local 47 from any and all liability on account of the competing claims, and an award of reasonable attorneys' fees and costs.

[79]AFM Facts, ¶ 40; Lee Decl., ¶ 22; see also Mancini Decl., Exh. 4 (excerpted minutes from IEB February 2008 meeting). Once again, plaintiffs contend that this fact is "immaterial" to their lawsuit. (Plaintiffs' Issues Re: AFM, ¶ 40.)

bargaining agreements into an interest-bearing account maintained by the court.[80] Since May 2008, Local 47 has made monthly deposits into the court's registry.[81] Also in May 2008, the parties entered into a second stipulation, which provides, *inter alia*, that "[i]n the event that the District Court (or, if there is an appeal, the highest appellate court to decide this case on the merits) adopts or defers to the Federation's interpretation of Article 9, § 32, Local 47 agrees to be bound by that interpretation and to defend it as against any claim by any member of, or any musician represented by, Local 47."[82] Conversely, if the court "interprets Article 9, § 32 in the manner advocated by Plaintiffs, [the parties agree that] the Federation and Local 47 shall apply that interpretation uniformly, and, for such period determined by the Court, retroactively, to Plaintiffs as well as to other members of, or musicians represented by, Local 47."[83]

E. Defendants' Motions for Summary Judgment

Each defendant has now moved for summary judgment on plaintiffs' complaint. As a jurisdictional matter, AFM contends that plaintiffs lack Article III standing to sue.[84] On the merits, AFM contends that its interpretation of its bylaws and constitution is entitled to substantial

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[80]JSMF, ¶ 45. The agreements affected are: (1) "Option 1" and "Option 2" video game agreement(s) with effective dates of November 2006; (2) video game agreement(s) in effect through November 2006, and continuing under Special Letters of Agreement for some time thereafter; (3) basic cable agreement(s); (4) telethon agreement(s); (5) syndicated radio (non-symphonic) agreement(s); (6) cruise ship agreement(s); (7) industrial films agreement(s); (8) basic television film agreement (independent producers); (9) basic theatrical motion picture agreement (independent producers); (10) non-standard television agreement(s) (pay TV); (11) motion picture documentary agreement(s); (12) festival film agreement(s); and (13) parades, spectaculars, and theme park agreements. (JSMF, ¶ 45 (identifying these as "electronic media collective bargaining agreements").) The parties do not agree that each of these contracts is necessarily a "promulgated" agreement. (AFM Facts, ¶ 41; Plaintiffs' Issues Re: AFM, ¶ 41.) In fact, different parties define the term "promulgated agreement" differently. (AFM Facts, ¶ 51; Plaintiffs' Issues Re: AFM, ¶ 51.)

[81]Local 47 has not made any claim to the disputed funds. (*Id.*, ¶ 51.)

[82]See Stipulation in Lieu of Amended Pleadings, Docket No. 56 (May 27, 2008), ¶ 1.

[83]*Id.*, ¶ 2.

[84]AFM Mem. at 23-25; AFM Reply at 16-18.

deference absent evidence of bad faith or special circumstances, neither of which, it contends, plaintiffs have shown.[85] AFM also contends that its interpretation of Article 9 § 32 is consistent with common sense and its historical approach to work dues. It asserts that its interpretation of the provision is logical and, unlike plaintiffs' incoherent theories regarding "promulgated agreements," capable of uniform application.

Local 47 contends that the duty of fair representation can be breached only by the exclusive bargaining agent; because the AFM serves in that capacity with respect to the disputed agreements, Local 47 asserts it has no enforceable duty to its members regarding the collection of the disputed work dues.[86] The local also argues that plaintiffs' breach of contract claim against it fails because its adherence to AFM's interpretation of the AFM Bylaws is not patently unreasonable.[87] Finally, Local 47 asserts that plaintiffs' fourth "claim for relief" fails as a matter of law, because injunctive relief is a remedy, not an independent cause of action.[88]

Plaintiffs acknowledge that an order granting AFM's motion for summary judgment would necessitate granting Local 47's motion.[89] Consequently, the court will first evaluate AFM's arguments, and reach Local 47's motion only if necessary.

II. DISCUSSION

A. Legal Standard Governing Article III Standing

Under Article III, § 2 of the United States Constitution, federal courts have jurisdiction only over actual "cases and controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997); see also

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[85]AFM Mem. at 9-10; AFM Reply at 3-8.

[86]Local 47 Mem. at 14-19. Local 47 further asserts that, even if plaintiffs could bring a fair representation claim against the local, there is no evidence to support a finding that it acted in an arbitrary, discriminatory, or bad faith manner (*Id.* at 19-20.)

[87]*Id.* at 20-24.

[88]*Id.* at 24-25.

[89]Opp. to Local 47 MSJ at 5 n. 6.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (standing is "an essential and unchanging part of the case-or-controversy requirement of Article III," and so constitutes a limitation on the court's jurisdiction). Article III standing rests on the idea of separation of powers. Courts must thus analyze a party's standing to sue by "reference to the Art[icle] III notion that federal courts may exercise power only in the last resort, and as a necessity, and only when adjudication is consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process." *Allen v. Wright*, 468 U.S. 737, 752 (1984) (internal citations and quotation marks omitted); see also *Raines*, 521 U.S. at 820 (noting that principles of standing reflect an "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere").

The Supreme Court has held that Article III standing must be established before a court may proceed to the merits. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-94 (1998) ("[Several Courts of Appeals] find it proper to proceed immediately to the merits question, despite jurisdictional objections, at least where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied. . . . The Ninth Circuit has denominated this practice – which it characterizes as 'assuming' jurisdiction for the purpose of deciding the merits – the 'doctrine of hypothetical jurisdiction.' . . . We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers" (citations omitted)).

To establish standing, a plaintiff must show (1) that he or she has suffered an "injury in fact"; (2) that there is a causal connection between the injury and the conduct alleged in the complaint; and (3) that it is "likely," as opposed merely to "speculative," that the injury will be "redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61. Additionally, where, as here, plaintiffs seek injunctive relief, "they must demonstrate that they are 'realistically threatened by a *repetition* of the violation.'" *Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006) (quoting *Armstrong v. Davis*, 275 F.3d 849, 860-61 (9th Cir. 2001) (emphasis original)). The party invoking federal jurisdiction bears the burden of establishing each element, which it must do "with

the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 559. In the context of a motion for summary judgment, a plaintiff must set forth by affidavit or other evidence "specific facts" supporting his or her standing to sue. See, e.g., *Truth v. Kent School District*, 542 F.3d 634, 642 (9th Cir. 2008) ("At the summary judgment stage the plaintiffs need not establish that they in fact have standing, but only that there is a genuine question of material fact as to the standing elements," quoting *Central Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002) (punctuation omitted)); *Walker v. City of Lakewood*, 272 F.3d 1114, 1123 (9th Cir. 2001) (citing *Lujan*); *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1352 n. 11 (9th Cir. 1994) ("To survive a motion for summary judgment that challenges a claimant's standing, the claimant must demonstrate specific facts, through affidavit or other competent evidence, in support of his or her standing to bring the lawsuit," citing Rule 56 of the Federal Rules of Civil Procedure).

