

**SERVICE EMPLOYEES INTERNATIONAL UNION, CTW, CLC**

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**In the Matter of the** )  
**Possible Trusteeship of** )  
**SEIU United Healthcare** )  
**Workers - West** )

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**REPORT AND RECOMMENDATION  
TO THE INTERNATIONAL PRESIDENT  
ON WHETHER A TRUSTEE SHOULD BE APPOINTED  
AT SEIU UNITED HEALTHCARE WORKERS - WEST**

**Ray Marshall  
January 2009**

**PROCEDURAL BACKGROUND**

I was appointed by International President Andrew L. Stern of the Service Employees International Union (“SEIU” or “International Union”) to serve as hearing officer in a hearing to determine whether a trustee should be appointed to take charge and control of the affairs of SEIU United Healthcare Workers - West (“UHW-W”). This is my report and recommendation to President Stern on whether a trustee should be appointed to take over the affairs of SEIU UHW-W.

Article VIII, Section 7(a) of SEIU’s Constitution and Bylaws states:

Whenever the International President has reason to believe that, in order to protect the interests of the membership, it is necessary to appoint a Trustee for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of this International Union, he or she may appoint such Trustee to take charge and control of the affairs of a Local Union.

The Amended Notice of Hearing (hereafter Amended Notice) on Whether a Trustee Should be Appointed issued by President Stern on September 12, 2008, stated that the hearing was to address the following question:

Whether the leaders of UHW<sup>1</sup> have engaged in financial malpractice and undermined democratic procedures by engaging in improper financial transactions and making misrepresentations to its members and the International Union through the creation of false official records and the issuance of a series of false statements and otherwise failed to carry out the legitimate objects of the International Union.

The Amended Notice set forth six grounds for a trusteeship. They were:

1. The leadership of UHW-W attempted to move \$6 million of the members' dues monies off the UHW-W books for their own purposes, created false records describing the purpose of the transfer and otherwise misrepresented to the members the real purposes for which the monies were transferred so as to undermine democratic procedures.
2. UHW-W failed to take action to recover all funds from the Patient Education Fund (PEF) to which the funds alleged in the first paragraph were transferred.
3. UHW-W moved another \$500,000 to an attorneys' trust account as part of a continuing effort to move UHW-W funds off the books.

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<sup>1</sup> I will use UHW except in quotations.

4. The leaders of UHW-W wrongfully converted the International Union's Convention delegate database.
  
5. UHW-W has failed to cooperate with the International Union's audit of UHW-W and with the International Union's assignment of monitors.
  
6. Leaders of UHW-W are alleged to have retaliated against members who have dissented from UHW-W's leadership on internal union matters.

At the hearing, the representatives of the International President did not pursue the fifth and sixth charges and presented evidence and argument only on the first four charges.

The hearing was initially noticed for September 22 and 23, 2008, but at the request of UHW-W, it was put off until September 26 and 27, 2008. The first two days of the hearing were held at the San Mateo Events Center in San Mateo, California. It was estimated that approximately 1300 members of UHW-W attended the hearing. Because the hearing was not completed on September 27<sup>th</sup>, four more days of hearing were scheduled for November. A hiatus in the hearing was provided because everyone was involved in the Presidential elections. The hearing was continued at the San Jose Hilton in San Jose, California from November 12-15, 2008. It was estimated that approximately 50-60 UHW-W members attended the hearings in San Jose. All six days were necessary to complete the hearing.

At the hearing, both sides were represented by teams of lawyers. Because this was an internal union hearing, I applied relaxed rules of evidence, permitting each side to introduce any evidence which it wanted to with the caveat that I would give appropriate weight to each piece of evidence based on how I assessed its credibility. I did permit cross-examination of witnesses by the attorneys for each side. The International President introduced 129 exhibits and called 10 witnesses. UHW introduced 232 exhibits (some were duplicative of the International President's exhibits) and called 22 witnesses. After the hearing, I permitted the parties to submit a number of affidavits either covering matters not addressed at the hearing or responding to the testimony at the hearing or in the other parties' affidavits. A transcript by a certified court reporter was made of the entire proceeding.

During the afternoon of the second day, I permitted members who were present to make a statement on the record if they wished to do so. Sixty-two UHW members made statements on the record regarding whether a trusteeship should be imposed on UHW. In addition, after the hearing concluded, I received hundreds of written statements from UHW members. At the end of the 5<sup>th</sup> day of hearing, UHW presented a petition to the International Executive Board that they claimed was signed by 80,000 members.

After completion of the hearing, both parties were given 30 days to submit briefs and then additional time to submit reply briefs. Both parties submitted lengthy briefs and reply briefs.

I believe that a full and fair hearing was provided to both the International President's representatives and to UHW. Both parties had more than adequate time to

present exhibits and witnesses and to submit briefs for my consideration. I have carefully reviewed the exhibits and the transcripts in this case as well as the briefs submitted by both parties for the following report and recommendations.

This report first summarizes the International President's case on the grounds for trusteeship in the Amended Notice, followed, in order, by the UHW's response to those charges, and the IP's reply to the UHW's response, the UHW's affirmative defense, the IP's response to the UHW's affirmative defense, a short summary of the parties' positions, and my conclusions and recommendations.

## **The SEIU International President's (IP) Case**

### **I. Introduction and Summary**

The IP alleges that the leaders of one of the SEIU's largest local unions, United Healthcare Workers-West

engaged in numerous acts of misconduct that, while differing in their particulars, all shared a common element and formed a continuous pattern of wrongdoing. The common element is that each wrongful act constituted a deliberate attempt to undermine the intended operation of democratically-adopted provisions of the SEIU Constitution and Bylaws and the UHW-W Constitution and Bylaws. (IP Opening Brief 1)<sup>2</sup>

The most significant points the IP's evidence is designed to show are:

1. "...that at a UHW-W Executive Board meeting May 18-19, 2007, UHW-W President Sal Rosselli proposed a scheme to create, and to finance with up to \$6 million of UHW-W members' dues monies, an entity called 'The Healthcare Workers and Patients Education Fund' ('PEF')—an entity that would, on paper, appear to be a genuine 'education fund' exempt from taxation under Section 501(c) (3) of the Internal Revenue Code, but that in reality would be what one UHW-W Board member present at that meeting called a secret 'war chest' to finance potential intra-union battles that UHW-W's

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<sup>2</sup> Hereafter referred to as IP Op Br.

top leadership expected might come to pass, including a potential trusteeship battle with the International Union.” (Id.)

The IP alleges, in addition, that the UHW’s leaders understood that for this scheme “to succeed, numerous acts of deception and stealth would have to be perpetrated, including most significantly, the creation of a set of official minutes of [the] May 18-19, 2007 UHW-W Executive Board meeting that misstated the true purpose of PEF.” (Id. 1-2)

The IP presented evidence designed to show that the PEF was structured to be under the control of a subset of ten of the UHW’s approximately 90-member Executive Board, including all of its top officers, led by Sal Rosselli, who was given sole discretion over the amount and timing of the transfer of up to \$6 million from the UHW to the PEF. The PEF board’s decisions regarding activities and expenditures “would be made outside the democratic governance structure of UHW-W, beyond the reach of the International Union’s auditing and oversight powers, outside the reporting requirements of the Labor-Management Reporting and Disclosure Act (‘LMRDA’) and outside the reach of a trustee if one were to be appointed by the International Union.” (Id. 2) The IP found it “perhaps more troubling” that the 10 PEF board members “were permitted under PEF’s bylaws to remain as PEF officers with control over millions of UHW-W’s members’ dues monies, even in the event they lost their UHW-W office, whether through a vote, a trusteeship, or a merger or other reorganization.” (Id.)

At the May 2007 UHW Executive Board meeting that created and financed the PEF, the IP contends that “Sal Rosselli asked for and was given the unfettered discretion to transfer—at times of his choosing and in amounts of his choosing—up to \$6 million of UHW-W members’ monies to PEF. And Rosselli in fact did transfer \$3 million in UHW-

W funds in two increments of \$1 million (May 25, 2007) and \$2 million (on February 5, 2008), respectively before the PEF scheme had been brought to light and subject to outside scrutiny.” (*Id.*) The IP was, in addition, troubled by the fact that, as Rosselli admitted, “he generated no contemporaneous memorandum or other document memorializing his reasons for either the timing or the amount of those two large transfers.” (*Id.* 3) The IP notes, in addition, that “*none of these things...* were disclosed to the UHW-W’s membership or to the International Union. They were uncovered only after the International Union commenced an investigation of UHW-W on March 24, 2008.” (*Id.*, emphasis in original)

In fact, according to the IP, the only document available to UHW’s members about the creation and purpose of the PEF, the May 18 and 19, 2007 UHW Executive Board minutes, “contained a false and misleading description of the purpose of PEF.” (*Id.*) According to those minutes PEF was created for health care education purposes, while two IP witnesses—Amado David and Pam Burton, both members of the Executive Board who attended the May 18 and 19, 2007 meeting—“testified that UHW-W President Rosselli told those assembled, during closed executive session, that PEF’s principal purpose would be to serve as a source of funds to fight internal union battles with the International Union, and not as a bona fide education fund.” (*Id.*) The IP produced additional testimony alleging that in May 2007 another UHW Executive Board member, Teresita Collado, who is still a member of that board, told Theresa Fernandez, a UHW staff employee, “that UHW-W had committed millions of dollars of union resources to

set up a fund to be used to fight the international union in the event of a trusteeship.”

*(Id.)*

The IP contends that both the credibility of its witnesses and the lack of credibility of UHW’s witnesses (who testified that PEF was created solely to promote health care reform and support the UHW’s 2008 contract campaign) are demonstrated by the actions and words of UHW’s leaders between the May meeting and the filing of the notice of trusteeship that commenced this proceeding. Indeed, the IP argues, “the very secrecy surrounding the transactions involving PEF is sufficient, by itself, to discredit UHW-W’s contention that PEF was a noble fund set up to advance reform...and to support the...2008 contract campaign.” *(Id. 4)* Because the UHW “prides itself in having a well-developed member communication program,” the IP argues that “it would have been completely out of character...to have said *nothing* to its general membership about PEF during the lengthy period between PEF’s creation and the commencement of the International Union’s investigation.” *(Id., emphasis in original)*

While the principal allegations in the IP’s Amended Notice of Trusteeship concern the PEF, that notice contains two other allegations of wrongdoing: “an unusually large and suspiciously timed payment of UHW-W funds to an attorney’s client trust account; and...the wrongful retention by UHW-W of stolen International Union property, even after the International had put UHW-W on clear notice that the property in question was stolen.” *(Id. 5)*

The IP alleges, in addition, that “...the wrongs that UHW-W’s leaders perpetrated were deliberate and premeditated, and were not mere isolated or inadvertent errors of

judgment. Furthermore...UHW-W's leaders, when confronted with the allegations against them, responded with false statements, evasions, and refusals to accept responsibility." (*Id.*)

The evidence shows, according to the IP,

“that the misconduct at issue here commenced at a time and in a context that suggests that the wrongful acts of UHW-W's leaders have been motivated by a desire to avoid the consequences of the democratically-enacted provision of the SEIU Constitution that govern the matter of mergers and reorganization of SEIU local unions. In particular, the misconduct took place against the backdrop of a local union merger and consolidation process that had been taking place for many years within SEIU—a process that is aimed at aligning local union jurisdiction along industry lines and providing for better national co-ordination of bargaining in circumstances where (as is increasingly the case) an employer has operations in multiple jurisdictions.” (*Id.*)

The IP alleges that UHW's actions were an attempt to avoid the creation of a single long-term care local union for California that would require the UHW to lose 65,000 of its 150,000 members. This reorganization process started at the 2000 SEIU convention but reached a critical phase from UHW's point of view after a two-person panel held hearings in 2006 on reorganization in California. At these hearings SEIU's Long-Term Care Division (LTCD) proposed a new statewide long-term care local which would include all long-term care members from several locals, including UHW. In its June 11, 2006 report, this panel made the case for a single LTC local for California but, for practical reasons, did not recommend it immediately.

The panel's report and recommendations were adopted by SEIU's International Executive Board (IEB) and put to a vote among affected members of the local unions involved. The UHW opposed a single statewide LTC local. They also opposed rules

governing the election among local union members that (1) prohibited the use of local union funds to campaign against the IEB's decision and (2) pooled the votes of all local union members. The UHW leaders considered these rules to less democratic than local-by-local voting that would allow any local union to veto the IEB's recommendations for its members. Despite the UHW's objections, the pooled vote was in favor of the IEB's decision, which was subsequently implemented.

Although they were not required to give up their LTC members as a result of the 2006 IEB decision, the UHW's leaders understood that this decision was temporary and that unless the SEIU Constitution was changed, they were ultimately likely to lose their LTC members. The provisions of the SEIU Constitution governing mergers and consolidations gave the IEB authority to effect mergers and consolidations with or without voting by the members, as well as to prevent the use of local funds to oppose the IEB's decisions. The UHW therefore developed proposals that would amend the SEIU Constitution at the 2008 SEIU Convention to, among other things, require local-by-local voting on these matters.

But, according to the IP, during the first half of 2007, the UHW's leaders,

perhaps fearing that there would be insufficient support for their proposals among members of other local unions to achieve their goals through...democratic processes...also began...to resort to a series of illegitimate and extra-constitutional means of challenging the International Union's elected leaders and their policies and practices. (*Id.* 8)

The first of these actions was the creation of the PEF in May 2007 which, according to the IP, provided a "war chest" of \$6 million in union funds,

so that if the other extra-constitutional actions they were considering...to preserve their jurisdiction led to a trusteeship and hence the removal of UHW-W's leaders from office, those displaced leaders would not have to draw down their own personal financial resources, but would...be able to draw on a source of transferred *union* funds to fight the trusteeship and continue their battle. (*Id.*; emphasis in original)

According to the IP, “[f]urther evidence that UHW-W was willing to go to great lengths to oppose any reduction of its jurisdiction came from the testimony of IEB member Thomas DeBruin,” (*Id.*) during a facilitated discussion in April 2008 designed to determine if the UHW and other SEIU healthcare locals could resolve their differences. During these discussions,

UHW-W's leaders...made it clear that their public campaign of criticism directed at the International and its leadership was their ‘strike,’ and that their ‘strike issue’—or non-negotiable demand—was avoiding a reduction of UHW-W's jurisdiction.” (*Id.*) The deadlock at these discussions came because “DeBruin and others on the healthcare steering committee responded at the facilitated discussion that they could not and would not exempt UHW-W from the operation of the democratically-adopted provisions in the SEIU Constitution that governed jurisdictional reorganization. (*Id.* 9)

Further evidence of the UHW's position, according to the IP, came with Sal Rosselli's speech at the 2008 SEIU convention, where he “stated that UHW-W would not abide by any [IEB] merger decision that would unite UHW-W's long-term care workers with the long-term workers in other SEIU local unions, unless UHW-W's members were separately polled on the matter and chose not to veto the merger.” (*Id.*)

The IP concludes:

...regardless of the precise motive or reasons for the actions taken by UHW-W's leaders, their decisions to transfer millions of dollars to a sham charitable organization, to misrepresent the purpose of these transactions in official minutes and public filings, to conduct substantial union business off the books of the union, and to engage in other wrongs proved at the hearing, constitute financial

malpractice, subversion of democratic procedures, and interference with the lawful objects of the International Union and hence grounds for trusteeship. (*Id.*)

## **II. The International President's Evidence**

The main facts presented by the IP to support the allegations in the Amended Trusteeship notice were as follows:

A . The PEF was created in such a way to conceal its real purpose, create a self-perpetuating board of directors, and provide an irrevocable grant of up to \$6 million from the UHW; (IP Ex. 1.)<sup>3</sup> and did so without a budget or other documentation in advance of the May 17-18 meeting. (Martin 11/14 Tr. 673-76; Lewis 11/14 Tr. 766; Borsos 9/27 Tr. 153; Trister 9/26 Tr. 184-87) The IP contends that the testimony of its three witnesses is corroborated by the following evidence:

1. The circumstances surrounding the May 2007 UHW Executive Board meeting, especially the absence of a budget, business plan, memorandum, or other documentation of any kind; (IP Op. Br. 18)
2. The absence of any publicity (by an otherwise publicity-conscious union) surrounding the creation of the PEF.
3. The timing of the transfers of first \$1 million (May 25, 2007) and then \$2 million (Feb. 5, 2008), which came just a few days before the UHW engaged in a confrontation with the International Union. (*Id.* 20)

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<sup>3</sup> I will use Ex. to reference exhibits and Tr. to reference hearing transcripts.

4. The nature of PEF's expenditures:
  - a. The absence of significant activity or expenditures between the first and second transfers suggests that the PEF was a dormant contingency organization to be activated in the event of a trusteeship or other conflict with the International Union.
  - b. Approximately \$16,000 was spent for the purchase of information technology, mainly 100 cell phones that were never used. (Martin 11/14 Tr. 682-83)
  - c. A \$75,000 retainer was paid to Arthur Fox, a Washington, D.C. attorney specializing in internal union disputes under LMRDA, who has no expertise in health care. (IP Ex. 74)
  - d. A \$50,000 disbursement for postage on a mailer for a dubious, non-binding jurisdictional election "outside the SEIU's constitutional processes for resolving jurisdictional matters." (IP Op. Br. 23; IP Ex. 11)
5. Further evidence that the PEF was a contingency organization is suggested by the fact that shortly after May 2007 the PEF acquired office space donated by the California Nurses Foundation (CNF), but did not begin buying office equipment until February 2008. (IP Op. Br. 25; Rosselli 11/15 Tr. 1022; Martin 11/14 Tr. 712) The IP was suspicious of this transaction because the CNF was created by one of the SEIU's rivals, the California Nurses Association.

6. The IP contends that its witnesses were further corroborated by statements made or adopted by UHW representatives:
- a. An April 2 statement on a blog maintained by Association for Union Democracy founder and Arthur Fox associate Herman Benson (discussing SEIU President Stern's March 24, 2008 inquiry to Sal Rosselli concerning PEF) that "the local executive board voted to put money into a separate tax-exempt fund...free from Stern's control, would give members resources to resist the imposition of the trusteeship and, if it is imposed, would help defend their rights while it remains in effect." (IP Ex. 26, 932-33) The IP argues that the UHW leaders confirmed this comment by posting excerpts from Benson's blog on UHW's own blog, [seiuVoice.org](http://seiuVoice.org), on April 4, 2008.
  - b. UHW President Rosselli's response to SEIU President Stern's March 24, 2008 allegation that Rosselli had executed a plan "to 'transfer significant local union...funds' to an entity 'outside the local union to enable...you or a select group of individuals to run an independent operation to subvert local union auditing functions, membership oversight...or future governance actions such as a ...trusteeship order, that might be taken...to safeguard the members' interests.'" IP Ex. 18, 1-2" (IP Op. Br. 31) Rosselli's April 3, 2008 response denied any intention to create a "shadow union" to compete with SEIU, and added: "...We...*believe that if a trusteeship were to be imposed, the underlying purpose would be to*

*retaliate against UHW for our public criticisms of SEIU's policies and it would, accordingly, be unlawful. As a consequence, we would have every right to retain legal counsel to defend our members' rights to participate in the governance of their union through their democratically elected leaders—a right that a trustee might attempt to quash by denying access to the funds needed to exercise that right. IP Ex. 27, 8” (Id. 32, emphasis in original) At the trusteeship hearing, Rosselli said he didn't write this very important letter and couldn't remember if he had read it. (11/14 Tr. 973-75)*

- c. An anonymous March 17, 2008 email to SEIU Long-Term Care Program Director Jim Philliou that the IP believes was from a credible UHW insider, discussing a mandatory UHW staff meeting over the weekend. The email reported that UHW leaders told staff employees that “in case the international tries to trustee, they have a fund set up for expenses, information technology, and office space. IP Ex. 123” (IP Op. Br. 35)
- d. UHW's suspicious behavior in responding to the International's investigation, including the failure to present notes and other records of the May 18-19, 2007 meeting, (Martin 11/14 Tr. 697-99; Rosselli 11/15 Tr. 1006-7) which suggests that UHW's leaders “had no confidence at that time that a full documentary record...would support their position as to what transpired at the meeting.” (*Id.*) After asserting in Sal Rosselli's April 3 letter to Andy Stern that a written opinion from legal counsel had

blessed the legality of PEF transactions, (IP Ex. 27) the UHW later invoked attorney-client privilege in refusing to supply the letter. (IP Ex. 36, 2) The parties disagreed on the legality of the attorney-client privilege claim, but agreed that the Hearing Officer lacked the authority to order the UHW to produce the letter.

7. The IP alleges, in addition, that UHW's leaders hid the real purpose of the PEF and its governance structure through a series of deceptive acts, including false Executive Board minutes and false legal filings with the State of California and the Internal Revenue Service (IRS). (IP Op. Br. 41-43)

Moreover, according to the IP, "by devising a means through which they could draw on UHW-W...monies rather than their...personal resources to fight anticipated internal union battles," UHW's leaders "were engaged in self dealing." (*Id.* 44)

The IP alleges, in addition, that "UHW-W's leaders structured PEF in such a way that the ten officers in charge of PEF could expend UHW-W members' dues monies out of PEF's account without being subject to the democratic accountability...requirements applicable to the expenditure of union funds under federal law and the SEIU and the UHW-W Constitutions." (*Id.* 47)

The IP also alleges that the "UHW-W's leaders were guilty of gross financial mismanagement and acted undemocratically by authorizing the transfer of up to \$6 million to PEF without seeing any...business plan...and by leaving the amount

and timing of the transfers to the unfettered discretion of a single UHW-W officer, who did not even memorialize the rationale for ...his unilateral transfer decisions in contemporaneous documents.” (*Id.* 51)

B. The evidence presented for the IP’s second charge, that “UHW-W officials failed to take action to restore all of the union funds that had been improperly transferred to PEF,” (*Id.* 54) is as follows:

The UHW’s leaders’ argument that they should not be required to make the union whole for the \$105,000 not returned to the UHW after the PEF was discontinued in April 2008 was that that sum could have been spent by the UHW because all of these expenditures benefited the local union. The IP disputes this claim because the PEF board’s obligation was to the fund, not the local union, a conclusion conceded by the UHW’s experts. (11/13 Tr. 436-37) “Thus no *union* decision was ever made to authorize those expenditures.” (IP Op. Br. 55) For example, the PEF’s payment of \$22,500 to Arthur Fox was to make him available for legal advice to PEF, not the UHW. (*Id.*)

C. The IP’s third allegation is that the UHW’s leaders made a false and misleading statement to hide the transfer of \$475,000 to an attorney’s trust account from the International Union. IP Ex. 101, control No. 289; IP Ex. 17, Hauptman 11/12 Tr. 31-35 (*Id.* 55) The IP contends that this transfer was improper because it was beyond the scope of the law firm’s monthly retainer of \$25,000, was not supported by any request from the firm, and “was executed under circumstances that are consistent with the proposition that the transfer was intended to be yet another impermissible means through which UHW-

W's leaders could shield union funds from the reach of a trustee—albeit in this case, for a limited rather than an indefinite period of time.” (*Id.* 56)

The IP contends that UHW concealed this transaction from the IU by failing to include the minutes of the March 7-8, 2008 Executive Board meeting which authorized this transaction in the materials sent to the IU in response to President Stern's request for copies of all minutes of UHW Executive Board meetings from September 1, 2007 to March 24, 2008. (IP Ex. 18) This transaction was not discovered until August 2008, while an IU auditor was examining UHW's books and records. (IP Ex. 24; IP Ex. 56; 11/12 Tr. 15, 30-31) The UHW's explanation for withholding the March 7-8 minutes was that they were not official because they had not been approved on March 31, 2008, when the UHW's former counsel purported to comply with the IP's request. (IP Ex. 24) The IP found this explanation false and misleading.

D. The IP's "fourth allegation in the Amended Notice of Trusteeship is that, in the summer of 2008, UHW-W wrongfully retained the property of the International Union, in violation of Article XVII, Section 1(9) of the SEIU Constitution, which makes 'the wrongful taking or retaining of...any...property of the International Union' by either a member or a local union a chargeable offense." (IP Op. Br. 60.) The property in question was the IU's confidential, proprietary convention delegate database which UHW, in its October 31, 2008 proffer, (UHW 10/31 Proffer at section B ) admitted having after previously denying any knowledge of it. (Hauptman 11/12 Tr. 38; 11/12 Tr. 49, 54, 58; IP Ex. 53; IP Ex. 54) The UHW minimized the seriousness of its possession and use of the database by claiming that the union (a) received the database unsolicited in an

attachment to an e-mail and (b) “the attachment, when opened did not say ‘proprietary’ or ‘confidential’ on it.” (Borsos 11/12 Tr. 280, 282-286) (IP Op. Br. 65) The IP considered this explanation to be dubious and noted that the UHW itself had “excoriated the leader of another local union [on April 9, 2008] that UHW-W believed (but never proved) had misappropriated UHW-W members’ personal information: ‘you have inappropriately obtained our members[‘] personal information without this organization or our members’ consent. You have violated our members’ most sacred right to privacy by attaining their private personal information that you have no right to be in possession of... We also are asking that you provide us how you acquired our membership lists.’ (UHW Ex. 84)” (IP Op. Br. 63)

The International Union discovered the theft of the database in early July and sought its return from the UHW over the following months, without success. Indeed, Joan Emslie, UHW’s secretary-treasurer, responded in a July 22, 2008 letter, which neither confirmed nor denied the theft allegation, that “the International Union’s inquiry about the theft of the database is an effort to suppress UHW-W’s free speech rights.” (IP Ex. 54) Emslie argued that “[O]ur ability to speak is meaningless if we are unable to communicate with other SEIU members and leaders.” (*Id.*) The IP considered the database controversy important because it “(1) raises serious doubt as to the willingness and capacity of UHW-W leaders ever to be forthright in their communications with the International Union; and (2) makes it unlikely that the misappropriated...database will ever be returned to the International Union, because it was apparently merged into UHW-W’s existing database

unmarked and unsegregated, such that the merged contact information cannot be distinguished from UHW-W’s pre-existing data.” (IP Op. Br. 66-67)

#### E. The Context

Because a major underlying source of conflict between the SEIU’s and UHW’s officers involves differences over the proper jurisdiction for long-term care (LTC) workers, the IP believes evidence on the evolution of these differences since the 2000 SEIU convention provides the context for understanding why the “wrongful acts” alleged in the IP’s Amended Notice “take on an even greater dimension...” (*Id.* 69) These contextual facts, the IP contends,

bring two critical points to the fore: (1) that the...acts of misconduct by the UHW-W...are not random occurrences but are...part of a pattern of actions that have demonstrated a willingness by UHW-W’s leaders to resort to virtually any means necessary, including extra constitutional means, to thwart longstanding proposals to restructure SEIU’s California healthcare locals in a way that would reduce UHW-W’s jurisdiction; and (2) that the process of restructuring California healthcare jurisdiction commenced before—and hence could not, as UHW-W claims—have been devised as a means of retaliation against—the...criticism of SEIU’s policies and practices that UHW-W highlighted in...its ‘retaliation’ defense. (*Id.* 69-70)

The IP presents the following evidence on this evolution:

1. The events leading to the California jurisdiction controversy are rooted in the 2000 SEIU Convention’s *Decide* report, which called for the creation of “local unions with the size, capacity, resources and focus to win significant improvements in working conditions and increase SEIU’s political clout in the state, provincial and Federal level[s], and therefore SEIU’s ability to enact progressive legislation on behalf of not only SEIU’s members, but working

families across North America.” (IP Ex. 79, 37-39) This report was authored by the “President’s Committee of 2000,” a group of 20 SEIU local presidents, including Sal Rosselli.

In *Decide*, the local presidents concluded that “Jurisdiction should be focused on an industry within the most logical geography;” and that “Industry-based jurisdiction will advance the local union’s ability to establish its identity.” (*Id.* 38)

The principles developed in the *Decide* report led to a wave of consolidations and realignments across the United States between 2000 and 2006, including the formation of UHW through the merger of Locals 250 and 399 in 2004, effective in 2005. (IP Ex. 101, 9; DeBruin 11/15 Tr. 1201-02) President Stern appointed Sal Rosselli, who had been president of Local 250, interim president of UHW. (IP Ex. 80)

2. In January 2006, the SEIU issued a notice of numerous hearings in California to determine if further restructuring was warranted and, if so, how it should be accomplished. (IP Ex. 82, 1-3) A panel of two local union presidents, who also were IEB members, coordinated eight days of hearings, two of which included substantial testimony on jurisdiction for LTC employees.

At these 2006 hearings, the SEIU’s Long-Term Care Division “proposed...that a new [LTC] local be chartered for the entire State, and that the [LTC] workers then...represented by several locals, including UHW-W, be transferred to the newly created local.” (IP Ex. 82, 55, 59) An important argument for a single LTC

local, according to the LTCD, was the fact that “state Medicaid payments had become the most important source of funding for homecare and nursing homes with the consequence that ‘the county-by-county approach no longer meets the needs of our homecare membership.’” (IP Br. 73; IP Ex. 82, 54)

At the 2006 hearings, the UHW’s leaders strongly opposed the LTCD’s proposals and “rejected the entire premise that [LTC] should be treated as a distinct industry from acute care.” (IP Ex. 81, 1) Moreover, according to UHW officials, there were “practical grounds for refraining from transferring [LTC] workers into a new statewide [LTC] local;” the UHW leaders argued that the LTCD’s concerns could be satisfied by coordination between the UHW and the other major local with LTC membership. (*Id.*)

3. The June 9, 2006 *Joint Report and Recommendations on California Jurisdiction* (The *2006 Decision*) adopted by the IEB at its June 2006 meeting, (IP Ex. 82) identified the “patchwork of SEIU local union jurisdiction” as a problem because it “is not designed to maximize local union strength through uniting workers by industry in the most relevant geography” and therefore “do[es] not reflect the current needs of SEIU members to win significant improvement in standards, preserve gains previously won, and grow the union in areas of low union density.” (*Id.* 21) The *2006 Decision* also pointed out that the “patchwork” of SEIU local union jurisdiction in California “did not adhere to the principles adopted by the 2000 *Decide* report designed to bring order to SEIU local jurisdiction.” (*Id.*)

The *2006 Decision* noted that SEIU members had told the union's leaders that they wanted to be "united with their coworkers doing similar work in the same geographic area so that they can exert maximum power to improve their working conditions." Moreover, the 2000 SEIU Convention had adopted the policy "to combine members employed in a particular industry in a manner that mirrors the structure of that industry, minimizes fragmentation and, as a result, increases bargaining power. The focus on industry-based jurisdiction necessarily means that employees of the same employer are to be represented by the same SEIU local union." (*Id.* 5)

The *2006 Decision* likewise rejected the UHW's contention that the distinction between LTC and acute care was "artificial," noting that the SEIU had "recognized the unique attributes and requirements" of the LTC industry by establishing the LTCD,

separate from the Health Systems Division, which encompasses acute care and related facilities. The record persuasively demonstrated that the [LTC] industry is characterized by state and national employers and that a statewide strategy is imperative if we are to effectively deal with the key industry players on behalf of current and future members. The record also establishes beyond dispute that all facets of the industry—homecare, skilled nursing home care, and senior living—are linked as part of the continuum of supportive services for the infirm with related workplace issues, employee skill sets, payer mixes and clients who go from one setting to another...Accordingly, we think that, ideally, uniting [LTC] workers in one union makes the most sense. We also believe that, to really win for [LTC] workers, that local union should focus solely on the particular needs of those workers. *Id.* 59-60 (IP Op. Br. 76)

The IP concludes that "The *2006 Decision*'s framework thus posed a threat not only to UHW-W's leaders' desire to hold onto UHW-W's [LTC] membership but

also to their ultimate ambition to expand their influence by obtaining jurisdiction over all of California's healthcare workers." (*Id.*)

The *2006 Decision* nevertheless provided for two temporary compromises to the LTC jurisdiction problem: (1) "For the present," to allow the North Central regional public sector local to retain its homecare workers because, without these workers, the local might not have sufficient members to grow into its extensive geography; (IP Ex. 82, 61-2) and (2) "For the present," based on "the large number of nursing home and public sector [In-Home Support Service (IHSS)] workers currently represented by UHW and the difficulties that would be posed by removing these workers from UHW" the *2006 Decision* was for UHW to "continue its current homecare workers, IHSS workers, and Nursing Home Workers." (*Id.* 62)

The *2006 Decision* noted, however, that these exceptions to the 2000 SEIU convention principles "may not be the optimum solution for the long run," (*Id.*) and recommended "that the effectiveness of this reorganization be evaluated by the [LTCD] in the future to determine what changes may be warranted." (*Id.* 64)

The IEB adopted the 2006 report, subject to a vote to be conducted in the fall of 2006 on a one-member one-vote basis among the members affected by the reorganization. (IP Ex. 83) SEIU's *Policy on Implementation* prohibited officers from using union funds, staff, or other resources to oppose the IEB's jurisdiction decision. (IP Ex. 86, 6) These rules, the IP claims, made it clear to the UHW that they were likely to lose their LTC workers unless the SEIU's Constitution or rules

were changed to give the local veto power over national jurisdiction decisions. (Borsos 11/12 Tr. 119-20; Rosselli Tr. 996) With pooled voting rules, UHW's 65,000 LTC workers could be outvoted by the approximately 175,000 such workers in other California locals. And the prohibition on the use of local funds to oppose the IEB decisions limited the UHW's ability to campaign to persuade the members of other locals to oppose the creation of a single statewide LTC union.