B. Legal Standard Governing Motions for Summary Judgment

A motion for summary judgment must be granted when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED.R.CIV.PROC. 56(c). A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. . . . [S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party").

Where the moving party will have the burden of proof on an issue at trial, the movant must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. On an issue as to which the nonmoving party will have the burden of proof, however, the

movant can prevail merely by pointing out that there is an absence of evidence to support the nonmoving party's case. See *Celotex Corp.*, 477 U.S. at 323. If the moving party meets its initial burden, the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, "specific facts showing that there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 250; FED.R.CIV.PROC. 56(e)(2).

Evidence presented by the parties at the summary judgment stage must be admissible. FED.R.CIV.PROC. 56(e)(1). In reviewing the record, the court does not make credibility determinations or weigh conflicting evidence. Rather, it draws all inferences in the light most favorable to the nonmoving party. See *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630-31 (9th Cir. 1987). Nonetheless, conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. See *Falls Riverway Realty, Inc. v. Niagara Falls*, 754 F.2d 49, 56 (2d Cir. 1985); *Thornhill Pub. Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

C. Whether Plaintiffs Have Standing to Sue

1. Actual Injury, Threat of Repetition, and Causation

To show "injury in fact," plaintiffs must show that there has been "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). The purpose of the requirement is to "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

AFM asserts that plaintiffs have not personally suffered any actual or threatened injury as a result of its alleged breach of contract (i.e., the collection of work dues on "promulgated" agreements under Article 9 § 32).[90] Plaintiffs, however, counter that they have been "injured financially" by the allegedly improper collection of work dues from their scale wages.[91] As

[90]AFM Mem. at 24.

[91]Opp. to AFM MSJ at 7.

evidence of this, plaintiffs submit the declaration of former Local 47 president Espinosa, who states that, after this action was filed, Local 47 reviewed session reports[92] pertaining to each plaintiff to ascertain the total amount of dues each had paid to AFM under the disputed agreements. This review revealed that between January 1, 2000 and October 17, 2008, the local remitted to AFM approximately $1,702 in work dues paid by David Parmeter; approximately $2,212 in work dues paid by Anatoly Rosinsky; and approximately $2,439 in work dues paid by Andrew Shulman.[93] This is sufficient to satisfy *Lujan*'s "injury in fact" prong. See, e.g., *National Audobon Society, Inc. v. Davis*, 307 F.3d 835, 855-56 (9th Cir. 2002) ("First, the trappers suffered actual, discrete, and direct injury in fact in the form of financial losses incurred from the prohibition on trapping contained in Proposition 4"); *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121, 1130 (9th Cir. 1996) ("Economic injury is clearly a sufficient basis for standing" under first prong of the *Lujan* test).

Additionally, it is undisputed that AFM will, absent outside interference, continue to interpret its Bylaws to require the assessment of work dues on the disputed employment agreements. That is the clear import of Freund's October 15, 2007 letter to Espinosa. This is sufficient to show a realistic threat of repeat injury moving forward, as plaintiffs must do in order to have standing to seek prospective injunctive relief. See, e.g., *Armstrong v. Davis*, 275 F.3d 849, 860-61 (9th Cir. 2001) ("[W]here, as here, a plaintiff seeks prospective injunctive relief, he must demonstrate that he is realistically threatened by a *repetition* of the violation. . . . There are at least two ways in which to demonstrate that such injury is likely to recur. First, a plaintiff may

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[92]Session reports are submitted to Local 47 by employers who are signatory to one or more electronic media agreements with AFM. These reports detail the wages paid to bargaining unit musicians. They identify each musician whose services were covered by the applicable electronic media agreement, the dates of the musician's employment, the type of electronic media agreement involved, and the wages paid to the musician. Local 47 uses the reports to calculate the amount of work dues an individual member musician owes. (See generally Declaration of Stephany Fernandez in Support of Defendant Professional Musicians, Local 47's Motion for Summary Judgment ("Fernandez Decl."), Docket No. 90 (Mar. 25, 2000), ¶¶ 4-5.)

[93]Opp. to AFM MSJ at 7; see also Espinosa Decl., ¶¶ 7-14.

show that the defendant had, at the time of the injury, a written policy, and that the injury 'stems from' that policy. . . . In other words, where the harm alleged is directly traceable to a written policy, . . . there is an implicit likelihood of its repetition in the immediate future. . ." (citations and punctuation omitted)).

Plaintiffs' showing also satisfies the second prong of *Lujan*; plaintiffs have adduced evidence from which it can reasonably be inferred that their injury was caused by AFM's requirement that its locals collect work dues from member musicians for certain specified work engagements, including engagements governed by "promulgated" agreements. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 505 (1975) ("Petitioners must allege facts from which it could reasonably be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield. . . . [Under Article III, a petitioner must] establish that, in fact, the asserted injury was the consequence of the defendants' actions. . ."); *Marijuana Policy Project v. Miller*, 578 F.Supp.2d 1290, 1302-03 (D. Nev. 2008) ("Causation is established if the plaintiff's injury is 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court,'" quoting *Pritikin v. Dep't of Energy*, 254 F.3d 791, 797 (9th Cir. 2001) (alterations original)).

2. Redressability

Having concluded that plaintiffs have satisfied the injury in fact and causation prerequisites to Article III standing, the court must next examine whether plaintiffs have demonstrated that it is likely that their injuries would be redressed if they were to prevail in this litigation. See, e.g., *Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1125 (9th Cir. 2006) ("To establish standing under *Lujan*, plaintiffs must show a likelihood that the injury they have suffered will be redressed by a favorable outcome to the litigation" (citing *Lujan*)); *Marijuana Policy Project*, 578 F.Supp.2d at 1303 ("As for redressability, 'it must be likely as opposed to merely speculative, that the injury will be redressed by a favorable decision"). In assessing whether plaintiffs' injuries are redressable, it is helpful to distinguish between the two types of relief plaintiffs seek on their breach of contract claim: (1) actual damages (i.e., a sum

equal to the work dues, if any, found to have been improperly withheld), and (2) permanent injunctive relief enjoining Local 47 in the future from remitting work dues to AFM "in connection with promulgated video game and other non-negotiated, electronic media agreements."[94]

Viewed in this manner, AFM's assertions that plaintiffs lack standing because they cannot establish redressability are unavailing. AFM contends that plaintiffs "have not alleged that any money need be returned directly to them, or that their claim entitles them to [the] return[ ] [of] any work dues."[95] As noted, however, plaintiffs' prayer for relief seeks actual damages.[96] Second, if plaintiffs prevail on their breach of contract claim, AFM may well be enjoined in the future from collecting the disputed work dues from plaintiffs' and other AFM member musicians'

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[94]Complaint at 8 (Prayer for Relief on first cause of action). According to Black's Law Dictionary, "actual damages" are "[a]n amount awarded to a complainant to compensate for a proven injury or loss," and are synonymous with compensatory damages, tangible damages, or real damages.