4. The IP contends that the May 18-19, 2007 Executive Board meeting that created the PEF took place against the backdrop of the UHW's major concern about the prospect of losing 65,000 LTC members. (David 9/26 Tr. 138; DeBruin 11/15 Tr. 1205, 1209-10; Burton 11/15 Tr. 1133-36)

The UHW's leaders also understood that both the SEIU Constitution and federal court rulings gave the IEB the power to establish trusteeships to compel the merger of local unions regardless of the wishes of the locals' members. For example, in 2002, the federal district court in San Francisco upheld such a trusteeship in a case where SEIU Local 87's members had voted against the merger with a larger local. (SEIU Loc. 87 v SEIU Local 1877, 230 F. Supp. 2d 1099, 1100-03 [N.D. Cal. 2002])

The UHW's leaders therefore decided on a campaign to change the SEIU Constitution's restructuring rules and to resist IEB jurisdictional directives if that campaign failed. (IP Op. Br. 83)

The components of this campaign included, according to the IP, the February-March 2008 “election” among the UHW’s LTC members, developing a strategy to make the local’s fight with Andy Stern about democracy and not jurisdiction, (IP Ex. 123) and attempting to change the pooled voting rule to give the UHW veto power over mergers, (UHW-W Ex. 152; DeBruin 11/15 Tr. 1227-28) and through an unsuccessful campaign to amend the SEIU Constitution at the 2008 SEIU Convention. (IP Ex. 109, 360)

It also should be noted that because of the thoroughgoing restructuring of SEIU unions that would result from its recommendations, the *2006 Decision* recommended a new statewide organization to replace the California State Council (CSC) that represented SEIU locals in the political arena. The *2006 Decision* therefore stipulated that nine months after its restructuring recommendations were carried out the CSC charter would be revoked and a new council chartered to reflect the reorganized structure and a new constitution to reflect the new array of local unions. (IP Supp. 82, 4, 7, 71)

5. Thus, according to the IP, the UHW’s campaign against Andy Stern and the IU coincided with a reexamination of the California jurisdiction structure put in place after the 2006 report. A report by IEB member Gerald Hudson on January 24, 2008 concluded that the continuing fragmentation of LTC jurisdiction among several local unions was causing many of the problems contemplated by the 2006 report. (*Id.*) The International Union therefore appointed former NLRB General Counsel Leonard Page to investigate this matter and recommend appropriate

changes. (IP Supp. 102, 89) Page consequently held hearings on May 6-7, 2008 and July 14-15, 2008 and issued his report August 27, 2008. Applying standards derived from the 2000 *Decide* report and the 2006 *Decision*, Page found that the post-2006 arrangements lacked cohesion, as the 2006 *Decision* had feared, and recommended a single statewide LTC local. Page's recommendation was adopted by the IEB, with the proviso that an advisory vote be taken among affected members with two options: whether (1) all health care workers should be in one local; or whether (2) all LTC workers should be in one local and all other health care workers in another local. (*Id.*)

Page rejected the UHW's argument that his report reflected collusion between the International Union, SEIU LTC Local 6434, and employers. He cited the history of the development of this issue, including the 2000 convention's *Decide* report and the 2006 *Decision*, pointing out that the principles developed in 2000 led to the creation of the UHW. Page concluded that there was no evidence that employers had ever influenced the SEIU's ideas about jurisdiction; he therefore gave no weight to the statements about employer attitudes UHW had entered into the record. (IP Supp. 102, 77-78)

The IP contends that a series of actions by the UHW's leaders reflected their concern about these jurisdictional developments, including the special UHW Executive Board meeting on January 25 and 26, 2008 and the campaign to have members vote "yes" in the UHW's election to determine if its LTC members wanted to remain with the UHW. (UHW Ex. 36; IP Minutes Tab, Vol. 1, 2901)

The UHW vote was authorized on January 26, 2008 and conducted in February and March 2008; on February 5, 2008, 12 days after the Hudson report, Sal Rosselli transferred \$2 million to the PEF; on February 9, 2008 Rosselli resigned from the SEIU International Executive Committee and wrote a letter attacking Andy Stern and the SEIU; the UHW created SeiuVoice, its blog, (UHW Ex. 35, 75) to criticize the SEIU and publicize its Platform for Change, designed among other things, to change the SEIU Constitution to permit local unions to veto the IEB's decision on jurisdiction.

#### **F. The IP's Conclusions**

The IP thus argues that:

A. "The wrongs committed by UHW-W were part of a systematic pattern of deliberate and premeditated attempts to circumvent the democratic processes of both the SEIU and UHW Constitutions, to evade legitimate oversight and audit authority, and to cover up these misdeeds by deliberate misrepresentation and calculated omissions." (IP Op. Br. 88)

B. "The wrongs committed by UHW-W easily satisfy the standards for trusteeship, in that they constitute financial malpractice, anti-democratic conduct, and conduct contrary to the legitimate objectives of the International Union as set out in the SEIU Constitution. SEIU Constitution Art. VIII Section 7(a)" (*Id.* 94)

## **The UHW's Response to Charges**

### **I. Introduction and Summary**

The UHW's basic case is that the IP has not met the standards established by the LMRDA and the SEIU Constitution for imposing trusteeship. Indeed, they argue, the IP's attempt to impose a trusteeship against the local "is exactly the kind of abuse that the LMRDA was enacted to prevent: an international union stifling dissent by ousting the democratically-elected leaders of a local union and replacing them with its own appointed trustees." (UHW Op Br. 1)

The UHW alleges that this trusteeship hearing grew out of its disagreements "with the direction in which President Andrew Stern has taken SEIU. President Stern has sought to create a top-down, corporate-style management structure through which union policy is set and bargaining is controlled from the national level. UHW advocates bottom-up, democratic member participation in union policymaking and bargaining....UHW has objected to attempts by the International to settle contracts for UHW members without the participation of those members in the bargaining process. First internally within the union and then publicly. UHW has protested what it considers undemocratic practices within SEIU." (*Id.*)

The UHW alleges that the SEIU has responded to this criticism by seeking to "discredit UHW and its leaders and to destroy UHW by any means available." (*Id.*) The UHW claims that its evidence demonstrates that "those efforts began...long before the International made the claims put at issue by the International's trusteeship hearing notice." (*Id.*)

The UHW argues, in addition, that the evidence presented by the IP during six days of hearings does not meet the trusteeship standards established by the SEIU Constitution and LMRDA because the International's attempt to justify trusteeship "is founded on gross speculation about presumed intent to take hypothetical future actions and no evidence of actual misconduct." (UHW Reply Br. 1) Moreover, according to UHW,

the International has proceeded in bad faith to retaliate against UHW for UHW's political opposition to the International. And in its post-hearing brief *fails to even address whether a trusteeship is necessary to protect the interests of UHW's members*. The un rebutted evidence shows to the contrary that a trusteeship will result in great harm to UHW's members and put in jeopardy contract standards and bargaining relationships achieved over the past 20 years. The International has utterly and fundamentally failed to explain why the Hearing Officer *should* recommend putting UHW—which by all accounts an extraordinarily successful, vibrant, healthy, and popularly supported local union—under the control of unelected, unpopular appointees of the International President. Such raw usurpation of the democratic process would be—as International witness Tom DeBruin admitted—*unfair* and must be rejected. (*Id.*, emphasis in original)

The SEIU's offensive began, according to UHW, with a massive publicity campaign to discredit UHW and its leaders. This campaign, UHW alleges, was revealed by a June 5, 2008 email

from one International official to others (UHW Ex. 115)...[in which] trusteeship was considered one among a number of possible strategies for accomplishing the International's goal of removing UHW's democratically-elected leadership. These strategies included orchestrating the 'implosion' of UHW, weakening UHW by stripping away its 65,000...[LTC] members, through SEIU's jurisdictional process, and filing federal litigation. (UHW Op. Br. 2)

The UHW argues, in addition, that the International resorted to its trusteeship notice after other plans hit a snag, "including the exposure of rampant corruption by the International's appointed leadership of Local 6434, the local into which the SEIU sought to move UHW's LTC members, and the dismissal of the International's federal court

complaint based on the same alleged conduct it now asserts as the basis for trusteeship.”  
*(Id.)*

The UHW considered it paradoxical that the trusteeship charges were based on “claims that the UHW had made improper plans to resist a future trusteeship.” The International’s principal charge was that the PEF created in May 2007 was to operate as a “shadow” union after a trusteeship was imposed. However, the UHW argues, the PEF “was conceived and operated throughout according its stated educational purposes, which included education of members and the public about the importance of democratic workplace representation.” *(Id.)* With respect to the charge that the \$500,000 transfer to the Siegel and LeWitter law firm’s client trust account in order to put these funds beyond a trustee’s reach, “UHW and its lawyer understood and agreed...that in the event of trusteeship, any funds remaining in the client trust account would be under the control of the trustee.” *(Id.)*

The UHW also rejects the IP’s claim that the local improperly used the convention delegates’ mailing list “...which was received from an anonymous source with no stated restrictions, [and was used] to communicate with SEIU convention attendees about matters of policy and strategy differences that had been raised at the [2008] convention and were continuing topics of debate within the union.” *(Id. 2-3)*

The UHW concludes that

[e]ven if the International had proved its claims, which it decidedly has not, they would provide no basis for the imposition of a trusteeship on the eve of new UHW officer elections. Trusteeship, the ultimate remedy afforded to an international union, is intended to be remedial, not punitive. It is to be imposed

only ‘in order to protect the interests of the membership’ ...As the evidence at the hearing showed, UHW is a vibrant and democratic union that has achieved extraordinary success in organizing the unorganized and in representing the interests of its members.” (*Id.*)

The UHW adds that trusteeship is untimely because the PEF, “the primary basis advanced by the International for imposing trusteeship, was dissolved *eight months ago at the request of the International.* (*Id.* 3; emphasis in the original)

## **II. The UHW’s Evidence for Refuting the Specific Charges**

The UHW presented the following background evidence.

A. “The UHW’s current leadership has an established history in the labor movement and has built UHW into a model union.” (*Id.*) The UHW has become the second largest health care local in the United States following its formation in 2005 as a result of a merger of locals 250 and 399. The UHW has about 150,000 members, 75,000 of which were organized in the last eight years. (UHW 9/26/08 corrected opening statement 43)

UHW claims to have “the best set of hospital contracts and some of the best contract standards in the United States.” (Borsos 9/26/08 Tr. 66-69)

The UHW adds that “Kaiser Permanente’s 45,000 members have the highest standards for staffing and organization rights in the United States.” (*Id.* 70; Rosselli Tr. 925-926)

The Kaiser Labor-Management Partnership—a nationally recognized cooperative relationship—is, according to UHW, the extraordinary example of collaboration and the best contract in the healthcare industry. (Rosselli Tr. 920, 924)

Finally, the UHW claims to have developed a highly successful bargaining strategy, which includes synchronized contract termination dates, and has become financially healthy with an annual budget of over \$80 million, a strike fund of \$5.5 million, and the ownership of five buildings. (UHW 9/26/08 corrected opening statement 43-44)

B. UHW's leadership worked successfully with the International's leadership, despite policy differences, to rebuild Local 250 after the 1986 Kaiser strike, which resulted in the local's bankruptcy and voluntary trusteeship. Sal Rosselli was elected president of Local 250 in 1988, after the local emerged from bankruptcy. (Rosselli Tr. 907-08) In 1991, SEIU President John Sweeney invited Rosselli to join the International Executive Board. (*Id.* 913-14)

C. UHW continued to work successfully with the International after Andy Stern became president in 1996. In 1996 Stern appointed Rosselli to the SEIU President's Committee 2000, (*Id.* 916-17) and over the next decade Local 250 led a number of initiatives for President Stern, including advocacy for the President's New Strength Unity Program at the 2000 SEIU convention. (*Id.* 917-18) Local 250, in cooperation with Local 6434, established and led the Nursing Home Alliance Organizing campaign. (*Id.* at 918, 191) At the 2004 convention, Rosselli supported Stern's constitutional amendment for mandatory coordination in bargaining and organizing. This amendment created unity councils among locals representing the same employer and gave rank-and-file members a significant role in negotiations. (*Id.* 920-921) Also in 2004, Stern asked Rosselli to become an International Vice President and appointed him to the International Executive Committee, a "kitchen cabinet" of advisors to the president. The following year Rosselli

was elected president of the SEIU California State Council (CSC), the organization that coordinates SEIU's political and public policy work. (*Id.* 912, 935-936)

After the UHW was created in 2005, according to the UHW, policy differences between the International and the local sharpened over “bargaining strategy, growth strategy, union democracy, healthcare reform and other matters.” (UHW Op Br. 9, UHW Exs. 217, 218, and 238)

The UHW alleges that because of its expression of policy disagreements, “the International...unleashed a massive retaliation campaign...on multiple fronts. This campaign was well underway in 2007 before any of the allegations against UHW that led to this hearing.” (UHW Op. Br. 11; UHW Exs. 16, 44) According to the UHW, Tyrone Freeman and Matthew Maldonado admitted to UHW that, by November 2007, “International leaders formed a ‘war council’ to map out plans to attack and to discredit UHW. (Vellardita Tr. 579-581) Thomas DeBruin admitted that he became a ‘Campaign Program Manager’ of a team—approved by Anna Burger—to carry out projects to wage a ‘vigorous campaign’ against UHW.” (UHW Op. Br. 110)

The UHW contends that its evidence shows that “the retaliation campaign included removing Sal Rosselli from his position as president of the SEIU State Council; initiating jurisdictional hearings to remove 65,000 [LTC] members from UHW; an unrelenting barrage of telephone calls, email blasts, and flyers with false, misleading and inflammatory statements against UHW; attempts to organize UHW's members against UHW; circulating false allegations against UHW among UHW's members and other matters.” (*Id.*)

The UHW argues, in addition, that this trusteeship proceeding was brought “in the context of this political dispute and retaliation campaign.” (*Id.* 12) With respect to each of the charges in the Amended Notice, the UHW argues as follows:

1. The PEF was created by the UHW Executive Board’s May 18-19, 2007 meeting, which “approve[d] up to \$6 million...to provide education to healthcare workers and patients concerning issues related to the healthcare crisis, as well as the issues of importance to healthcare workers and their patients.” (UHW Ex. 14)

According to UHW witnesses who attended the 2007 meeting, the PEF was created for member and patient education in relation to “(1) legislative attempts to create comprehensive healthcare reform in California, (2) the [2008] presidential election campaign, and (3) UHW’s coordinated contract campaign.” (Borsos 9/27 Tr. 73, 78 and 79; Martin Tr. 653; Martinez Tr. 332-333; Brennan Tr. 298-299; Jones Tr. 312-313) The PEF was created as a nonprofit 501(k)(3), according to the UHW, to “allow for contributions by allies...” (UHW Op Br. 13; Rosselli Tr. 950-957; Lewis Tr. 729-30; Martin Tr. 654-55)

Moreover, UHW witnesses testified, during the discussions surrounding the PEF’s creation, “there was no mention by Mr. Rosselli or anyone else that the Fund was being created to put funds outside the reach of the trustee in case of a trusteeship. (Brennan Tr. 300-303; Martin Tr. 659; York-Jones Tr. 314; Martinez Tr. 333-34; 348-49; Lewis Tr. 15-23; Borsos 9/27 Tr. 79; Rosselli Tr. 1031)” (*Id.* 14)

The UHW alleges that the minutes of the May 18-19 executive Board meetings re disseminated to union staff and Executive Board members who, in turn, discuss them at Steward council meetings, hand out copies and answer questions. (Borsos 11/12 Tr. 194-95; Brennan Tr. 303; York-Jones Tr. 315-16)” (*Id.*)

The UHW argues, in addition, that the proper filings for the PEF were made with the IRS. (UHW Ex. 183) (*Id.* 28) The \$1 million transferred to the PEC in 2007 was only 1.5 percent of UHW’s revenues and less than 2 percent of expenditures (UHW Op Br. 15; Kupperberg Tr. 518-19) and that “every penny” of PEF’s expenditures of approximately \$122,000 “has been accounted for. (UHW Ex. 167, Hauptman 9/26 Tr. 90-91; UHW Ex. 98C; Martin Tr. 657)” (*Id.* 15)

The PEF did not solicit funds from outside sources, according to UHW, because “the IRS had not approved its application for tax-exempt status.” (Borsos 11/12 Tr. 18; UHW Ex. 183)

According to the UHW: “At the request and demand of the International, on April 24, 2008 the UHW Executive Board requested that the Education Fund return unspent funds to UHW because ‘the political landscape [with regard to an anticipated healthcare initiative] has now changed markedly,’ and because ‘the establishment of the Fund has become a source of unnecessary conflict between UHW-W and the SEIU International, diverting attention from the [UHW’s] mission of promoting the interests and welfare of the UHW-W membership by all means possible. (UHW Exs. 95, 97)” (UHW Op. Br. 19)

The UHW argues that the funds contributed to the PEF were never at risk of loss as the International alleges, because the PEF was always under the control of the UHW and the PEF's Board of Directors was a ten-person subset of UHW's Executive Board members. (*Id.*, 35, 42)

With respect to the charges to the PEF, the UHW's evidence was designed to show the following:

- a. That the Fund was established and used for proper purposes and provides no basis for the imposition of a trusteeship. (UHW Op Br. 29) The Fund was created to provide education for healthcare workers and patients and as "a vehicle for long-term cooperation with allies who shared that goal. (UHW Ex. 14; Rosselli Tr. 948-49)" (*Id.* 30) The Fund's main immediate objective was to enact comprehensive healthcare legislation in 2008. (Lewis Tr. 729-30; Borsos 9/27 Tr. 74-75) (*Id.*) The Fund also was to support the UHW's healthcare concerns in the 2008 presidential election. (Kumer Tr. 816, 843; Borsos 9/27 Tr. 76; Rosselli Tr. 937; Lewis Tr. 729-30) (*Id.*) The UHW's testimony emphasized the "importance of union democracy for the delivery of optimal healthcare education to patients" (*Id.*), which both the UHW's and International's experts consider a proper function for an education fund. (Herman Tr. 419; Trister 648-49F) (*Id.*)
- b. The UHW argues that the IP's main witness for the allegation that the PEF was created for a secret purpose is Amado David, who testified that at the May 18-19 Executive Board meeting, " 'Sal Rosselli spoke and [proposed]

that millions of dollars be moved into a fund and that fund was going to be used in the event or in case a trusteeship was imposed by the International Union.’ (David 9/26 Tr. 140)” (*Id.* 34) In its effort to impugn David’s credibility, the UHW contends that of approximately 80 Executive Board members at this meeting “only Mr. David testified that there was any discussion about using the Education Fund in the event that a trusteeship was imposed by the International. Seven Executive Board members...testified categorically that there was no such discussion at the May 2007 meeting or at any other time. (Brennan Tr. 300-02; York-Jones Tr. 314; Borsos 9/27 Tr. 79-80; Martinez Tr. 333-34, 348-49; Martin Tr. 655; Lewis Tr. 730; Rosselli Tr. 952-53)” (*Id.*)

According to the UHW, “Mr. David’s testimony...is neither credible nor reliable, and...cannot be the basis to impose a trusteeship on UHW”: (*Id.*)

“First, [he] voted in favor of the Education Fund in May 2007 and never raised any concerns regarding its legitimacy, at or after the meeting. (David 9/26 Tr. 148, 150; Lewis Tr. 731-32) (*Id.*)

“Second, [he] resigned from UHW on February 1, 2008 and submitted a resignation letter (UHW Ex. 210) [which] makes no mention of the Education Fund.” (*Id.* 35)

“Third, [he] is motivated by a desire to retaliate against UHW and its leaders because he opposes the direction of the labor movement advocated

by UHW and its decision to speak out publicly against the direction in which International leadership is taking SEIU. Far from a neutral observer, Mr. David has a large stake in the International's political fight with UHW." (*Id.*)

"Fourth, [he] attempted to injure UHW by organizing UHW's members against UHW." (*Id.* 36)

"Fifth, [he] was part of the International's team...organized to attack UHW." (DeBruin Tr. 1336) (*Id.* 37)

"Sixth, as part of the campaign against UHW, Mr. David has been actively engaged in attempting to recruit other witnesses, including Pamela Burton and Terri Fernandez, to testify against UHW." (Burton Tr. 1127-30; Fernandez Tr. 1152-56.) (*Id.*)

"Seventh,...[he] has lied on other occasions. For example, he lied to Barbara Lewis about his intentions when he left UHW and to Will Brennan the night before he testified on September 26, 2008." (Lewis Tr. 738-41; Brennan Tr. 302, 304-05) (*Id.*)

"Eighth, on a personal level, [he] has long been disgruntled towards Sal Rosselli." (David Tr. 132, 134, 146; Rosselli Tr. 911) (*Id.*)

The UHW also attempted to discredit Pamela Burton, the IP's other witness who was at the May 18-19, 20076 meeting, who the UHW argues,

was recruited by Amado David to testify, (Burton Tr. 1128-29; 1154-55) (*Id.*) and had previously been called “to promote the International’s campaign against UHW.” (UHW Ex. 226; Burton Tr. 1122-23, 1136-38; UHW Ex. 225; IP Ex. 108, 34; UHW Ex. 189) (*Id.*)

The UHW argues that “Ms. Burton’s testimony shows confusion and lack of reliability.” (UHW Br. 38) She was the only witness, for example, who said that in selecting members of the PEF board Sal Rosselli “called out” the names, while all other witnesses said he asked for volunteers. (Burton Tr. 1119, but see Martin Tr. 655; York-Jones Tr. 314-15) (*Id.*)

The UHW also sought to discredit the testimony of Terri Fernandez, “who was also recruited by Mr. David. Fernandez Tr. 1154-155)” (*Id.* 38)

Fernandez was not at the May Executive Board meeting, but testified that Pamela Burton told her that “ ‘there had been a discussion about moving a lot of money...in the millions—to an account that they were going to call an educational fund, but it was really—her term was a war chest to fight SEIU.’ (Fernandez Tr. 1151, 1146)” (*Id.* 38) Fernandez also testified that Teresita Collado, another Executive Board member, told her “ ‘that there was an attorney there who gave them a kind of pep talk about being united and being on the same page, and that they were going to take a good bit of money...it was...millions--...that could be an education fund, but that *she felt* it would be used for possible impending trusteeship.” (*Id.* 1148) (*Id.*, emphasis in original)

However, the UHW contends, at the September 27, 2008 trusteeship hearing, Teresita Collado did not support Fernandez's testimony, asking "How dare you...question the integrity of [the] Executive Board...our leaders are elected...We're representing our members. We don't hide anything...that we do." (Collado 9/27 Tr. 212-213)" (*Id.* 39) Teresita Collado also wrote the hearing officer: "What Terri Fernandez said in her testimony to you was not true...I have never spoken to her about our Education fund. Even the words she used to describe the conversation that never took place) are not the words I would use like "war chest." (Letter Compilation, Ex. 246, November 26, 2008 e-mail from Teresita R, Collado to Hearing Officer ) Collado claimed, in addition, that Amado David had asked about the Executive Board meeting and "pressured her to make false statements. (Collado 9/27 Tr. 212-213)" (UHW Op. Br. 39) Collado added that Terri Fernandez and Pamela Burton "are not reliable witnesses and are disgruntled with UHW." (UHW Br. 39; Collado 9/27 Tr. 212-13) (*Id.*)

The UHW also discounts the importance of Herman Benson's April 2, 2008 blog, (IP Ex. 26 930-34) which stated that

under a trusteeship, members retain certain democratic rights protected by the LMRDA; but in the main, these rights can be enforced only by private suit. Without money these rights become a fiction because the trustee's victims can't afford the costs of a federal lawsuit. *The independent fund established by UHW-W, free from Stern's control, would give members resources to resist the imposition of the trusteeship and, if it is imposed, would help defend their rights while it remains in effect.* Consistent with his

drive to eliminate opposition, Stern would deprive his critics of their right...to establish this fund in defense of democratic rights. (*Id.* 933, emphasis added) (*Id.* 40.)

However, the UHW argues that it did not endorse Benson's article, (Borsos, 11/12 Tr. 203) (*Id.*) and that its posting of excerpts from that blog on its "SeiuVoice.org website...say[s] nothing about the Education Fund or its purpose but discuss the historic uniqueness of the threatened trusteeship. (IP Ex. 26, 929)" (*Id.*) "UHW posted only that statement, which UHW believes to be true. (Borsos 11/12 Tr. 203-04)" (*Id.*)

2. The UHW argues that "all funding of and expenditures from the [PEF] were proper to the purposes of the Fund and made under the control of UHW's Executive Board." (*Id.* 41)

The International alleges that the UHW's creation and use of the PEF "was 'financial malpractice' within the meaning of the LMRDA and the SEIU constitution. (Amended Notice 1-2)" (*Id.*) UHW notes, however, that "There is no allegation in this proceeding that money was spent for personal purposes. Indeed...International monitor Bob Hauptman found no evidence that union funds were spent for anything other than union business. (Hauptman 9/26 Tr. 98)" (*Id.* 41)

The IP contends that the large size of the \$6 million authorization and the timing and circumstances of the transfer of the \$3 million from UHW to the PEF suggest that this was a contingency fund to be used to defend UHW and its officers beyond the reach of a trustee or the International in the event of a trusteeship.

The UHW counters that the SEIU itself has created 501(c)(3) and transferred much larger amounts absolutely and relative to its assets. (UHW Ex. 206; Seavey Tr. 879)

With respect to timing, especially of the \$2 million transferred in February of 2005, the month after the ballot initiative the Fund was primarily created to campaign for, failed to emerge from the California Senate (Amended Notice, 3) the UHW claims that it still thought healthcare reform would be important for the presidential campaign, its coordinated bargaining campaigning for 75,000 members, and the continuing effort for comprehensive healthcare reform in California. (Rosselli Tr. 959-60; Borsos 9/27 Tr. 73-74, 83-84; UHW. Ex. 207) (*Id.* 43)

The UHW adds that the “International’s own expert, Mr. Zelman, showed that the need for public discussion and education persisted even after [the ballot initiative] failed to pass the Senate. (Zelman Tr. 27-28; 31-32; 36) (*Id.*44) The UHW also argues that all expenditures from the PEF were “appropriate to the stated purposes of the Education Fund” and “typical for a start-up operation: they included legal fees for setting up the fund; payment to an IT consultant; telephone service; 100 cell phones; and storage space. “Approximately half of the...expenditures...were made to two consultants, Edward Garvey (\$28,259.80) and Arthur Fox (\$22,500). (UHW Br. 46; UHW Ex. 167)” (*Id.* 46) Both of these consultant expenditures “had to do directly with the stated educational purposes of the Fund.” (*Id.*). Garvey is a media consultant “retained to help communicate a national healthcare

reform message and to publicize the work [UHW was] doing on behalf of its members, patients, and the community with respect to healthcare. (Martin Tr. 659; IP Ex. 4).” (*Id.*47) “Mr. Fox, an attorney and a nationally known expert on union democracy issues, was retained to give legal and consulting advice to the [PEF]. (Martin Tr. 664)” (*Id.*)

Another expenditure “of \$50,804 was for a mailing to UHW members communicating the results of an independently conducted election that gave [LTC] workers the opportunity to vote on whether they would choose to remain in UHW, an integrated healthcare workers union, or be merged into a single [LTC] union (Martin Tr. 668; IP Ex. 9).” (*Id.*)

In its opening statement, the IP argued that PEF expenditures were “outside of the view of the local union’s members and outside the constitutional and legal controls that ensure accountability to the members for how their money is spent. (IP 9/26 opening statement 26)” (*Id.* 48) The UHW counters that this statement ignores the UHW’s “democratically elected Executive Board:” which “created the [PEF] and authorized UHW contributions of up to \$6 million. (UHW Ex. 14)” (*Id.* 48) Moreover, the UHW contends, SEIU monitor Bob Hauptman admitted, these expenditures “were completely appropriate for UHW. (Hauptman 9/26 Tr. 116)” (*Id.*) And the UHW’s independent auditor “concluded that ‘UHW [had] the ultimate control over PEF through board representation.’ (UHW Ex. 154)” (*Id.*)

The IP and UHW accounting experts disagreed on the extent to which UHW controlled PEF funds. The IP’s expert, Nicholas Ross, “concluded based on his

review of [PEF] Articles of Incorporation and Bylaws that UHW did not control the [PEF] for purposes of consolidation of their financial statements. (Ross Tr. 231)” (*Id.* 48) However, the UHW’s expert from the Hood & Strong firm testified that Ross’ “testimony fail[ed] to address some of the other information that [his firm was] aware of, because we worked with the audit, namely the relationship between the two entities and all the other information we gathered as part of the audit itself. (Hernandez Tr. 494-495).” (*Id.*) UHW’s other accounting expert, Clifford Kupperberg, agreed with Hood & Strong’s conclusions (Kupperberg Tr. 516-17; UHW Op Br. 49).

3. The UHW argues, further, that the PEF charge is not timely because the PEF “has been a dead issue for nearly eight months. It was effectively dissolved in April of 2008 at the request of the International. (UHW Exs. 96 and 97)” (UHW Op. Br. 50). Moreover, “The vast majority of the funds transferred to [PEF] were never used, and more than \$2.9 million was returned to UHW. (IP Ex. 45; Kupperberg Tr. 513; Hauptman 9/29 Tr. 87; Martin Tr. 722-24)” (*Id.*)
4. The experts also disagree about the extent to which the PEF’s return of funds to UHW could result in tax liability. The IP’s expert, Michael Trister, testified that “the [PEF’s] return of funds to UHW could result in loss of tax-exempt status by the Education Fund” (Trister 9/26 Tr. 199-200)” (*Id.*51) The UHW’s expert, Gail Harmon, “explained, however [that] return of funds to a donor is not uncommon when a 501(c)(3) organization has a failed purpose (Harmon Tr. 427-428)” (*Id.*) In Harmon’s opinion, “return of the funds will have no tax consequences for

UHW (Harmon Tr. 429)” (*Id.*) and, she argues, is unlikely to have tax consequences for the PEF. (*Id.*) And even if in the “extreme case” it were found that PEF had done “something that was improper...that would lead to a revocation of tax-exempt status, in almost all cases, revocations are prospective rather than retroactive” and since PEF’s expenses for 2007 and 2008 exceeded its income, there could be no tax liability ((Harmon Tr. 430; see also Trister Tr. 649-50)” (*Id.*)

The UHW concluded that since the “International’s trusteeship power is to be exercised for corrective, not punitive purposes (SEIU Const. Art. VIII, Sect. 7(a))...whatever issues, if any, were created by the creation and operation of the [PEF], and by its ceasing operation– and returning funds to UHW at the International’s request eight months ago, there is no basis to conclude that imposition of a trusteeship is necessary to address those issues” (*Id.*)

D. The UHW argues that Charge 3, the deposit of \$500,000 into its lawyer’s client trust account (CTA) also was proper and no basis for trusteeship.

According to the UHW

(1) the funds were placed in the [CTA] only after it became clear that UHW and its members would need to devote substantial resources to defending their legal rights and resisting unlawful imposition of a trusteeship, (2) those funds can be drawn from only to pay bills submitted by the lawyer for work authorized by UHW and only to the extent allowed by law, (3) UHW can direct return of any unused funds deposited in the [CTA] at any time and (4) the UHW and its lawyers understood and agreed that, in the event a trusteeship was imposed the trustee would control the UHW funds in the client trust account. (*Id.* 52-3)

With respect to the IP's charge that UHW failed to produce minutes of the March 7-8, 2008 meeting that authorized the \$500,000 expenditure for its lawyer's CTA, the UHW alleges that "any failure to provide the minutes...was inadvertent and resulted from the process of approving and preparing those minutes...[which] were not approved until the March 29, 2008 Executive Board meeting, and were not prepared in final until April 1, 2008 (UHW Ex. 64, 1; 179; Rogers Tr. 369-71)" (*Id.* 53, footnote 12)

The IP also argues that "the payment to the [CTA] was improper because the resolution approving it referred to legal defense of "UHW's membership and officers (Amended Notice, 8)" (*Id.* 54) But, the UHW counters, the IP's argument "ignores the fact that the resolution provides that all legal fees will be paid from the [CTA] only '*to the greatest extent allowed by law...*' (UHW Ex. 53, emphasis added; Hauptman Tr. 64)." (*Id.*)

Moreover, Jonathan Siegel, the UHW's lawyer, testified that "no funds from the [CTA] have been used to defend UHW officers, despite the fact that individual officers have been sued in two lawsuits by the International (Siegel Tr. 795-796)" (*Id.*) Siegel also testified that it was his "understanding that in the event of a trusteeship...[control of] the CTA would pass to the trustee (Siegel Tr. 796-799; see also Martin Tr. 671; Rosselli Tr. 972-73)" (*Id.*)

The UHW contends that since there is no evidence that the funds in the CTA were to be "used for any unlawful purpose," the "creation and funding of the [CTA] provides absolutely no basis for imposing a trusteeship on UHW." (*Id.*)

E. Finally, the UHW contends that the local's "use of a mailing list received from an anonymous source with no stated restriction to communicate with convention attendees

about matters of policy debate within SEIU is not a basis to impose a trusteeship.” (*Id.*) The UHW adds that each of the mailings using the SEIU’s list “addressed matters that had been subjects of discussion at the [2008] SEIU Convention and...continued to be matters of policy debate within SEIU (Borsos 11/12 Tr. 207-208; Hauptman 11/12 Tr. 84-86; IP Exs. 50 and 47)” (*Id.*)

### **The IP’s Reply to UHW’s Defense of the Amended Notice of Trusteeship Charges**

The IP contends that the charges alleged in the amended notice were proved by overwhelming weight of evidence.