[95]AFM Mem. at 24.

[96]In their opposition, plaintiffs state that they "did not seek to have any money returned to them at the onset of this litigation." They go on to argue, however, that "a favorable decision by the Court entitles [them] to a refund of a portion of the work dues they have paid." (Opp. to AFM MSJ at 7.) AFM characterizes this as a new claim for the return by Local 47 of a portion of the work dues paid to the local and asserts that it is "unconnected to [plaintiffs'] LMRA § 301 claim against the AFM." (AFM Reply at 17.) AFM overlooks the fact that plaintiffs sought actual damages for AFM's alleged breach of contract in their complaint. Were plaintiffs to prevail on the merits, their financial losses could be redressed by entering judgment in their favor and against AFM for the amount of work dues that were wrongfully collected by the international union. For this reason, it is unnecessary to resolve the parties' dispute regarding whether or how Local 47 would redistribute returned work dues in order to conclude that plaintiffs have shown redressability on their breach of contract claim. (See Opp. to AFM MSJ at 7-8 (asserting that plaintiffs are entitled to 1% refund of work dues paid under the disputed agreements and that Local 47's governance structure includes democratic processes whereby local members will determine how any returned funds will be used); AFM Reply at 17-18 (asserting that "it would be speculation at best to guess how any refunded monies would be used by the local as a result of this hypothetical vote" by Local 47 member musicians).)

Moreover, since plaintiffs assert that Local 47 erroneously collected the work dues in question because of AFM's policies (specifically, AFM's reading of Article 9 § 32), AFM's contention that "the relief Plaintiffs seek . . . is not based on any LMRA § 301 claim related to the AFM bylaws, but rather on an alleged breach by Local 47 of its own bylaws" is incorrect. (AFM Reply at 16-17.)

earnings.[97]

Consequently, the court concludes that plaintiffs have established that they have standing to pursue their breach of contract claim against AFM.

D. Whether Defendants Are Entitled to Summary Judgment on Plaintiffs' Breach of Contract Claim

The core of plaintiffs' claim is their contention that the international union has improperly collected work dues for musical work performed under so-called "promulgated agreements." Plaintiffs argue that because these agreements are not "AFM-negotiated" contracts, they fall outside the purview of Article 9 § 32, and work dues may not be assessed for work performed pursuant to them. Plaintiffs assert their claim under § 301 of the LMRA, 29 U.S.C. § 185 et seq., which supplies federal jurisdiction over "[s]uits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . or between any such labor organizations." *Id.*[98]

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[97]The parties' joint stipulation in lieu of amended pleadings, entered into in May 2008, further supports the court's finding that plaintiffs have demonstrated redressability. As noted, this stipulation states that if the court "interprets Article 9, § 32 in the manner advocated by Plaintiffs, the Federation and Local 47 shall apply that interpretation uniformly, and, for such period determined by the Court, retroactively, to Plaintiffs as well as to other members of, or musicians represented by, Local 47." (Docket No. 56, ¶ 2.)

[98]A union's constitution is a "contract" for purposes of § 301. See, e.g., *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, et al. v. Local 334, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, et al.*, 452 U.S. 615, 619-27 (1981) (holding that the district court had jurisdiction to adjudicate a suit by a local against a parent international union alleging violation of the international's constitution under § 301 of the LMRA); *id.* at 620 ("The Courts of Appeals are unanimous that a union constitution can be a 'contract between labor organizations' within the meaning of § 301(a)" (collecting cases)); see also *Wooddell v. International Brotherhood of Electrical Workers, Local 71*, 502 U.S. 93, 101 (1991) ("Congress expressly provided in § 301(a) for federal jurisdiction over contracts between an employer and a labor organization *or between labor organizations*. Collective-bargaining agreements are the principal form of contract between an employer and a labor organization. Individual union members, who are often the beneficiaries of provisions of collective-bargaining agreements, may bring suit on these contracts under § 301. Likewise, union constitutions are an important form of contract between labor organizations. Members of a

Courts have long recognized that "[t]here is a well-established federal policy of avoiding unnecessary interference in the internal affairs of unions." *Motion Picture & Videotape Editors Guild, Local 776, I.A.T.S.E. v. International Sound Technicians, Cinetechnicians and Television Engineers of the Motion Picture and Television Industries, Local 695*, 800 F.2d 973, 975 (9th Cir. 1986) (collecting cases); see also *Sergeant v. Inlandboatmen's Union of the Pacific*, 346 F.3d 1196, 1200 (9th Cir 2003) (observing the existence "of the well-established federal policy of avoiding unnecessary interference in the internal affairs of unions and according considerable deference to the interpretation and application of a union's rules and regulations" (citing *Motion Picture & Videotape Editors Guild, Local 776*)).

Consequently, the Ninth Circuit has joined its sister circuits in holding that "absent bad faith or special circumstances, an interpretation of a union constitution by union officials, as well as interpretations of the union's rules and regulations, should not be disturbed by the court." *Motion Picture & Videotape Editors Guild, Local 776*, 800 F.2d at 975 (collecting cases); see also, e.g., *Noble v. Sombrotto*, 525 F.3d 1230, 1235 (D.C. Cir. 2008) (precedent "requires that we defer to 'an interpretation of a union constitution rendered by officials of a labor organization . . . unless the court finds the interpretation was unreasonable or in bad faith," quoting *Monzillo v. Biller*, 735 F.2d 1456 (D.C. Cir. 1984)); *Executive Board of Transport Workers Union of Philadelphia, Local 234 v. Transport Workers Union of America, AFL-CIO*, 338 F.3d 166, 170 (3d Cir. 2003) ("[C]ourts typically defer to a union's interpretation of its own Constitution and will not override that interpretation unless it is 'patently unreasonable'"); *Local No. 48, United Brotherhood of Carpenters and Joiners of America v. United Brotherhood of Carpenters and*

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collective-bargaining unit are often the beneficiaries of such interunion contracts, and when they are, they likewise may bring suit on these contracts under § 301"); see also, e.g., *Shea v. McCarthy*, 953 F.2d 29, 31 (2d Cir. 1992) ("*Wooddell* having thus answered in the affirmative the question whether union members may sue their union under section 301(a) for violations of the union constitution, the question we now must answer is whether section 301(a) authorizes similar suit against union officials who perpetuate the constitutional violation. We hold that it does"); *Kinney v. International Brotherhood of Electrical Workers*, 669 F.2d 1222, 1229 (9th Cir. 1981) ("An individual union member may bring suit on a union constitution against a labor organization [pursuant to § 185(a)]" (citation omitted)).

Joiners of America, 920 F.2d 1047, 1051-52 (1st Cir. 1990) ("There is a well-established, soundly based policy of avoiding unnecessary judicial intrusion into the affairs of labor unions . . . Conscious of the value of non-interference, we align ourselves squarely with those courts that have said judges should refrain from second-guessing labor organizations in respect to plausible interpretations of union constitutions. . . . [W]hatever the specific formulation of the test, the circuits are in agreement that the proper focus of judicial inquiry is on the reasonableness of the union's interpretation of its constitution at the time of the decision, not on a *post hoc* evaluation of the reasonableness of the underlying action. In other words, the critical question, uniformly, is whether the stated reason for the action was facially sufficient under the instrument of governance, or put another way, 'whether there was arguable authority for the officer's act from the officer's viewpoint at the time.' . . . If this query is answered in the affirmative, further judicial scrutiny of the decision, absent bad faith, is foreclosed" (citations omitted)).

Using this standard, the court will examine the record to determine whether AFM's interpretation of Article 9 § 32 is patently unreasonable. If it is not, the court will evaluate whether there is any evidence of bad faith or special circumstances that would justify judicial interference with AFM's interpretation. See, e.g., *Stelling v. International Brotherhood of Electrical Workers Local Union No. 1547*, 587 F.2d 1379, 1389 (9th Cir. 1978) ("[W]hen the union officials have offered a reasonable construction of the constitution, and no bad faith on their part has been shown, the courts should not disturb the union officials' interpretation").

1. Whether AFM's Interpretation of Article 9 § 32 is Unreasonable

Referencing the context, actual text, and historical application of Article 9 § 32, as well as pragmatic considerations regarding enforcement of the work dues provision, AFM argues that its interpretation of the contested Bylaw is reasonable.

As explained, AFM and its affiliated local unions split responsibility for entering into work agreements on behalf of member musicians.[99] This shared responsibility reflects a structural

[99]AFM Mem. at 10-11 ("*First*, as noted *supra* at 2, there are at least two types of agreements under which union musicians can work: (1) agreements between an employer or employers and the *AFM itself*, and (2) agreements between an employer or employers and an

division of labor between AFM and the locals, which AFM contends can be seen in the Bylaws provision governing work dues. AFM asserts that "the function of the critical phrase from the AFM Bylaws at issue in this case – 'AFM-negotiated Agreements' – is simply to distinguish, on the one hand, agreements entered into by the AFM from, on the other hand, those entered into by a local union."[100] Plaintiffs do not dispute the fact that the union divides responsibility for collective bargaining in this way; nor do they argue that the "promulgated" agreements here in question are drafted and offered to employers by some entity other than the AFM. For this reason, it is not unreasonable for AFM to denominate proposed collective bargaining agreements that it "promulgates" and offers to prospective employers for acceptance[101] or additional negotiation as "AFM-negotiated" to distinguish them from agreements that are local-negotiated.

Moreover, the current framework governing the collection of work dues was enacted in 1991 in response to at least two interrelated problems. Musicians' dissatisfaction with paying work dues on performances for which AFM had provided no meaningful support services (i.e., casual employment) led to a decline in AFM membership, which in turn threatened the international union with insolvency.[102] Ultimately, in response to this financial crisis, 1991 Convention delegates voted to restructure certain key sources of union revenue, including annual fees and work dues on certain types of musical employment, namely, employment facilitated and

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AFM-chartered *local union*" (emphases original)); JSMF, ¶ 8 ("Both AFM and Local 47 act as the collective bargaining representative for professional musicians working within certain industries").

[100]AFM Mem. at 11.

[101]The parties agree that "[a]ll agreements for which the AFM serves as the representative of musicians require an affirmation or acceptance by an employer, or group of employers, before the agreement can take effect," and the AFM "cannot unilaterally enter into an agreement on behalf of its members with an employer or group of employers without the consent, affirmation, or agreement by such employer or group of employers to the wages, hours, and working conditions in that agreement." (JSMF, ¶¶ 59-60.)

[102]AFM Facts, ¶ 18; Plaintiffs' Issues Re: AFM, ¶ 18.

governed by AFM-negotiated agreements.[103] In targeting this type of employment, AFM sought to quiet member dissatisfaction by collecting work dues only on employment as to which it had provided support services for its members. As AFM explains:

> "AFM has certain responsibilities that inhere to it as the collective bargaining representative of the musicians [in entering into agreements with employers], and there are associated costs borne by the AFM in administering these agreements. Requiring locals to collect and remit dues to finance such costs is both logical and consistent with the purpose of assessing work dues in the first place."[104]

AFM contends that plaintiffs "can offer no sensible reason to distinguish between agreements that the AFM administers for its member[s] based on terms that the union has developed internally [so-called promulgated agreements] and those that have been haggled over with employers, allowing work dues on one but not on the other."[105]

Finally, AFM asserts that its interpretation and application of Article 9 § 32 is capable of uniform application. A local can readily ascertain whether a particular agreement is or is not AFM-negotiated (as opposed to local-negotiated) for the purpose of collecting work dues; this is evident from the uncontroverted fact that AFM has consistently collected the dues in question from its locals for seventeen years.[106] Each plaintiff, by contrast, offered a different definition of "promulgated agreement" during his deposition.[107] None was able to describe a "simple method

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[103]AFM Facts, ¶ 24; Plaintiffs' Issues Re: AFM, ¶ 24.

[104]AFM Mem. at 13.

[105]*Id.*

[106]AFM Facts, ¶ 36; Sprague Decl., ¶ 25.

[107]AFM Facts, ¶ 43 ("Each Plaintiff testified differently as to his respective belief of what constitutes a 'negotiated agreement'"); Plaintiffs' Issues Re: AFM, ¶ 43 (undisputed); AFM Facts, ¶¶ 44-50 (summarizing each plaintiff's deposition testimony as to meaning of the term "negotiated agreement" to underscore the lack of coherent definition); Plaintiffs' Issues Re: AFM, ¶¶ 44-50 (undisputed). See also AFM Facts, ¶ 52 ("Each Plaintiff testified differently as to the meaning of the phrase 'promulgated agreement'"); Plaintiffs' Issues Re: AFM, ¶ 52 (undisputed); AFM

to determine whether an AFM agreement was 'promulgated' or 'negotiated' by determining the extent of 'negotiation' that was conducted between the AFM and an employer."[108] The AFM Bylaws and instructions to locals regarding the collection of work dues, moreover, do not reference or draw a distinction between "negotiated" agreements and "promulgated" agreements. This supports AFM's interpretation that "AFM-negotiated" refers to all agreements for which it – rather than a local – acts as the musicians' exclusive bargaining agent, and indicates that its interpretation of Article 9 § 32 is not unreasonable.

Significantly, plaintiffs acknowledge that the international's interpretation of "AFM-negotiated" is not unreasonable "in light of the deference that is typically afforded" to a union's interpretation of its own rules and regulations.[109] They argue, however, that AFM has articulated conflicting meanings of the phrase "AFM-negotiated Agreements" and that this undermines the reasonableness of its position.[110] A careful review of the record reveals that this is not, in fact,

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Facts, ¶¶ 53-55 (summarizing each plaintiff's deposition testimony as to meaning of the term "promulgated agreement" to underscore lack of coherent definition); Plaintiffs' Issues Re: AFM, ¶¶ 53-55 (undisputed).