A. With respect to the PEF-related charges, the IP argues that the UHW’s attempt to rebut the IP’s charges was unsuccessful because “we showed in great detail that the evidence in the hearing record overwhelmingly supports the allegation that PEF was created and funded for reasons different from the ‘educational’ purposes set forth in UHW-W’s Executive Board Minutes.” (IP Reply Br. 8)

The IP’s principal evidence to support this charge consisted of three witnesses who “testified that at the UHW-W board meeting authorizing PEF, UHW-W board members were told in a closed executive session that PEF was being set up to finance potential battles against the International Union.” (*Id.*) According to the IP, the testimony of these three witnesses was corroborated by the conduct of the UHW’s officers after the May Executive Board meeting and by statements “made or adopted by UHW-W’s own representatives.” (*Id.*)

The UHW’s Opening Brief tries “to rebut the PEF charges by devoting virtually all of its energy to a lengthy multi-pronged attempt to impugn the character and motives of former UHW-W Administrative Vice President and Executive Board member Amado David. See UHW-W Br. at 34-37.” (*Id.* 8-9) The other two IP witnesses who corroborated David’s testimony were former UHW Executive Board member Pam Burton UHW staff employee Theresa Fernandez.

The IP argues that the attack on David “fails on its own terms,” but misses “a full eleven months of *conduct* by UHW-W’s own officers, agents, and allies—which, unlike testimony, cannot be manufactured or tailored after the fact to fit a desired narrative—*corroborates* the account of PEF’s true purposes” related by David and the IP’s other two witnesses. (*Id.* 9, emphasis in original)

The IP alleges that the UHW’s officers, allies and agents’ actions between the creation of the PEF on May 18, 2007 and Sal Rosselli’s April 3, 2008 response to Andy Stern’s March 24, 2008 inquiry letter regarding the PEF, “only make sense...if PEF was created in order to serve as a contingency fund to fight internal union battles including a potential trusteeship battle, and that, conversely makes no sense if, as UHW-W’s witnesses claimed, PEF was set up and operated to be a genuine education fund.” (*Id.* 9-10).

These actions, according to the IP “include but are not limited to” (*Id.* 10)

1. The fact that Rosselli asked the UHW’s Executive Board to authorize the transfer of up to \$6 million of UHW’s money, “(nearly 40% of its net assets) to a newly-created entity with no track record” and “no business plan, budget, or document

of any kind...makes sense only if what is being proposed is something meant to be kept secret.” (*Id.*)

2. “The fact that UHW-W, despite its well-developed member communications program, did absolutely nothing to publicize PEF to UHW-W’s membership. . . .”
3. On the two occasions when Rosselli wired first \$1 million (May 25, 2000) and then \$2 million (February 5, 2008), “he neither documented nor reported the rationale...for his decision.” (*Id.* 10)
4. The fact that the \$2 million transfer “was made at a time when PEF had spent very little of its original \$1 million grant and did not appear to need more money.” (*Id.*)
5. “The fact that *following* the second transfer...PEF took no action to finance or otherwise promote activities pertinent either to healthcare reform or the...contract campaign—the activities that UHW-W’s witnesses *claimed* were PEF’s *raison d’être*—even though...there was a flurry of activity surrounding healthcare reform and the contract campaign in the period between February 5 and the April 24 PEF dissolution resolution.” (*Id.*; emphasis in original)
6. “The fact that a disbursement that PEF *did* make following the second transfer...—indeed, PEF’s single largest disbursement—was unrelated to healthcare reform or the contract campaign but was fully consistent with the proposition that PEF was created and operated as a contingency fund in the event of a trusteeship or other internal union battle. The disbursement in question was a \$75,000 payment to

retain, for six months, Washington, D.C. attorney Arthur Fox, who is well known as an expert in intra-union litigation, including trusteeship litigation, and who has no demonstrated expertise on...healthcare reform.” (*Id.* 10-11; emphasis in original)

7. “The fact that Fox’s services could not, as UHW-W has recently suggested, have been in the nature of serving as a ‘consultant’ to communicate a ‘union democracy’ component of PEF’s mission, given that PEF asserted the attorney-client privilege as a basis for withholding correspondence between PEF and Fox, IP Exh. 36 at 2.” (*Id.* 11)
8. “The fact that *both* the \$1 million initial transfer *and* the \$2 million subsequent transfer were executed shortly *after* the...UHW-W Executive Board meetings at which UHW-W’s Board authorized efforts to confront the International Union and shortly *before* UHW-W carried out those efforts...” (*Id.*; emphasis in original)
9. “The...PEF’s second largest authorization to expend monies was to finance an internal UHW-W referendum or straw poll, on a matter of controversy between UHW-W and SEIU—the matter of long-term care jurisdiction.” (*Id.*)

In addition to these actions, an important statement by Sal Rosselli corroborates Amado David’s testimony. In his April 3, 2008 response to Andy Stern’s March 24, 2008 letter asking Rosselli to respond to seven allegations—including the transfer of UHW funds to an outside entity to fight the International, but “included a passage...*justifying* such a

transfer. (*See* IP Exh. 27 at 8) [According to Rosselli] ‘if a trusteeship were to be imposed, the underlying purpose would be to retaliate against UHW for our public criticism of SEIU’s policies and would, accordingly, be unlawful,’ and [a]s a consequence we would have every right to retain legal counsel...—a right a trustee might attempt to quash by *denying access to the funds needed to exercise that right*’ (emphasis added)” (*Id.* 11-12)

David also was corroborated, according to the IP, by the April 2, 2008 blog by Herman Benson, Arthur Fox’s colleague, quotations from which were featured on the UHW’s blog April 4, the day after Rosselli’s reply to Stern quoted above. In discussing PEF, Benson’s blog “reported that [UHW’s] ‘local executive board voted to put money into a separate tax-exempt fund protected from seizure by Stern...[that] would give members resources to resist the imposition of the trusteeship, and if it is imposed, would help defend their rights while it remains in effect...’” (*Id.* 12)

The UHW claims that their citation and excerpting of Benson’s blog was not an endorsement of his conclusion. The IP counters, however, that the idea that John Borsos, UHW AVP, who attended the May 18-19, 2007 Executive Board meeting that approved the PEF, “would draw attention to [Benson’s] article without including a disclaimer, if he believed that Benson gave a false account of the facts...is wholly unworthy of belief.” (*Id.* 12-13)

The IP’s other corroborating statement is from the anonymous email to SEIU LTC director Jim Philliou, which reported that UHW staffers were told, at a mandatory weekend meeting, that ‘UHW claims it is ready in case the international tries to trustee,

they have a *fund* set up for expenses, *information technology*, and *office space*.’ IP Exh. 123 (emphasis added).” (*Id.* 13) The IP refutes UHW’s attempt to discredit this email by arguing that John Borsos, not the email, got the date wrong for a demonstration that Borsos said occurred before the email was sent on the night of March 17, 2008 Pacific time. (*Id.*)

The IP also counters the UHW’s attempt to discredit Amado David, the IP’s principal witness with respect to the May 2007 Executive Board meeting.

1. The UHW claimed that David tried to instigate mass resignations and cause unrest among UHW members and staff when he resigned his position as UHW Organizing Director (UHW Proffer 10/24/08), but this argument was refuted, according to the IP, by the fact that its own witness, Raymond Cano, a steward and member-organizer, testified on cross-examination that David, his close friend, had not called him before or after his resignation. (11/13 Tr. 405-10). The IP claims: “The reality is that a number of UHW-W organizers resigned on their own, with no prompting from David, in the wake of David’s resignation and joined him to organize in Florida.” (IP Op Br. 17 n. 3)
2. Sal Rosselli, during cross-examination, tried to discredit David by “insinuating that he had been fired [by Rosselli] as an organizer from Local 250 in the late 1980’s for ‘gross incompetence’ (9/26 Tr. 146, 911).” (*Id.*) “But,” according to the IP, “that attempt only undermines the credibility of Rosselli himself, inasmuch as (a) Rosselli not only rehired David in 2005, but appointed him to high office (AVP) of significant responsibility and (b) two of UHW-W’s own witnesses

testified that Amado was a superb organizer: Cano, for example called David ‘an organizing inspiration’ Cano 11/113 Tr. at 404-405, and UHW-W [AVP] Barbara Lewis testified that she was ‘devastated’ by David’s resignation as Organizing Director 11/14 Tr. at 734-735. Furthermore, any suggestion that David was either incompetent or duplicitous is undermined by the fact...that a dozen UHW-W organizers resigned in the wake of David’s departure and joined him to organize in Florida.” (IP Op Br. 17-18 n. 3)

3. The UHW also tried to discredit David, according to the IP, by claiming that David had come forward with his story about the May 2007 Executive Board meeting “for the first time at the September 26, 2008 trusteeship hearing—five months after the International had made its allegations about the ‘secret purpose’ of the [PEF] in a federal lawsuit. UHW-W Op Br. At 34-35” (IP Reply Br. 14) Although the transcript is garbled, the IP thinks “it is clear that David’s answer was clear that he *had* told his story in March 2008...” The IP adds, “David has submitted to the Hearing Officer a short declaration...clarifying the transcript...and specifying that he had spoken to others about PEF prior to March 24, 2008.” (IP Reply Br. 14-15 n. 2; see Declaration of Amado David, submitted Dec. 18, 2008)
4. The UHW’s final attack on David’s credibility is in the form of “an *unsworn* letter to the Hearing Officer submitted, *ex parte*, on November 26 by a current *UHW-W Executive Board member*, Teresita Collado—an officer of the UHW-W whom UHW-W could have made available to testify under oath and certainly could have

asked to vouch for her story in a declaration sworn under penalty of perjury.” (Reply Br. 16, emphasis in original; *see* UHW-W Ex. 246) Collado, in this unsworn letter, “makes the scurrilous allegation that ‘[o]ver many months,’ David had called [her] about the May 2007 Board meeting at which PEF was authorized and ‘pressured her to say things [she] knew were not true’ about what was said at that meeting. UHW-W Br. at 39; UHW-W Exh. 246.” (IP Reply Br. 16) The letter also criticized Pam Burton and Theresa Fernandez—the IP’s other two witnesses—on what happened at the May 2007 Executive Board meeting—whom she characterizes as “ ‘angry and bitter,’ a description diametrically at odds with the demeanor of those two UHW-W members on the witness stand.” (*Id.*)

This letter should be discredited and disregarded, the IP argues, because Collado was present at the first phase of the hearings (9/17 Tr. 212-13), she spoke from the floor and “did not even mention Amado David, who had by that point completed his testimony.” (*Id.* 17, emphasis in original) Moreover, according to the IP, Collado did not say that David had given a false “account of the May 2007 Board meeting...they both...attended, or that David had ever tried to pressure her into giving a false account of the meeting.” (*Id.* 17)

“Furthermore,” according to the IP, “if as Collado claims, David had been pressuring her ‘over many months’ to speak about the PEF meeting, it is more than remarkable that UHW-W never called her as a witness to impeach David, given that Collado’s story—if believed—would provide far more powerful

impeachment evidence than the thin impeachment gruel that UHW-W served up at the hearing regarding David that we have just reviewed.” (*Id.*)

5. The IP argues that “one of the many aspects of UHW-W’s conduct that is difficult to explain if, as UHW-W has insisted, PEF was truly set up to finance education concerning an expected healthcare reform ballot is why UHW-W...wired \$2 million to PEF on February 5, which was after the pre-eminent healthcare reform initiative...died in committee on January 28.” (*Id.* 17-18). “The \$2 million transfer becomes particularly mysterious when considered...with the...language from the resolution passed by the UHW-W Board on April 24...explaining...the dissolution of PEF: ‘whereas, *the political landscape has now changed markedly, the anticipated ballot initiative that was to have been placed on the ballot in California never materialized*, and the establishment of the Fund has become a source of unnecessary conflict between UHW-W and the SEIU International.’ UHW-W Exh. 95 (emphasis added)” (*Id.* 18)

6. The UHW’s final defense against the PEF charges “...is to contend that the transfer of UHW-W assets to PEF was harmless, because those assets were *not* outside the control of the UHW-W and its Executive Board and hence *were* subject to the accountability, oversight and trusteeship provisions of the SEIU Constitution and the protections of federal law. That argument is fatally flawed. UHW-W Br. at 47-50” (*Id.* 20, , emphasis in original)

“To begin with,” the IP argues, the UHW’s accountants made their determination about the UHW’s control of PEF by looking outside of PEF’s documents and

considering events after the International raised questions about PEF, which was dissolved and, at UHW's request, the assets were transferred to UHW.

(Hernandez 11/13 Tr. at 997-98; Kupperberg 11/13 Tr. at 513)" (*Id.* 20-21)

The IP argues that the only behavior that is "relevant to the issue of whether UHW-W viewed PEF as an entity whose assets were outside the control of UHW-W—and hence outside the International Union's audit and trusteeship authority—is the behavior that UHW-W's officers engaged in *before* UHW-W's officers, realizing that the PEF transactions could not be justified, took steps to cause PEF to dissolve and transfer its assets to UHW-W." (*Id.* 21; emphasis in original).

The IP concludes that all of the relevant evidence "points entirely in one direction: that UHW-W did treat PEF as legally separate and outside the financial oversight and trusteeship authority of the International Union." (*Id.*)

The IP presents the following evidence for this conclusion:

(a) PEF's articles and bylaws were structured to make PEF a separate legal entity with board members chosen by other board members and not by the UHW. (Ross 9/26 Tr. at 229-30; Trister 11/14 Tr. at 630-32 The IP notes that contrary to UHW's claim (UHW Op. Br. at 51 n. 11), Trister did disclose that he had advised the SEIU (Trister 9/26 Tr. at 173) (*Id.*)

(b) After setting up PEF, the UHW treated it as a separate entity by listing the transfer of \$1 million to PEF as a contribution on its 2007 LM-2 form (IP Ex. 33, 144). (*Id.* 22) Furthermore, the UHW did not identify the PEF on its LM-

2 form as an entity in which the union was interested. (IP Ex. 23 at 174) (*Id.*)  
And the UHW did not list PEF's payments of over \$5,000 on its LM-2 form  
as a union would be required to do.

(c) In response to the International President's April 7, 2008 request for  
documents (IP Ex. 28, 29 at 1), Sal Rosselli wrote back on April 8: "...the  
vast majority of the documents you are demanding do not belong to, and are  
not in the possession of, UHW; rather,...they are records that belong to the  
[PEF] which is a separate and independent 501(c)(3) legal entity. And your  
authority under Article XIII §6(a) of the SEIU Constitution to audit local  
union financial records does not give you the right to audit, much less require  
the production of, its records, and to insist on compliance within just three  
days." (IP Ex. 29, 1) (*Id.* 22-23)

And, on April 10, 2008, PEF adopted a resolution which declared: "...the  
information and extensive documents sought do not belong to UHW-W,  
but...are the property of this Fund. (IP Ex. 30)" Furthermore, according to the  
IP, "Rosselli's description in his...April 3 letter of how PEF would operate in  
the event of a trusteeship—that it would provide access to funds that a trustee  
might deny—is also flatly inconsistent with the notion that UHW-W and its  
officers viewed PEF as an entity that would be under the control of a trustee in  
the event of trusteeship." (IP Reply Br. 23, n. 7) Moreover, in the event of  
trusteeship the PEF's officers would cease being officers of the UHW, but  
would still be officers of, and in control of, the PEF.

(d) Unlike local union officers, the PEF's could not be required to have fidelity bonds. The "UHW defended this practice on the ground that PEF was a separate...entity, not part of the UHW-W" (IP Op Br. 49)

B. The transfer of \$500,000 to the Siegel and LeWitter Client Trust Account served no legitimate purpose and was hidden from the International Union.