[108]AFM Mem. at 13 n. 9. In addition, plaintiffs do not dispute the fact that they "have no knowledge of the contracts under which they have worked as a professional musician. When Plaintiffs render musical services, they are not aware under which contract the services are rendered. Plaintiffs have no knowledge of whether a contract was promulgated, the parties to the agreement, or the effective dates of the contract." (JSMF, ¶ 52.)

[109]Opp. to AFM MSJ at 13 ("Had AFM only advanced a single, consistent interpretation and application of the term 'AFM-negotiated Agreement,' it is plausible that *either* interpretation – the original interpretation advanced by Plaintiffs or the subsequent interpretation advanced by AFM – would be considered reasonable in light of the deference that is typically afforded" (emphasis original)).

[110]*Id.* at 9 ("No deference should be afforded to the interpretation of the term 'AFM-negotiated Agreement' presently advanced by AFM as the undisputed facts establish that this subsequent interpretation directly conflicts with the AFM's initial interpretation of the same term. The term at issue, 'AFM-negotiated Agreements,' is susceptible to at least two interpretations. Contrary to AFM's assertion, Plaintiffs **do not** advance their own interpretation of this term. Plaintiffs rely solely on AFM's *original* interpretation, which has since been contradicted by the second interpretation now asserted by AFM" (emphases original)).

the case.

Posner's December 2006 letter to President Lee cited Article 5 § 33(a) as the basis for disputing AFM's right to promulgate a new video game agreement. Section 33(a) requires ratification of "[a]ny CBA negotiated or renegotiated by the AFM."[111] AFM's Bylaws define a "CBA" as a "Collective Bargaining Agreement, a *contract* between a union and one or more employers covering terms of employment such as wages, working conditions, and grievance procedures."[112] All parties agree that a work agreement promulgated by the international or one of its locals is not a binding contract until it is accepted by a prospective employer interested in hiring an AFM-member musician.[113] Consequently, Freund's January 2007 response to Posner clarified that so-called "promulgated" agreements were not, in fact, "negotiated" until executed by one or more employers and thus fell outside the scope of Article 5 § 33.[114]

In contrast to Article 5 § 33(a), Article 9 § 32 – the Bylaw in dispute here – references "AFM-negotiated Agreements." In context, this is a term of art, which distinguishes agreements negotiated by the AFM from agreements negotiated by its locals. Although the parties may disagree over how much or what kind of negotiation does or should occur in the context of so-

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[111]AFM Bylaws, Art. 5 § 33(a).

[112]JSMF, ¶ 11 (emphasis added).

[113]JSMF, ¶¶ 59-60.

[114]AFM explains that "[i]n the context of ratification rights, [it] has determined that the *sets of proposals* created by the AFM to offer to employers to reach what the Plaintiffs call a 'promulgated agreement' in the video game and other electronic media industries are not subject to membership ratification because, *inter alia*, these proposals are not collective bargaining *agreements* negotiated with employers. And, the AFM has determined, AFM Bylaw Article 5 only addresses the right of members to ratify *agreements* – not *proposed* agreements – entered into with employers. . . . Once, but only once, the terms and conditions embodied in a proposal are agreed to by both the employer and the AFM, does the document become a collective bargaining agreement and an 'AFM-negotiated Agreement.'" (AFM Mem. at 21-22 (emphasis original).) Because it is not at issue in this lawsuit, the court need not address the reasonableness of AFM's interpretation of the ratification provision in Article 5 § 33.

called "promulgated agreements,"[115] their disagreement does not change the fact that the international and the locals split responsibility for the negotiation of employer agreements, and assess work dues differently depending on which entity served as the collective bargaining agent.

For this reason, the court cannot agree with plaintiffs' assertion that AFM's interpretation of the term "negotiated," as used in Article 5 § 33(a), necessarily conflicts with its interpretation of the distinct term "AFM-negotiated agreement" in Article 9 § 32.[116] As the court understands AFM's position regarding the meaning of "negotiated" in Article 5 § 33(a), it encompasses

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[115]AFM argues, for instance, that a "negotiation" occurs when it submits a "promulgated agreement" to a prospective employer for consideration and acceptance. (AFM Mem. at 11-13 ("[C]ourts have noted that a 'negotiation can be as simple as the submission of an offer which is accepted without qualification or comment.' *Maples v. Kern County Assessment Appeals Board*, . . . 103 Cal.App.4th 172, [180-81 (2002)]; *United States v. McShain*, 258 F.2d 422, 424 (D.C. Cir. 1958) ('Negotiation is a process of submission and consideration of offers until an acceptable offer is made, and accepted, or until it becomes apparent that no acceptable offer will be made. The brevity or the length of the haggling does not remove it from the definition of negotiation. If the first offer is accepted, the negotiation is concluded and a contract is made, just as it would be if the fifth or the fiftieth offer had been the accepted one.'). In other words, where the communication between two parties to a contract consists of one party making an offer and the other party accepting the offer by signing it, the resulting transaction has been 'negotiated' even if no back-and-forth discussion over the terms was necessary to effectuate the transaction. The AFM's construction of 'AFM-negotiated agreements' for determining the scope of work dues obligations is consistent with this common view of the word 'negotiated.' . . . The fact that the negotiations which lead to the agreements are a simple process of offer and acceptance, rather than a more extended period of 'haggling,' does not change the fact that the agreements are, as AFM's October 15 letter put it, 'in effect as a consequence of a negotiation between the Federation and the employer'").)

Plaintiffs intimate that the minimal level of negotiation that surrounds entry into most promulgated agreements is problematic given "the emphasis the Supreme Court [has] placed on the significance of actual negotiation in the collective bargaining process." (Opp. to AFM MSJ at 15 n. 16.) Nevertheless, they acknowledge that they do not contend "that some requisite amount of negotiation is required." (*Id.* at 16 n. 17.) As this action does not challenge AFM's representation of member musicians in its capacity as exclusive collective bargaining agent, the court need not evaluate or decide whether the manner in which AFM- promulgated agreements are drafted and offered to employers satisfies the union's obligations as its members' collective bargaining agent.

[116]Opp. to AFM MSJ at 13-14. Article 5 pertains to "Locals' Rights and Duties," whereas Article 9 governs "Membership; Eligibility, Application, Fees & Dues." (AFM Bylaws at v.)

proposed contracts drafted by AFM that an employer ultimately executes, creating a binding agreement. Because AFM is the entity that proposes the contract terms to which the employers ultimately agree, the meaning of "negotiated" in Article 5 § 33(a) does not conflict with the meaning of the term "AFM-negotiated" in Article 9 § 32.