The IP argues that the UHW's "...conduct in connection with the transfer constituted financial malpractice and dishonesty, because a transfer in that amount was inconsistent with...the retainer agreement [for \$25,000], and because UHW-W officials deliberately hid the retainer from the International Union by sending a false and misleading email...to the [IP] on March 31, 2008, the day of the [\$475,000] wire transfer." (IP Reply Br. 24)

The IP considers the UHW's account that those minutes had not been approved at the time of the International's request to be "implausible" (*Id.*) and, when read "with other significant evidence...serves only to *strengthen* the case that UHW-W was engaged on March 31 in a willful and deliberate attempt to hide from the International Union the knowledge that the International would have gleaned from seeing the March 7-8 minutes, *i.e.*, the knowledge that another massive transfer of UHW-W assets was afoot." (*Id.* 25; emphasis in original) The IP notes that, on other occasions the UHW "made no distinction between 'draft' and 'final' minutes and produced some minutes that were in draft form and some that were in final. IP Exh. 61 at 250, 918" (*Id.*)

Moreover, the UHW's "...argument that the [IP] should have known to make a follow-up request for the March 7-8 meeting minutes because UHW-W had sent all of the International board members its annual promotional calendar in late 2007 is, with all respect, silly." (*Id.* 26, n. 9)

Finally, the IP concludes: "...the overarching point here—and one that UHW-W does not and cannot rebut—is that...transferring \$475,000 to Siegel & LeWitter's trust account on March 31 made absolutely no business sense, *unless* the purpose was to get the money off the books of UHW-W and hence outside the immediate control of a trustee. By wiring that money, UHW-W effectively put another obstacle in the way of a potential trustee by creating a class of asset that the trustee would not be able to identify immediately and would need a third party's cooperation to access." (*Id.* 27, emphasis in original)

C. The UHW admits that it retained the SEIU's stolen proprietary database. The UHW makes no attempt to deny the convention database or UHW's Secretary-Treasurer's "misrepresentation" when she denied that the UHW was "in possession of any property belonging to SEIU. IP Exh. 58" (*Id.*) Moreover, "John Borsos, who received and merged the database into UHW-W's master database, certainly knew what UHW-W had obtained [the SEIU's database]. Borsos 11/12 Tr. at 206-207...UHW's response can only be characterized as part of a pattern of deception and misrepresentation to the International Union." (*Id.* 27)

UHW's only justification for retaining and using the database is that it was a form of free speech blessed as protected by President Stern in an April 17, 2008

response to an April 16, 2008 letter from the UHW complaining about mailings from another local union. (UHW-W Exs. 89, 86)

*UHW's letter asked Stern to prevent another union from mailing information to UHW's members. UHW did not complain that the other union had stolen UHW's database, but wanted Stern to stop the mailings "through any means."* (UHW Ex. 86) Stern replied by explaining that acceding to the UHW's request would put him in the position of a censor, concluding "I could not lawfully order one local union to cease communicating with members of the public, including members of other local unions...[Complying with your request] would suppress free speech rights and prevent UHW members from hearing ideas that differ from those of UHW's leadership on matters of importance to UHW's members' UHW-W Exh. 89." (IP Reply Br. 28-29)

The IP concludes that Stern "was not encouraging or condoning the use of stolen lists for purposes of membership communication. He simply was applying SEIU's free speech policy and noting that UHW-W's leaders were expressing a profoundly paternalistic and anti-democratic conception of union free speech." (*Id.* 29)

"Thus, UHW-W's only justification for its theft is no justification at all." (*Id.*)

### **The UHW's Affirmative Defense**

The UHW argues that the IP's "attempt to impose a trusteeship on UHW is retaliatory, political and in bad faith." (UHW Reply Br. 29)

A. In making this case, the UHW contends that the International’s “own documents...show that it is using this trusteeship threat in bad faith as one of many tools to destroy or ‘implode’ UHW.” (*Id.*) One of these documents is an internal email, to SEIU officers Tom DeBruin and Stephen Lerner, which UHW refers to as the “implosion email,” in which SEIU staffer Bill Ragen wrote: “*Trusteeship would be difficult—it’s like Iraq, easy to get in and then a slog...Implosion would be a better outcome* (UHW Ex. 115).” (*Id.*, emphasis in original) The UHW claims that this email “was an admission by the International of its strategy and intentions towards UHW. Mr. Ragen was an employee of the International and his statements in the ‘implosion’ email are attributable and legally binding on the International.” (*Id.*)

According to the UHW, the International also demonstrated retaliation and bad faith by

1. Forming a “ ‘war council’ to attack and discredit UHW and Sal Rosselli, and the ‘war council’ was meeting by November 2007 (Vellardita Tr. [579-581]; see also UHW Op. Br. at 11).” (*Id.* 30)
2. Operating “a ‘skunk team’ which attempted to discredit Sal Rosselli (Dewar Dec. 411; UHW Ex. 78; See also UHW Op. Br. at 85-86).” (*Id.* 31)

3. Sending “Amado David to organize UHW’s members against UHW and to spread anti-UHW propaganda. (Lewis Tr. [738-41]; Cano Tr. [400, 414]; UHW Ex. 246; see also UHW OP. Br. at 36)” (*Id.*)
4. Interfering “with the CHW bargaining campaign by sending Amado David to meet with the bargaining team in an attempt to create division within the local. (See UHW Exs. 73 and 209)” (*Id.*)
5. Asserting “numerous baseless allegations in President Stern’s March 24, 2008 letter [to Sal Rosselli] (UHW Ex. 59)” (*Id.*)
6. Trumpeting “–for no reason other than to spread anti-UHW propaganda– its allegations regarding the [PEF] in the national media, on the Internet, and through flyers sent to UHW members’ homes, making false and misleading statements against UHW. (See, e.g., UHW Ex. 231)” (*Id.*)
7. Launching “a campaign of robo-calls, emails, and flyers aimed at UHW’s members and others in an attempt to discredit UHW (See UHW Op. Br. at 88-90)” (*Id.*)
8. Joining with Local 6434 in an attempt “to scuttle the early 2008 vote that UHW took among its LTC workers to determine if they wanted to remain with UHW or to join a separate union. (Vellardita Tr. [569-571])” (*Id.*)

9. Conspiring “with Local 6434 in 2008 to send anti-UHW propaganda to union members (UHW Ex. 227; DeBruin Tr. [1324-27]. *See also* UHW Op. Br. 93-94)” (*Id.*)
10. Having “leaders—DeBruin, Lerner and Ragen—[hold] meetings to list the ‘sins’ of UHW. (UHW Ex. 228; DeBruin Tr. [1328-1329]; *see also* UHW Op. Br. at 94)” (*Id.*)
11. Acquiescing in “decertification campaigns against UHW. (UHW Exs. 230, 147)” (*Id.* 32)
12. Isolating and marginalizing “UHW at the 2008 Convention. (Vellardita Tr. [583-584])” (*Id.*)
13. Unilaterally eliminating “the Catholic Healthcare West (CHW) Unity Council three weeks before contract negotiations were to start covering 16,000 CHW employees at 35 hospitals (Borsos 11/12 Tr. [221-222])” (*Id.*)

The UHW’s other examples of bad faith are that Andy Stern:

1. “personally coordinated handing out anti-UHW propaganda through whips at the 2008 convention. (UHW Ex. 229; DeBruin Tr. [1329]; *see also* UHW Op. Br. at 94-95)” (*Id.*)

2. "...or his agents secretly met with Governor Schwarzenegger to discuss healthcare reform without telling SEIU-elected leaders in California or the SEIU State Council. (Kumar Tr. [826]) (*Id.*)
3. "encouraged locals in California not to endorse Obama for president, even though SEIU International's official position was that it would remain neutral and would allow locals to determine for themselves whether they wanted to endorse a candidate (UHW Ex. 44)" (*Id.*)
4. The UHW also alleges that "Local 1199 [has] conducted opposition research against UHW. (Borsos 11/12 Tr. [252-55]; UHW Ex. 198; *see also* UHW Op. Br. at 83-84." (*Id.* 31)

B. The second part of the UHW's "bad faith/retaliation" argument is the International's attempt to transfer the UHW's 65,000 LTC workers out of that local.

The UHW emphasizes that the "UHW's political opposition to the International's bargaining strategy and other policy matters regarding LTC workers began *before* the International instituted jurisdictional hearings to remove UHW's LTC workers." (*Id.* 33, emphasis in original)

1. These differences over bargaining and organizing strategies were underscored by a 2005 dispute over the SEIU's relations with the Nursing Home Alliance (NHA). The International favored "template" agreements which provided fewer benefits and contract terms than the UHW wanted to include in full collective bargaining agreements (CBAs). Their supporters thought the template agreements reduced employer opposition to the

organization of nonunion workers. The UHW wanted the template agreements to be “just a transitional first step to full [CBAs].” (UHW Ex. 218, 3) The LTCD, by contrast, wanted to continue the template agreements.” (DeBruin Tr. 1154-55; 1156)

The UHW and the International also clashed over tort reform, which the International favored and the UHW opposed. (UHW Reply Br. 33)

Those disagreements led to what the 2006 Dale-Balanoff report on jurisdiction called a “clash of paradigms.” (UHW Ex. 217) The UHW embraced a more traditional and confrontational “shop floor tradition of organization and a contract-by-contract approach to bargaining.” (*Id.* 60) The International, by contrast, believed in the “growth strategy” adopted by SEIU’s LTCD.

The approach favored by the LTCD focused on

improving standards for our members and improving quality [health] care through improving reimbursement systems and a fair approach to collective bargaining. The [traditional] grievance mill was not productive for either the employers or the union so workplace disagreements would be moved into labor-management settings that focused on problem solving, not adjudication of disputes. Strikes would no longer exist in this volatile, care driven industry. Expedited arbitration would be used to resolve disputes. It is fair to say that UHW rejects [this] philosophy and approach. Instead, shop floor struggle and the grievance mill remains the norm. The distrust between UHW and the provider community impedes our ability to expand the Alliance agreement for new organizing rights in the future, leaving thousands of workers without the benefit and rewards of unionization. (*Id.*)

The UHW contends that by “the time the Dale-Balanoff report was issued, the UHW had long been speaking out politically against the International’s policies—particularly towards LTC workers.” (UHW Reply Br. 35)

2. The UHW contends, in addition, that “The Dale-Balanoff Report recommended that UHW’s LTC workers remain with UHW, and the International’s revisiting that issue in 2008 was retaliation for the UHW’s bargaining strategy regarding the Nursing Home Alliance.” (*Id.*)

Furthermore, the UHW argues, the 2006 Dale-Balanoff report “was in response to the policy differences...UHW had espoused—particularly regarding LTC workers. It was itself retaliatory.” (*Id.*)

However, the Dale-Balanoff report recommended the LTC workers “for the present” continue to be represented by the UHW; this was because of the large number of such workers represented by the UHW and the difficulty posed by removing them. (IP Ex. 82, 62)

But, according to UHW, “although nothing about these circumstances had changed, on January 28, 2008, the International suddenly revived the jurisdiction hearings...through the Hudson Report. (IP Ex. 87) There were no hearings that preceded the Hudson Report...[and] the International failed to give UHW an opportunity to give input into or to be heard in connection with the preparation of that report. (UHW Ex. 237 at 3)” (*Id.* 36)

The UHW alleges that the main thing that had happened between the Dale-Balanoff and Hudson reports was the disagreement over the NHA negotiation in 2007. (Vellardita Tr. 557-558)

These disagreements over the NHA bargaining objective resulted in the UHW and Local 6434 presenting “different and conflicting visions” from its first meetings with employers. (IP Ex. 87, 7) UHW members even presented “about 3,000 petitions in opposition...to the International’s bargaining position. (*Id.*)” (*Id.* 36-7)

As a result of these differences, “By January 15, 2008, the International’s retaliation campaign against UHW was in full swing.” (*Id.* 37)” This campaign included “at least one initial meeting of the ‘war council;’...(Vellardita Tr. 599-81);” “the removal of Sal Rosselli from the State Council Presidency,” and other ‘undemocratic practices’ (*Id.* at 581)” (UHW Reply Br. 37), and the stepped up “retaliation” attempt “to remove LTC workers from UHW.” (UHW Reply Br. 37) “If the International removed the LTC workers from UHW, UHW would not be able to oppose the International’s agenda to settle template agreements; to pursue tort reform; and to enter sweetheart deals with nursing home operators.” (*Id.*)

3. The third prong of the UHW’s bad-faith/retaliation argument is that the International implemented a voting process regarding the 2006 jurisdictional changes suggested by the Dale-Balanoff report by “disenfranchising the vast majority of UHW’s members, by silencing dissent, and by undemocratic voting procedures.” (*Id.* 38)

The UHW supports this allegation by arguing that (1) “the vast majority of UHW’s members were not allowed to vote on whether to approve [the Dale-Balanoff Report’s] recommendations; (2) local unions and their staffs were prohibited “from campaigning against the option favored by the International union;” (3) “votes cast by members from the 24 separate local unions were pooled...rather than totaled separately on a local-by-

local basis,” (Borsos 11/12 Tr. [218-19]);” (*Id.*) and (4) “the members who were allowed to vote were only given an up or down choice in what was a massive and complex jurisdictional reorganization that proposed changes to about 24 local unions.” (*Id.* 39)

4. UHW contends that the International’s “bad faith” is further demonstrated by the International’s discrimination against UHW because in almost every other state “healthcare workers are organized in a single union.” (*Id.*; DeBruin Tr. 1246)

C. The UHW argues that further evidence of the bad faith and retaliation was “[t]he International’s removal of Sal Rosselli from President of the State Council.” (UHW Reply Br. 39) The UHW believes the International’s argument that the Dale-Balanoff report called for a reorganization of the State Council (IP Op. Br. 78 n. 22) is a “pretext” because the Dale-Balanoff report “did not require that the [State Council] charter be revoked to replace the elected leaders...that the charter be revoked in the middle of Mr. Rosselli’s term, and...that selective waivers be given to allow the International President to rig the vote to enable his supporters to vote against Sal Rosselli.” (UHW Reply Br. 40)

D. The International’s conduct preceding the 2008 convention, UHW alleges, “proves the International’s bad faith.” (*Id.* 41)

The UHW rejects the International’s argument that its good faith was demonstrated by not imposing an emergency trusteeship on UHW before the convention as some UHW supporters predicted; by correcting the UHW’s initial improper delegate selection process in time to permit the local to elect new delegates, and “allow[ing] UHW to express its views” at the 2008 convention. The UHW counters that it “had an absolute right to

attend the convention” and that the “International simply had no basis to impose an emergency trusteeship in March and April 2007 just as it has no basis now to impose trusteeship.” (*Id.* 41)

Moreover, the UHW alleges that “the International in bad faith exploited [the] delegate election mistake made but corrected by UHW.” (*Id.* 43) The UHW argues that “Far from supporting UHW in its efforts to correct this matter, the International spent substantial resources to publicly attack and attempt to discredit UHW...(UHW Ex. 54 B)” (*Id.* 43) “Although the UHW notified the International within 30 minutes of being alerted to the mistake, the International was *already holding a press conference* to publicly trumpet the mistake and *within moments* was attacking UHW on the International’s website. (UHW Exs. 54B, 79, 83, 93, 94, 232)” (*Id.* 44) For example, “a flyer [was] sent to UHW members, entitled ‘UHW’s Hypocrisy on Democracy. (UHW Ex. 232; DeBruin Tr. [1350-1351])” (*Id.*)

### **The International’s Response to UHW’s “Bad Faith/Retaliation” Defense**

The IP argues that the UHW’s “bad faith/retaliation” contention should be rejected on multiple grounds:

A. “This proceeding was initiated solely to remedy UHW-W’s *conduct*; no action has ever been taken against UHW-W or its leaders based on their speech, and the International Union has in fact taken affirmative steps to accommodate UHW-W’s right to speak and participate in SEIU forums.” (IP Reply Br. 30; emphasis in original)

The IP notes that “all of the allegations of wrongdoing set forth in the Amended Notice of Trusteeship charge UHW-W based on its leaders’ *conduct* and not on their speech.” (*Id.*, emphasis in original)

Moreover, according to the IP, “UHW-W and its leaders have been engaged in open, robust and full-throated speech—including speech on public websites and other public forums—for a long time, *see, e.g.*, IP Exh. 12 at 77...and UHW-W has not cited a single instance in which the International Union or its leaders have ever taken any action or threatened to take any action against any UHW-W leader or member based on anything that member or leader has said.” (*Id.*)

According to the IP, Andy Stern recommended that the UHW make no further transfer to the PEF while the International investigated the situation, the SEIU gave the UHW a chance to “abate what would have easily met the standards for an ‘emergency’ situation under the case law—the prospect of an additional transfer of \$3 million in union assets to an outside entity—and thereby to avoid the necessity for an emergency pre-Convention trusteeship; *see also* OP. Br. at 106-108.” (*Id.* 31) Moreover, the International officers did not have to alert the UHW about its delegate selection mistake. (*Id.*)

B. The IP alleges, in addition, that the UHW’s “ ‘retaliation’ defense is incoherent and built upon wildly unreliable evidence.” (*Id.*)

1. The UHW’s “effort to reverse-engineer a retaliation theory from an email reflecting the musings of a mid-level International staff employee who was not in the decision-making loop fails utterly.” (*Id.*)

The IP alleges that the UHW “has placed virtually the entire weight of its retaliation defense on a single email—which it refers to as the June 5, 2008 ‘implosion’ email—and on the defective premise that the motives of...Andy Stern in initiating this trusteeship proceeding can be deduced from that email even though the email was neither written by Stern nor sent to Stern. UHW-W Exh. 115.” (*Id.* 31-32)

Moreover, the author of the email, Bill Ragen, “was out of the decision-making loop with respect to the two matters that are pertinent to UHW-W’s retaliation defense: trusteeship and long-term care jurisdictional issues.... [DeBruin] 11/15 Tr. 1355” (*Id.* 32) In fact, “as Tom DeBruin testified, the June 5 email had so little impact when written that so far as he could recall, none of the recipients even replied to it; and on the very day Ragen wrote the email he was assigned to transition to SEIU’s ‘private equity’ project, which had nothing to do with UHW-W. [DeBruin Tr. 1354-1355]” (*Id.*)

The UHW infers that Ragen considered trusteeship and the LTC as mutually exclusive alternatives and then “in a major leap, UHW-W makes the further inference that the International Union’s *actual decision makers*—including Andy Stern—conceived of trusteeship and jurisdictional transfer as mutually exclusive alternatives.” (*Id.* 33, emphasis in original)

According to the IP, based on this “implosion email” the UHW develops its retaliation defense by assuming that the proposal to unite California LTC workers into a single union “depended not on any deeper structural considerations, but

solely on the identity of the particular [LTC] union leaders in California, and that the jurisdictional transfer proposal ceased to be viable on August 9, 2008, the date on which the *Los Angeles Times* published a front-page story reporting evidence of serious instances of self-dealing and breaches of fiduciary duty by Tyrone Freeman, who was then president of California's largest [LTC] local, Local 6434." (*Id.* 33-34)

The UHW had assumed that before the *Los Angeles Times* disclosure the International's plan was to transfer all LTC members into Freeman's union. That plan, UHW assumed, had to be aborted because of Freeman's removal.

Thus, the UHW's final assumption, according to the IP, is that the LTC transfer alternative "was dealt a fatal blow by the downfall of Tyrone Freeman." (*Id.* 34)

However, the IP contends, the UHW's retaliation defense "suffers from a glaring defect: it is contradicted by actual events." (*Id.*) The LTC jurisdictional reorganization process in California, the IP argues, "had begun well before the *Los Angeles Times* published its August 9, 2008 Freeman article IP Op. Br. at 71-87. And—of particular importance—that process continued *without pause*...after the *LA Times* article [and] after the SEIU placed Freeman's local into trusteeship..." (*Id.*, emphasis in original)

The IP therefore argues that there is "not only a complete dearth of evidence to support UHW-W's two key retaliation premises—that Andy Stern shared Bill Ragen's apparent view that trusteeship and jurisdictional transfers were mutually

exclusive alternatives...and that Stern lost interest in jurisdictional transfer when Tyrone Freeman fell from grace—all of the evidence concerning the International Union’s conduct after Ragen sent his email on June 5 is to the contrary.” (*Id.* 34-35) “Furthermore,” the IP contends, “the broader proposition advanced by the UHW-W based on the Ragen email—that the proposal to transfer UHW-W’s [LTC] members into a single statewide...local was formulated, not because of its merits, but because it was seen as a way to punish or ‘implode’ UHW-W to retaliate against its leaders for their free-speech activities—is refuted by two full years of history that preceded the email.” (*Id.* 35; see also IP Op. Br. 116-20)

The IP contends that “the proposal to create a single statewide [LTC] local was developed in early 2006—well *before* the UHW-W engaged in any of the exercises of free speech that UHW-W claimed...caused the International Union to attempt to retaliate against it. Opening Brief at 74-81, 116-20.” (*Id.* 35, emphasis in original)

The IP adds that the June 2006 Dale-Balanoff report was adopted shortly thereafter by the IEB, which “took the position that a rigorous application [of] the...2000 *Decide* report would dictate transfer of the [LTC] members of UHW-W—as well as those in other California locals—into a single statewide [LTC] local, but that pragmatic considerations led them to recommend a temporary exception. Opening Br. at 87.” (*Id.*) However, in his summary of the IEB decision, President Stern called for a future study, resulting in the Hudson report and the 2008 jurisdictional hearings leading to the August 27, 2008 *Page* report.

The IP concludes that the International Union’s 2006 report “was an important *cause*—and was not, in any way, an *effect*—of UHW-W’s decision to begin speaking out against the International Union in public forums. Opening Br. at 117-20. And that point became crystal clear during the 2008 facilitated discussion, when UHW-W put forth as a non-negotiable demand that it be excepted from ordinary policies and procedures for determining jurisdiction developed by the [IEB]—an elected and broadly representative body—and that its membership be given a guarantee of veto power over any proposal that would reduce UHW-W’s jurisdiction. Opening Br. at 85-89” (*Id.* 36, emphasis in original)

The IP concludes that the record refutes UHW’s theory that the LTC issue was revived in the late spring of 2008 to retaliate against the UHW, as well as the notion that at the same time the International’s interest in investigating the UHW’s misconduct evaporated only to be revived when publicity concerning Tyrone Freeman’s misdeeds ended the International’s LTC plans. (*Id.* 36-37) The IP noted, further, that President Stern issued a letter on April 4, 2008—five days before the *Los Angeles Times* Tyrone Freeman story—directing Bob Hauptman “to conduct an on-site audit of UHW-W’s books and records to verify UHW-W’s previous statements about the status of the PEF monies and to determine whether any other large and suspicious asset transfers had occurred. IP Exh. 56.” (*Id.* 37)

Hauptman’s on-site audit led to the discovery of both the \$475,000 to the Siegel client trust account as well as the deceptive March 31 email that had prevented the

International from learning about that transfer months earlier. (*Id.*) Moreover, in the months before Stern's August 4 letter, the International was actively pursuing the stolen database issue. (See IP Exs. 52, 53, and 57) And, contrary to UHW's assertion that the SEIU had lost interest, the International was actively pursuing the PEF charges in federal court, and, again contrary to UHW's assertion, that litigation is ongoing. (IP Ex. System Control nos. 450-520; Control nos. 521-523)

2. The "UHW's most incendiary 'retaliation' allegations are based on unreliable tales told by absent witnesses whose stories were not tested through cross-examination." (Reply Br. 39)

The IP contends that a "substantial portion of the [UHW's] submission on the retaliation issue is devoted...to a laundry list of sensational charges directed at the [International] officers and staff employees" which "does not appear to be aimed at establishing any particular theory; rather, the point seems to be to create the impression that the [SEIU] is staffed with a lot of bad actors, who, because they are capable of doing nefarious and underhanded things, might have decided to initiate a trusteeship proceeding against UHW-W out of spite." (*Id.*)

The IP contends that the "fundamental defect in this part of UHW's case is that all of the most incendiary allegations leveled at UHW-W are based on second-and-third-hand accounts...from individuals whom UHW-W did *not* put on the witness stand to testify under oath and subject to cross-examination. Further, all but one of them were *co-operating* with UHW-W in the presentation of its defense, and thus UHW-W could have, and undoubtedly would have, placed them under oath

and subjected them to cross-examination if it had faith that these tales would survive scrutiny.” (*Id.*, emphasis in original)

The first of the “absent witnesses is Thomas Dewar, who despite being on UHW-W’s witness list, was never put on the stand by UHW-W. Instead, UHW-W submitted a declaration by Dewar after the hearing in which Dewar claims that he was asked to be part of a ‘skunk team’ ...[that] would advocate the International Union’s platform at the 2008 Convention in letters to the editor, criticize UHW-W’s leadership, and, in the part stressed by UHW-W, try to uncover negative personal information about UHW-W’s leaders. Dewar claims that he discussed that last aspect of the supposed assignment at a restaurant meeting...See Declaration of Thomas Dewar (submitted 11/21/2008)” with several people, including IEB member Thomas DeBruin, who testified under oath and was cross-examined. DeBruin “explained that he and [SEIU staff member Josie Mooney who was also at the restaurant meeting discussed by Dewar] had been tasked with the job of advocating the International Union’s convention program, responding to criticisms from UHW-W on the merits, and pointing out inconsistencies where UHW-W did not practice what it preached, but *not* with making personal attacks against UHW-W’s leaders or digging up negative personal information about them. 11/15 Tr. at 1242.” (*Id.* 39-40). DeBruin testified that “Dewar’s tale was a fiction; that [he]...came on very aggressively and immediately took over the conversation, talking non-stop; and that Dewar...brought up the issue of the existence of a file about Sal Rosselli that one of the consultants had access to.

11/15 Tr. at 1238-1241. DeBruin testified that he felt suspicious about Dewar after he joined the meeting. *Id.*” (*Id.* 40)

The IP discounts Dewar’s declaration because he was on the UHW’s witness list, but the UHW did not have him testify under oath, choosing “to have his story told by UHW AVP John Borsos, who was not at the restaurant meeting, but read Dewar’s account from a local newspaper. Borsos 11/12 Tr. at 249-51”

It was revealed after the hearing and shortly after his declaration that Dewar accepted the UHW’s offer of a consulting job. (See Declaration of Bob Hauptman (submitted 12/10/08; 12/10/08 letter from Dayan to Marshall)

The IP names “two other witnesses on whom UHW-W heavily relies in making its most sensational allegations...Tyrone Freeman, the disgraced former President of Local 6434, and Matthew Maldonado, Freeman’s former chief of staff, who was removed from office when Local 6434 was placed under trusteeship for corruption and financial malpractice...” (IP Br. 41) The IP contends that “the weight given to the out-of-court statements that UHW-W claims—[Freeman and Maldonado] made to UHW-W representatives should be nil.” (*Id.*)

“A fourth absent witness...is an unnamed person...John Borsos asserted...claimed to be formerly employed by...another SEIU Local—Local 1199NY, 11/12/ Tr. 252-55...and said, according to Borsos, that ‘Amy Gladstein directed Local 1199NY staff...to conduct opposition research on UHW-W. *Id.* Gladstein, however, rebutted the allegation...by testifying under oath and subject

to cross-examination 11/15 Tr. at 1162-82” (Reply Br. 41-42) Borsos testified, falsely according to the IP, that Gladstein was an *International* staff employee (11/12 Tr. at 254), but, since she is not “there could be no possible justification for finding the *International Union* responsible for her misconduct even if, contrary to fact, UHW-W had been able to prove any misconduct on her part.” (Reply Br. 42, emphasis in original)

3. The IP alleges, in addition, that the UHW not only has “injected unreliable evidence into the record, [but] has gone further and grossly misrepresented that evidence. (*Id.*)

One of the “most scurrilous allegations—one which [UHW] has elevated to...an argument heading—is that “The International Promoted a Decertification Campaign against UHW at Good Samaritan Hospital’ UHW-W Op. Br. at 95.” (*Id.*) This allegation was based on a cryptic response to an email from SEIU staffer Bill Ragen to SEIU officers Mary Kay Henry and Stephen Lerner, asking if another SEIU staffer, Keisha Stewart, “should be sent in ‘to help on the Good Sam decert.’ *Id.* (citing UHW-W Exh. 230)” (*Id.*) Mary Kay Henry responded “Why do?” which UHW interpreted as a callous refusal by the SEIU to help UHW with a decertification campaign. However, the balance of Henry’s response, which UHW did not quote, was, Henry said, immediately after “why do?” that they should “ ‘talk by phone’ about the appropriateness of assigning Keisha Stewart, because ‘she was issue in facilitated discussion.’ UHW-W Exh. 30. *See also* second Declaration of Mary Kay Henry at ¶ 6. Henry therefore was

trying to *accommodate* UHW-W, not harm it, when she raised her concern.” (*Id.* 43, emphasis in original)

The IP concludes: “The only lesson to be drawn from the “Why do?” email is that UHW-W is willing to level even the most serious allegations without subscribing to even the most minimal standards of candor.” (*Id.*)

4. The IP contends, further, that contrary to UHW-W’s premise in its submission, the SEIU “is not retaliating against UHW-W for its speech when the International merely responds to UHW-W’s speech with speech of its own.” (*Id.*)

The IP points out that “there has been a robust public debate between UHW-W and the International ever since UHW-W made its decision, at the January 25-26 [2008] Executive Board meeting to launch a ‘massive public campaign’ of criticism against the International Union. 9/26 Tr. at 143.” (*Id.* 43-44)

By suggesting that when UHW criticizes the International and its officers it is free speech, but when these officers respond it is unlawful retaliation UHW “is tacitly advocating...a legal regime that, in the First Amendment context, the Supreme Court has condemned as impermissible...*R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992)” (*Id.* 44)

C. The IP concludes that “Even if, contrary to fact, UHW-W had proven with reliable evidence that some International officers or staff employees engaged in some unfair conduct toward UHW-W, that would not shelter UHW-W’s serious acts of financial malpractice, subversion of democratic procedures, and

interference with the legitimate objects of the International Union from forming the basis for a proper trusteeship.” (*Id.*)

According to the IP, “The law is well-established that, because a parent labor organization may establish a trusteeship over a local union whenever the parent has *one* proper purpose for taking that action, evidence that a combination of permissible and impermissible purposes may have motivated a trusteeship decision is insufficient to defeat trusteeship. See, e.g., *Morris v. Hoffa*, 361 F. 3d 177, 184 (3<sup>rd</sup> Cir. 2004)” (*Id.* 44-45)

The IP adds, “were the law otherwise, a local union’s officers could engage in the most extreme acts of impropriety imaginable—including diversion of local union funds to family...and friends or rigging elections—and yet still raise a defense against trusteeship by showing that the parent organization officers who recommended the trusteeship were unhappy with the local officers and wished to see them go for reasons independent of the financial improprieties.” (*Id.* 46)

## **Summary, Conclusions, and Recommendations**

This section presents a brief summary of the parties’ positions, starting with the International President’s, followed by the UHW’s, and then my conclusions and recommendations.

## Summary of the IP's Amended Notice Charges

### *1. Background*

Since the 2000 Convention and the *Decide* report,<sup>4</sup> the SEIU has been restructuring to maximize its organizing, bargaining, and political power to improve the conditions of its members and all workers. The basic objective of this policy has been to create local unions with sufficient size, power, capacity, and focus to improve the conditions of their members and organize their jurisdictions. The 2000 *Decide* report emphasized that the most appropriate structure to achieve this outcome would be to organize workers by industry. The achievement of this objective also required organizing the unorganized workers in the appropriate geographical areas in order to improve their conditions, as well as to prevent nonunion conditions from undermining the conditions in the unionized sectors. Because healthcare costs and benefits depend heavily on public health care policies, the SEIU and its locals place considerable emphasis on political power at the state, provincial (in Canada), and national levels. The achievement of these bargaining and political objectives required a rationalization of union structures to overcome the fragmentation and parochialism of strong local unions more concerned with maintaining the power of their locals and benefits of their members than in expanding by organizing unorganized workers. SEIU leaders concluded that the failure to organize the unorganized was an important reason for the decline of union density in the United States.

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<sup>4</sup> This report was put together by the President's Committee of 2000, made up of 20 local union presidents.

The policies adopted by the *Decide* report have contributed to a doubling of SEIU's membership over the last two decades at a time when overall union density has declined. And, as the 2008 presidential election demonstrated, SEIU has emerged as a strong force for progressive policies in American politics.

Before 2005, Sal Rosselli was an enthusiastic supporter of Andy Stern's policies and served on the committee of local union presidents that produced the *Decide* report. He was appointed by Andy Stern to important positions within the SEIU. In 2005, when the UHW was formed with the merger of Local 250, of which Sal Rosselli was president, and Local 399, Stern appointed Rosselli as interim president. With the help of resources and staff from the International, under Rosselli's leadership the UHW has emerged as one of the strongest local unions in the healthcare sector with active membership support. The local has developed some of the best benefits for its members in the industry. And, with the help of the SEIU, the UHW has established one of the country's most effective union-management cooperation partnerships. Sal Rosselli has been a strong supporter of this partnership and has worked to cause it to be more effective. The SEIU's assistance in building UHW was based on the strategy of creating strong local unions to serve as the bases to extend unionization into unorganized regions and companies, which are increasingly national in scope.

Despite early cooperation between Andy Stern and Sal Rosselli, differences emerged after the UHW was created. Some of the differences were over proper organizing strategies and others over public policy matters, especially the important objectives of

achieving universal health care, an issue of enormous importance to the SEIU and the country.

Both leaders agree on the importance of universal health care, but disagree on strategies to get there. Differences also emerged over organizing strategies. In order to extend the benefits of unions to more unorganized workers and strengthen union political and bargaining power, Stern favored compromising with companies willing to work with unions, while Rosselli and UHW leaders stress improving the conditions of organized workers through strengthening traditional bargaining power at the company level and coordinating the expiration of contracts with different companies in order to maximize bargaining power and the efficacy of strikes. Stern and his allies in the SEIU believe that strikes in the healthcare industry could stiffen employer resistance to organizing and weaken public support for unions; they therefore view strikes as a last resort and give greater weight to arbitration as a way to resolve differences with employers.

The most important source of conflict between the SEIU and the UHW is over the appropriate strategy for organizing long-term care workers in California. The UHW believes that one local union should represent all healthcare workers and the SEIU, based on the 2000 *Decide* principles, believes LTC workers should be in a separate statewide organization. The SEIU Long-Term Care Division contends that a statewide LTC local can maximize power at the state level, which is very important for these workers because states provide a large share of the resources to support nursing home, home care and other LTC workers. Moreover, the industry organizing principle is to unite workers who do similar kinds of work. The UHW's core jurisdiction is hospital workers who,

according to the LTCD, have different working conditions and skill sets than LTC workers. The UHW believes, by contrast, that it can leverage its strength in the acute care sector, whose workers generally have better wages and conditions, to improve LTC workers' conditions. The LTCD believes, however, that conditions between acute and LTC workers are sufficiently great that attempting to equalize conditions before the industry is better unionized will stiffen employers' opposition to unions and make it harder to organize unorganized workers.