At the hearing on this motion, plaintiffs argued that, while Article 5 § 33(a) does not use the term "AFM-negotiated agreement," Article 5 § 33(b) does. They asserted that AFM interpreted the phrase differently in the ratification and work dues contexts, construing it, in each case, in a manner that was adverse to the membership. The court cannot agree. As noted, Article 5 § 33(a) references "[a]ny CBA negotiated or renegotiated by the AFM *or a Local*. . . ."[117] Section 33(b), in turn, sets out the ratification procedures to be followed "[i]n the case of *AFM*-negotiated agreements."[118] Reading all of § 33 in context, it is clear that the phrase "AFM-negotiated agreements" is used to distinguish such contracts *from local-negotiated agreements*. The phrase "AFM-negotiated agreements" is thus used in an identical fashion in both Article 5 and Article 9 – namely, to identify and differentiate between contracts negotiated by the international, on the one hand, and those negotiated by a local, on the other.[119] Put differently,

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[117]AFM Bylaws, Art. 5 § 33(a) (emphasis added).

[118]AFM Bylaws, Art. 5 § 33(b) (emphasis added).

[119]Significantly, member ratification is not required for every CBA under the AFM Bylaws. Article 5 § 32 explains that "[i]n the event the Local and/or the AFM are unable to identify a bargaining unit for purposes of ratification, the International President or the Vice-President from Canada, as is appropriate, may empower the Local Executive Board to ratify the Agreement." Likewise, Article 5 § 33(a) explains that "[i]n the event that a list of eligible members cannot be reasonably established, this [ratification] requirement shall not apply, and the IEB or the Local's Executive Board, as the case may be, shall be empowered to ratify the agreement." Finally, § 33(b) states that "[i]n the context of AFM-negotiated agreements, the IEB shall also be empowered to ratify amendments that are of the nature of technical corrections, incidental improvements, or experimental formulas provided the period of time during which the amendment is to be in force does not exceed 15 months." (AFM Bylaws, Art. 5 §§ 32, 33(a)-(b).)

In response to an argument to this effect by AFM's counsel, plaintiffs' lawyer argued that at the hearing that during his deposition, President Lee made no reference to limitations on ratification based on inability to identify an affected bargaining unit. In fact, Lee testified specifically to such limitations. (Lee Depo. at 28:16-25 to 29:2-5 ([Q:] "Now, are all AFM

the term "AFM-negotiated Agreement" is intended to highlight AFM's, as opposed to the locals', participation in the process leading to contract formation. Because Article 5 § 33 and Article 9 § 32 are consistent in this regard, AFM's interpretation of Article 9 § 32 does not conflict with another "stark and unambiguous" provision in the Bylaws, or read important provisions out of the Bylaws. This, too, weighs in favor of deference to AFM's interpretation. See, e.g., *Local 234*, 338 F.3d at 170 ("Furthermore, we have noted that an interpretation that conflicts with the 'stark and unambiguous' language of the Constitution or reads out of the Constitution important provisions is a 'patently unreasonable interpretation' of a union Constitution").[120]

In sum, given the division of labor between the international and its locals, the rationale for the creation of a new work dues structure in 1991, and AFM's consistent interpretation and enforcement of Article 9 § 32 over the course of nearly two decades,[121] the court concludes that its reading of the Bylaw is not patently unreasonable. See *Stelling*, 587 F.2d at 1389 n. 10 ("The

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agreements subject to ratification? [A:] No. [Q:] What distinguishes whether an AFM agreement is subject to ratification or not? [A:] Without having the bi-laws [sic] in front of me which I can actually read[,] it is almost universally understood that if you have an identifiable bargaining unit then that agreement could be subject to ratification. If you don't have an identifiable bargaining agreement then you can't identify individuals that would be appropriate to ratify that agreement and so the IEB would ratify the agreement").)

[120]Compare *Loretangeli v. Critelli*, 853 F.2d 186, 194-95 (3d Cir. 1988) ("Second, we believe that it was an error of law to defer to the Federation's interpretation of its constitution. Such deference was inappropriate here, where the Federation's interpretation conflicted with the stark and unambiguous language of the constitution. . . . [I]t is likely that the Federation's interpretation will be found 'patently unreasonable' because it reads out of the constitution an important protective provision").

[121]As noted, the IEB – which is the ultimate authority on the AFM Bylaws – has also reaffirmed this interpretation unanimously on two occasions since the initiation of this lawsuit. Plaintiffs argue "[i]t is no surprise that the IEB unanimously voted that the section authorized the collection and remittance of Federation work dues on promulgated agreements." (Opp. to AFM MSJ at 5.) To the extent plaintiffs suggest that these votes evidence bad faith or misconduct on the part of the IEB, they fail, as discussed *infra*, to proffer any evidence supporting such a contention. Additionally, the chronology of events indicates that IEB may not have had an opportunity to respond formally to plaintiffs' position before suit was filed. As discussed, plaintiffs sent a letter to AFM in early September 2007, to which Freund responded in mid-October 2007. Suit was filed in early November.

proper inquiry has been described as 'whether there was arguable authority for the officer's act from the officer's viewpoint at the time, not from a court's more sophisticated hindsight'"); *Noble*, 525 F.3d at 1239 (" In determining reasonableness, a district court may consider the union's consistent past practices, see *Conley v. Parton*, 116 L.R.R.M. (BNA) 3071, 3075-76 (N.D. Ind. 1984). We agree with the district court that the Executive Council's reliance on past practice and a plain language reading of other provisions in NALC's constitution as authorizing per diem payments to Executive Council members without having read their names aloud to the Convention was reasonable and entitled to deference").[122]

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[122]The possibility that the Bylaws may be ambiguous in certain respects does not require a different result. See, e.g., *Local 234*, 338 F.3d at 175 ("The difficulty is that a reading of all of the applicable provisions shows that there is no unambiguous grant of power to either [the international union or the international's board]. Consequently, we are constrained to accept the Union's interpretation, not because it is compelled by the language [of the constitution] but because of the considerable deference we owe to it. In so concluding, we do not suggest that the [union's] interpretation is better than the Board's, but we merely hold that it is not patently unreasonable. . . . Given the deference we afford to unions in interpreting their own Constitutions, we conclude that although not compelled by the language, the Union's constitutional interpretation is not patently unreasonable"); *Stelling*, 587 F.3d at 1388-89 ("There is ambiguity in the constitutional provisions, but we cannot say that the district court was clearly erroneous in finding that the appellees' interpretation was reasonable"); see also, e.g., *District Council No. 9 v. Empire State Regional Council of Carpenters*, 589 F.Supp.2d 184, 194 (E.D.N.Y. 2007) ("I do not see the ambiguity; the constitutional documents plainly compel no action. But even if there were such ambiguity, this type of case presents an instance where federal labor policy supersedes the common law rules of contract interpretation. It is not only that federal courts defer to a union's interpretation of its own constitutional documents[ ]; it is the policy recognizing that affairs within and between unions are most often best resolved between those parties themselves without judicial interference" (citations omitted)); *Chase v. Massey*, No. C 03-02636 CW, 2005 WL 588519, *5 (N.D. Cal. Mar. 11, 2005) ("In circumstances where the meaning of a union's Constitution is ambiguous, the Court defers to the International Union's own interpretation so long as it is rational"); ; *Dow v. United Brotherhood of Carpenters and Joiners of America*, 810 F.Supp. 23, 25 (D. Mass. 1993) ("This Court does not find Defendant International's interpretation of its Constitution and the Local's By-Laws to be 'patently unreasonable.' It is entirely reasonable to interpret the two documents in such a manner as to avoid conflict between them. Accordingly, this Court defers to the expertise of the International and declines to intrude unnecessarily into internal Union affairs. Since the International's interpretation of its Constitution and Local 218's By-Laws is not 'patently unreasonable,' Defendants' Motion for Summary Judgment is granted").

2. Whether Plaintiffs Have Adduced Evidence of Bad Faith or Special Circumstances

Having concluded that AFM's interpretation of Article 9 § 32 is not unreasonable, the court must decide whether there is any evidence of bad faith or special circumstances that would weigh against deferring to AFM's interpretation of its Bylaws here. "Bad faith can be found on evidence that union officials acted contrary to the International's best interest, out of self-interest, or in an unconscionable or outrageous way." *Teamsters Joint Council No. 42 v. International Brotherhood of Teamsters, AFL-CIO*, 82 F.3d 303, 306 (9th Cir. 1996); see also, e.g., *Bishop v. Air Line Pilots Association International*, 211 F.3d 1272, 2000 WL 234520, *5 (9th Cir. Mar. 1, 2000) (Unpub. Disp.) (same); *Local 1052 of United Brotherhood of Carpenters and Joiners of America v. Los Angeles County District Council of Carpenters*, 944 F.2d 610, 615 (9th Cir. 1991) ("In its recent decision in *Local 48 v. United Brotherhood of Carpenters & Joiners*, 920 F.2d 1047 (1st Cir. 1990), the First Circuit articulated a test to determine whether a union merger was made in bad faith. Under that test, 'bad faith in ordering a merger can be found on evidence that union officials acted contrary to the international's best interests, out of self-interest, or in an unconscionable or outrageous way.' *Id.* at 1055. We adopt the First Circuit's test, and find that none of the allegations put forth by the dissident locals meets this standard"). Plaintiffs here have failed to raise triable issues of fact regarding AFM's bad faith or special circumstances.

The evidence shows that AFM's interpretation of Article 9 § 32 is rooted in the need for a steady, collectable source of revenue, which the international must have to remain viable, and in exchange for which the union provides its members with valuable collective bargaining services. Interpreting and enforcing AFM's Bylaws to meet these objectives is hardly contrary to the union's best interests, and plaintiffs do not argue otherwise. See, e.g., *Mason Tenders Local Union 59 v. Laborers' International Union of North America, AFL-CIO*, 924 F.Supp. 528, 546 (S.D.N.Y. 1996) ("Moreover, even if this Court agreed with the Locals' view that the Plan was not in the best interests of the rank-and-file members, such a view would not necessarily support a finding of bad faith as defined in *Local 48*. The standard set forth by the First Circuit in *Local 48* and adopted by the Second Circuit in *Local 810* defines bad faith as actions contrary

to the best interests of the international, not the rank-and-file"); cf. *Bishop*, 2000 WL 234520 at *4 (observing, in the context of a claim for breach of the duty of fair representation, that "'[t]he complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.' *Ford Motor Co.* [*v. Huffman*], 345 U.S. [330,] 338 [(1953)]. A union 'must be able to focus on the needs of its whole membership without undue fear of law suits from individual members.' [*Herring v. Delta Air Lines, Inc.*, 894 F.2d 1020, 1023 (9th Cir. 1990)]").[123]

In furtherance of these goals, AFM has uniformly applied Article 9 § 32 to all of its locals and member musicians since January 1992, consistently requiring collection and remittance of work dues on specified types of musical employment. Thus, nothing in the record suggests that AFM's interpretation of the disputed Bylaw provision unjustly burdens or unfairly targets any individual member musician or group of member musicians. In addition, the parties concede that the term "promulgated agreement" does not appear in the AFM Bylaws, and do not dispute the IEB's authority to interpret and apply the Bylaws. In the absence of a conflict between AFM's interpretation of Article 9 § 32 and the "stark and unambiguous" language of another Bylaw provision, and absent contrary evidence proffered by the plaintiffs, the court cannot conclude that the international's interpretation of "AFM-negotiated agreement" undermines the union's best interests or is detrimental to the interests of AFM members. See, e.g., *Local 1052*, 944 F.2d at 615 ("First, the dissident locals argue that the UBC's explanation for the merger was pretextual. As the First Circuit observed in rejecting a similar claim of bad faith, 'Once the International has given a reasoned and founded explanation for the merger, judicial inquiry into the decision's

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[123]See also, e.g., *Local 48*, 920 F.2d at 1055 ("The most that can be said of appellants' evidence . . . is that it established the existence of a deal. But the appellants stopped short of the finish line; they failed to present any proof either that the merger was not in UBCJA's best interests or that the consolidation of Local 107's health and welfare fund into the SWF was contrary to the interests of the UBCJA membership as a whole. That an arrangement entails a quid pro quo does not mean, or even necessarily suggest, that the exchange should not have been made. There was no authentic factbound controversy as to 'best interests'").

reasonableness as a tell-tale for bad faith must end,'" quoting *Local 42*). This is particularly true since it is undisputed that AFM serves as the members' exclusive bargaining agent for such agreements and administers them once they take effect.

Alternatively, bad faith "may be shown if plaintiff demonstrates that the union official who made the decision did so based on 'some interested or sinister motive.'" *Local 100, Transport Workers Union of Greater New York v. Transport Workers Union of America*, No. 03 Civ.3512PKC, 2005 WL 2230456, *6 (S.D.N.Y. Sept. 13, 2005); see also, e.g., *Mason Tenders Local Union 59*, 924 F.Supp. at 547-48 ("Almost every union determination . . . is likely to be opposed by some groups and officials. The Second Circuit, the First Circuit, and the Ninth Circuit have instructed that the inquiry into bad faith should be employed where there is evidence that a union official had a 'sinister motive' or intent to benefit personally, such as some pecuniary gain"). Plaintiffs have adduced no evidence, however, of any self-interested or sinister motive underlying the international's interpretation of "AFM-negotiated agreement" in Article 9 § 32.[124] Nothing in the record suggests that AFM, the IEB, President Lee, Freund, or any other official derives some improper financial or other benefit from the interpretation given to Article 9 § 32. See, e.g., *Local 48*, 920 F.2d at 1055 ("We likewise find no probative evidence of self-interest or sinister motive. There was not an iota of proof that Lucassen, Lia, or any other official of the International benefitted personally from the merger. Plaintiffs' rather feeble attempt to raise a suggestion of self-interest, through Leger's statement that Vokes made a $10,000 charitable donation at Lucassen's urging near the time that he persuaded the General President to order the merger, was inadequate as a matter of law to support an inference that Lucassen acted out of an

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[124]Rather, plaintiffs rely on summary assertions of AFM's purported bad faith. (See, e.g., Opp. to AFM MSJ at 12 ("When the AFM wants to restrict the voting rights of its membership pursuant to Article 5, Section 33, agreements that are promulgated by AFM **are not** considered 'AFM-negotiated agreements.' When the AFM wants to collect money from its members pursuant to Article 9, Section 32, promulgated agreements **are** considered 'AFM-negotiated Agreements.' These two contradictory interpretations evidence bad faith and present the special circumstances that warrant Court intervention" (emphases original)).) As discussed, the phrase "AFM-negotiated Agreement" in Article 5 § 33 does not conflict with the manner in which the term is used in Article 9 § 32. Thus, this argument is unavailing.

interested or sinister motive in ordering the merger"); *Murray v. Carroll*, 536 F.Supp.2d 225, 231-32 (D. Conn. 2008) ("Plaintiff adduces no evidence that International President Hill was motivated by bad faith when he interpreted the constitutional provisions to allow for removal of plaintiff pursuant to Article IV, Section 3(j) without the procedures required by Article XXV, Section 8. Further, plaintiff's evidence does not support an inference that Carroll's conduct was contrary to IBEW's interest, promoted his self-interest, or was otherwise unconscionable. Accordingly, the Court will grant summary judgment in defendants' favor on plaintiff's claim of breach of the IBEW Constitution").[125]

Likewise, plaintiffs have adduced no evidence of unconscionable or outrageous behavior. Cf. *Laborers' District Council of Washington, D.C. and Vicinity v. Laborers' International Union*, 306 F.Supp.2d 22, 27 (D.D.C. 2004) ("'[T]he general reasonableness of the merger decision is not a matter for judicial review[; r]ather, the plaintiffs must show that the order was unreasonable in a special sense, namely, that the order totally lacked any plausible foundation and was, therefore, unconscionable or outrageous.' . . . Plaintiffs have neither adduced evidence nor pointed to anything of record indicating that the GEB's reorganization decision was so unreasonable that it totally lacked any plausible foundation" (citation omitted; alterations original)).

3. Conclusion Regarding Plaintiffs' Breach of Contract Claim

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[125]See also *Local 1052*, 944 F.2d at 615-16 ("Second, the locals argue that the limited decisionmaking role played by the District Council's special merger committee creates a material question of fact as to McCarron's bad faith . . . That the committee's role was limited does not, however, create a material question of fact as to the *UBC's* bad faith. The locals have presented no evidence to suggest that the General President acted in bad faith in accepting the committee's findings. Moreover, as they concede, under section 6(A), the General President was not required to appoint a committee, nor to abide by its findings. Third, the dissidents point to the General President's failure to make specific findings. Section 6(A) does not, however, require that any such findings be made. . . . Fourth, they claim that the disposition of funds belonging to the former locals creates a material question of fact as to bad faith. Those funds were transferred to 'merger accounts' held in the name of the District Council for the merged locals. This procedure is arguably contrary to the General President's instruction that the funds were to go directly to the merged locals. . . . This evidence does not, however, create a material question of fact as to the *UBC's* bad faith in ordering the merger"(emphases original)).

For the reasons stated, the court concludes that AFM's interpretation of Article 9 § 32 is not patently unreasonable. Its review of the record also compels the conclusion that plaintiffs have failed to raise triable issues of fact regarding bad faith or special circumstances warranting judicial interference with AFM's reasonable interpretation. Accordingly, defendants are entitled to summary judgment on plaintiffs' breach of contract claim.[126]

E. Whether Defendants Are Entitled to Summary Judgment on Plaintiffs' Breach of Duty of Fair Representation Claims

Plaintiffs' complaint also includes two claims for breach of the duty of fair representation ("DFR"), one against AFM[127] and the other against Local 47.[128] As the allegations of the claims make clear, however, the DFR claims are entirely dependent on plaintiffs' breach of contract claim. Because the contract claim fails, the DFR claims fail as well.[129]

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[126]Plaintiffs argue that "in the absence of deference, general principles of contract interpretation apply," and analyze the 1991 Convention delegates' intent in enacting Article 9 § 32. (Opp. to AFM MSJ at 13 n. 14.) Because the court concludes that deference to AFM is warranted in this case, it need not reach these arguments.

[127]Complaint, ¶ 22 ("[T]he refusal of Defendant AFM to account for and refund to Defendant Local 47 any and all dues paid under promulgated video game and other non-negotiated, electronic media agreements constitutes a breach by Defendant AFM of the duty of fair representation owed to Plaintiffs and other members of Defendant Local 47").

[128]*Id.*, ¶ 26 ("[T]he refusal of Defendant Local 47 to take action to recover from Defendant AFM any and all work dues collected by Defendant Local 47 under promulgated video game and other non-negotiated, electronic media agreements that were improperly remitted to Defendant AFM constitutes a breach by Defendant Local 47 of the duty of fair representation owed to Plaintiffs and other members of Defendant Local 47").

[129]Plaintiffs appear to have abandoned their DFR claims, neglecting to oppose either AFM's or Local 47's substantive arguments regarding the claims. (See, e.g., AFM Reply at 4 n. 2 ("Plaintiffs do not dispute that their Duty of Fair Representation claim fails because the Duty only governs union behavior where the union is acting in its role as exclusive bargaining representative in the collective bargaining process. Plaintiffs have apparently abandoned this claim"); Local 47 Reply at 4 ("By failing to provide any support or opposition on their third claim for relief, breach of duty of fair representation against Defendant Local 47, this claim should be deemed abandoned as a matter of law" (citations omitted)). This serves as a second, independent basis for entering summary judgment in defendants' favor on the DFR claims. See, e.g., *Sanchez v. Maricopa*

III. CONCLUSION

For the reasons stated, the court grants defendants' motions for summary judgment.

DATED: May 21, 2009

MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

County, No. CV 07-1244-PHX-JAT, 2008 WL 4057002, *7 (D. Ariz. Aug. 27, 2008) ("If a non-moving party only partially responds to a motion for summary judgment, then the party abandons the claims that it does not address in its opposition to the motion"); *Raspberry v. Johnson*, 88 F.Supp.2d 1319, 1327-28 (M.D. Ala. 2000) ("In Count One of his Complaint, Plaintiff alleges that [defendants' conduct] constitutes cruel and unusual conduct in violation of the Eighth and Fourteenth Amendments. However, Plaintiff fails to even mention these claims in his Brief, much less elaborate on them. . . . Therefore, based on the foregoing, the court finds that Plaintiff has abandoned his claims alleged in Count One and, thus, summary judgment is due to be granted as to these claims"); *Natitonal Communications Association, Inc. v. AT&T Co.*, No. 92 Civ. 1735 (LAP), 1998 WL 118174, *28 (S.D.N.Y. Mar. 16, 1998) ("In moving for summary judgment, AT&T argues that even if NCA could prove its allegations, NCA has not stated a claim under the Communications Act. In opposing AT&T's motion, NCA did not address any of these arguments. Under these circumstances, it appears that NCA has abandoned this claim. AT&T's motion with respect thereto is, therefore, granted" (record citations omitted)).