### **The International President's View of the Conflict**

According to the IP the origins of the actions that led to the charges in the Amended Notice came during 2006, when the IEB adopted the Dale-Balanoff report's recommendations to organize LTC workers into a single local, which would have removed 65,000 LTC workers from the UHW, greatly weakening its numerical strength, though arguably leaving it with a stronger ability to concentrate on improving its position in the acute care sector. Because the UHW had so many LTC workers, for practical reasons the IEB made a temporary decision not to remove these workers from the UHW in 2006. Before it implemented the 2006 *Decision* report's recommendations, the IEB provided for an advisory vote among the affected workers in California, which approved the IEB's 2006 decision. The UHW vigorously opposed the rules for this advisory vote, which provided for pooling the votes of all affected members and prohibited local leaders from using union money to oppose the Board's decisions. The UHW preferred local-by-local voting and opposed the prohibition on the use of union funds to fight the IEB's proposals.

In the IP's interpretation of events following the 2006 decision and vote approving the IEB's proposal, it became clear to UHW leaders that without changes in voting procedures and rules they were likely to lose their LTC members. The IP argues that the UHW's leaders therefore adopted a multi-pronged strategy to hang on to their LTC members. One point of that strategy was their unsuccessful attempt to amend the SEIU Constitution at the 2008 Convention. Another prong was to mount a vigorous campaign to resist efforts to strip away the local's LTC members. This conclusion is suggested by Sal Rosselli's 2008 convention speech in which he asserted that he was speaking for himself and his entire executive board when he declared, with respect to the IEB's pooled voting procedures on local union mergers, "we cannot and will not accept that kind of vote." (IP Ex. 109)

Similarly, the preservation of its jurisdiction was reported to have become "a non-negotiable" issue for the UHW at the April 2008 facilitated meeting, designed to determine if there could be a resolution of the differences between the UHW and other locals on the SEIU's Health Care Division Steering Committee. (DeBruin 11/15 Tr. 1228) Indeed, the UHW's leaders are reported to have described the jurisdictional conflict as their "strike issue," and they referred to their public campaign against the SEIU initiated in February 2008 as their "strike." (*Id.*)

According to Dennis Rivera, who chaired the Health Care Division Steering Committee, and who was a participant in the facilitated discussions, "the UHW was unwilling to commit that it would abide by the majority decision-making process within our union if it disagreed with the outcome." (UHW Ex. 152, 2) The steering committee concluded that

“the UHW’s participation in this process was a ploy to create leverage for...UHW-W—to get preferential treatment within the union and be exempt from implementing the democratic decisions of the majority.” (*Id.* 1)

According to the IP, this campaign produced the friction between the UHW and the SEIU that led to the actions that caused President Stern to issue the Amended Notice of Trusteeship. The creation of the PEF and the \$500,000 attorney client trust account were directly involved in the UHW’s attempt to create funds to fight the SEIU, according to the IP, and the UHW’s use of the stolen convention delegate database was to carry on the fight on issues debated at the convention.

Another part of the UHW campaign, according to the IP, was an all-out public campaign to change the subject of its conflict with the SEIU from jurisdiction to internal union democracy and local autonomy. The strategy was adopted at a special January 25-26 2008 Executive Board meeting and consisted of a media campaign, including the creation of the SeiuVoice.org website and strengthening the UHW’s relationship with union democracy supporters like Herman Benson and progressive media sources.

Another component of this campaign, according to the IP, was to conduct an election among UHW long-term care workers to determine if they would prefer to stay with the UHW, where they were told they would have higher wages, benefits, and better contracts, or go with a LTC local with weaker bargaining power and inferior contracts. The UHW’s leaders campaigned hard to get a “yes” vote on remaining with the UHW. The election acquired an image of authenticity by having it administered by an independent agency. To no one’s surprise, the vote was overwhelmingly to remain with the UHW.

The IP argues that this vote was a sham not only because it was not preceded by any debate with respect to the positions being voted upon, but also because the questions were framed in way that elicited the desired outcome.

A number of developments related to the UHW's campaign, according to the IP, led President Stern to issue the Amended Notice for this trusteeship hearing. All of them involved a growing conflict between the UHW and the SEIU. When the International found out about the PEF and received reports that it was being established to transfer union monies to the nonprofit to put it beyond the reach of a trustee, the International launched an investigation, which produced evidence that the conflict with the International, not healthcare education, was the nonprofit's real purpose. The UHW's lack of cooperation in providing information included asserting attorney-client privilege in providing the legal opinion the union said blessed PEF's creation and asserting that some information could not be provided because it belonged to the PEF, an independent agency not controlled by the UHW. The International's suspicions led it to undertake a special audit in August of the UHW's books and records, which discovered the retainer agreement and the \$500,000 transfer to the UHW's attorney's client trust account. The SEIU's suspicions of this account deepened because the minutes of the March 2008 UHW Executive Board meeting which authorized the retainer were not delivered with other minutes and materials the UHW had delivered for that period. The IP was dubious of the UHW's explanation that the minutes were not approved until April 1, which was beyond the March 24 cutoff date for the materials the International had requested. The

International therefore concluded that the March 31 email from UHW's former attorney stating that all relevant data had been delivered was false.

The International's suspicions were intensified by the UHW's lack of candor in responding to inquiries about the stolen convention delegate database, which the International had convincing evidence the UHW was using, but which the UHW denied any knowledge of and accused the SEIU of trying to stifle free speech with the inquiry. The UHW did not confess to having the database until its attorney's proffer on October 31, during these hearings. The IP thought it ironic that the UHW would trivialize the importance of the theft of the International's data when it excoriated another local union it accused of violating UHW members' sacred right to privacy by using UHW's data without authorization. The IP also was dubious of the UHW's claim that the database was sent to it as an attachment to an anonymous email.

The IP had a variety of evidence that the PEF was created as a contingency fund to fight the International. First, there was testimony from what it regarded as reliable witnesses who were at the May 18-19, 2007 UHW Executive Board meeting that authorized transferring up to \$6 million to the PEF. The IP's principal witness was UHW Executive Board member Amado David, who was also a UHW administrative vice president and director of organizing, who said that Sal Rosselli told the board members in a closed session that the fund would provide a "war chest" beyond the reach of a trustee to fight the International over trusteeship and other matters. One other witness, Pamela Burton, who also was an Executive Board member, corroborated David's story. A third witness was Theresa Fernandez, a staff employee, who testified that Pam Burton and another

board member, Teresita Collado, had confirmed that the PEF was set up as a fund to fight the SEIU.

These witnesses were corroborated, according to the IP, by the way the PEF was structured; the absence of a paper trail other than the May 18-19 Executive Board minutes; giving a single individual, Sal Rosselli, sole discretion on the timing and amount of transferring the \$6 million; the absence of any publicity surrounding the fund's creation; the circumstances surrounding its activities; and Rosselli's April 3 response to the IP's March 24 letter in which he declared that in the event of an "unlawful" trusteeship the union "would have every right to retain legal counsel...—a right a trustee might attempt to quash by *denying access to the funds needed to exercise that right.*" (IP Ex. 27, 11-12, emphasis added)

The IP argues that its witnesses also were corroborated by statements made or adopted by UHW's leaders, including a blog by Herman Benson which reported that UHW's "executive board voted to put money into a separate tax exempt fund...free from Stern's control, [that] would give members resources to resist the imposition of a trusteeship and, if it is imposed, would help defend these rights while it remains in effect." (IP Ex. 26, 932-33) The UHW published an excerpt from Benson's blog on April 4, but not the statement about the fund quoted above.

In addition, the IP cites an anonymous email from what the International Union argues was a credible insider reporting on a mandatory meeting where UHW staff employees were told "in case the international tries to trustee, they have a fund set up for expenses, information technology, and office space." (IP Ex. 123)

Further evidence that the PEF was a contingency organization, according to the IP, is the lack of any significant activity related to health education or reform between the time it was created in May 2007 and when it was dissolved on April 24, 2008. In May 2007, the PEF acquired office space from the CNF (which was created by the California Nurses Association, one of the SEIU's rivals), but the space was never occupied. Similarly, the PEF spent \$16,000 for information technology, including cell phones which were never used. And, the PEF's other expenditures were related more to the UHW's fight with the SEIU than to health care: a \$75,000 retainer to Arthur Fox, an attorney specializing in internal union disputes, and \$50,000 for postage on a mailing for the non-binding election on its members' LTC preferences.

### **The UHW's Response to the Amended Notice Charges**

The UHW denies the IP's charge that the PEF was established for improper purposes. It also alleges that the trusteeship hearing and the LTC jurisdictional decisions are to retaliate against the UHW's leaders for their public disagreements with the direction President Stern has taken the SEIU. The UHW alleges that the SEIU has responded to this criticism by seeking to discredit the UHW and its leaders and destroy UHW by any means available. (UHW Op. Br. 1)

With respect to the IP's evidence provided in this hearing, the UHW argues that the International is attempting to establish a trusteeship on the basis of "gross speculation about presumed intent to take hypothetical future actions and no evidence of actual misconduct." (UHW Reply Br. 1)

Moreover, the UHW argues, the International has proceeded in bad faith to retaliate against UHW for UHW's political opposition to the International. (*Id.*) According to the UHW, the SEIU's retaliation campaign was revealed by the June 5, 2000 "implosion" email from one SEIU official to another, which considered trusteeship and the weakening of the UHW by stripping away 65,000 LTC members as alternative strategies. (UHW Ex. 115)

UHW argues, with respect to the specific charges, that the PEF was conceived and operated throughout for its stated education purposes and the \$500,000 transferred to its attorney's client trust account was never considered by either the UHW or the local's attorney to be beyond the reach of a trustee. Moreover, the UHW rejects the IP's claim that its use of the convention delegate database was improper. The list, UHW claims, was "received from an anonymous source with no stated restriction [and was used] to communicate with SEIU convention attendees about matters of policy and strategy differences...raised at the [2008] convention and were continuing topics of debate within the union." (*Id.* 2-3)

The UHW's responses to the specific charges are:

1. The UHW witnesses who attended the May 18-19, 2007 Executive Board meeting all testified that the Fund was created for member and patient education in relation to attempts to create comprehensive healthcare reform in California, the 2008 presidential campaign and the UHW's coordinated 2004 bargaining campaign. There was, according to these witnesses, no mention of putting funds beyond the reach of a trustee.

2. The UHW argues that the creation of the PEF was not secret because minutes are disseminated and discussed by Executive Board members at steward council meetings.
3. The UHW made proper filings with the IRS and “every penny” of PEF funds has been accounted for.
4. The Fund was terminated April 24, 2008 and unspent funds were returned to the UHW because the Fund was creating “unnecessary conflict” with the International and the “political landscape” for healthcare reform had changed markedly.
5. The funds contributed to the PEF were never at risk of loss, as the International alleges, because the PEF’s directors were all members of UHW’s Executive Board.

The UHW disputes the IP’s evidence in the PEF case:

1. The IP’s witnesses, especially Amado David, are unreliable. The UHW had seven witnesses who “testified categorically” that there was no discussion of using the PEF in the event of trusteeship. (UHW Op. Br. 30) The IP’s other witnesses were recruited by Amado David and also were unreliable.
2. UHW argues that it did not endorse Herman Benson’s blog article and the parts of his article reproduced on UHW’s website made no mention of PEF. (*Id.* 40)

3. The UHW was not involved in financial malpractice. All expenditures were proper, none ever spent for personal purposes, and all were spent for union business.
4. With respect to the IP's charge about the suspicious timing of the transfer of \$2 million to the fund on February 5 after the California healthcare ballot initiative died in January, the UHW contends that it had other purposes for the fund and California healthcare issues continued to be important. (*Id.* 43)
5. The UHW contends that the IP's PEF charges are not timely because the Fund was effectively dissolved in April and since the International's trusteeship powers are to be exercised for corrective and not punitive purposes (SEIU Const. Art. VIII §7(a)).

### **The UHW's Affirmative Defense**

The UHW argues that the IP's "attempt to impose a trusteeship on UHW is retaliatory, political, and in bad faith." (UHW Reply Br. 29)

The UHW bases this conclusion primarily on the so-called "implosion" email from Bill Ragan, a staff employee, to SEIU officers Tom DeBruin and Stephen Lerner, in which Ragan wrote that "Trusteeship would be difficult—it's like Iraq, easy to get in and then a slog...Implosion would be a better outcome." (UHW Ex. 115) The UHW argues that this email "was an admission by the International of its strategy and intention towards UHW." (UHW Reply Br. 29) The UHW then presents a long list of activities that it claims demonstrates bad faith. Most of the items on this list reflect the intensified conflict

between SEIU and UHW, and some are misinterpretations of incomplete information, like the charge that the SEIU acquiesced in a decertification campaign against UHW based on an incomplete email, a more complete version of which showed that the SEIU was actually trying to accommodate UHW by not sending a staffer to help with that campaign that the UHW had found objectionable during the facilitated April “mediation” discussion.

The second part of UHW’s “bad faith/retaliation” charge is that the attempt to transfer UHW’s 65,000 LTC workers out of the local is because of disagreements over bargaining strategy, tort reform, and the proper jurisdiction for LTC workers and other issues. UHW argues that the 2006 Dale-Balanoff decision on jurisdiction was in retaliation against UHW leaders for speaking out politically against the International policies, particularly with respect to LTC workers. (*Id.* 35) Similarly, even though the 2006 decision temporarily exempted the UHW from the 2002 *Decide* report principles, In January 2008 the International revived the jurisdiction issue with the *Hudson* report (IP Ex. 87), which led to the *Page* report, and ultimately to the 2008 advisory election and the IEB’s January 2009 decision to create one LTC local for California. The UHW argues that the SEIU revived the jurisdiction question in retaliation for the 2007 Nursing Home Alliance negotiations in which the UHW clashed with SEIU negotiators at the bargaining table and in public. Ultimately, however, all of the union negotiators walked away from the NHA negotiations because they were unable to get an acceptable agreement.

## **Conclusions and Recommendations**

1. I find that the Leaders of the UHW did Engage in Financial Malpractice and Undermined democratic Procedures when they Transferred UHW Funds to a Nonprofit Organization to be Used in Contests with the International Union. I also find that UHW's leaders wrongfully converted the International Union Convention delegate database, and hid from the International the movement of \$500,000 to an attorney's trust account to fund contests with the International Union.

However, I do not recommend imposing a trusteeship on these grounds at this time because these actions were merely symptoms of the basic underlying cause of the conflict between UHW and the International Union—the jurisdictional conflict over long-term care workers. Therefore, I recommend a trusteeship under the circumstances of this case only if the UHW leaders don't agree to abide by and cooperate with International Executive Board's January 2009 decision over long-term care.

Although I do not recommend trusteeship for the reasons stated above, I believe a trusteeship would have been appropriate to prevent further transfers and recover UHW money already transferred had the trusteeship been imposed at the time of the transfer. At this point, however, imposing trusteeship only if UHW fails to promptly abide by and cooperate with the implementation of the jurisdictional decision will, considering all of the circumstances, best serve the interests of the UHW members and the International Union. However, I believe my recommendation will better serve remedial purposes at UHW and within the SEIU.

2. This Hearing and the IEB's Jurisdiction Decisions were not Initiated to Retaliate against the UHW for its Aggressive Criticisms of International Leaders' Policies and Strategies.

While there are other policy differences between SEIU national leaders and the UHW, the major underlying source of friction for several years has been over the UHW's fear that the International jurisdiction proposals would cause it to lose approximately 65,000 LTC workers to a new statewide local.

The UHW argues that the LTC proposal is retaliation by the International for its decision to aggressively speak out against what it regards as undemocratic policies of the SEIU's national leadership. In my view, that charge is not supported by the evidence. SEIU's jurisdictional changes have been underway since at least the 2000 convention and have been thoroughly debated. It seems to me that on this issue various reports, beginning in 2000 with the *Decide* report, have been cogent and well thought out—which is unlikely to have been the case if they were pretexts to deprive the UHW of its 65,000 LTC members as punishment for its aggressive attacks on the SEIU's national leadership.

I also do not believe this trusteeship hearing was initiated for retaliatory reasons. The vigorous give-and-take of debate cannot be interpreted as retaliation against UHW's leaders for free speech. Of course, adversarial processes tend to be self-accelerating and too often give way to exaggeration and unfairness on both sides, but exaggerated and unfair speech is not retaliation.

The UHW places far too much weight on the “implosion” email from a mid-level staff employee, Bill Ragen, who was not in the decision-making loop. It is, moreover, difficult to impute Ragen’s speculation to International policy. If this could be done, we would stifle the free flow of ideas that is so important to problem solving. There is, moreover, no evidence that President Stern ever saw or even knew about that email. There also is no credible evidence that the SEIU ever considered jurisdictional decisions and trusteeship as alternatives.

3. The IP had Reason to Believe that a Trusteeship Hearing was Necessary to Protect the SEIU and UHW Membership.

International officers had reason to believe that the UHW was attempting to transfer millions of dollars of UHW money off of its books to fund trusteeship or other fights with the International Union. The International’s evidence on this point included reports from UHW members, media reports like the Benson blog; statements like those in Sal Rosselli’s April 3, 2008 letter in which he defended the UHW’s right to have a fund beyond a trustee’s control for defense against an “unlawful” trusteeship; the lack of adequate documentation for the creation of a nonprofit fund with up to \$6 million of UHW money; the timing of the transfer of \$2 million to the PEF on February 5, 2008 after the California healthcare ballot initiative the UHW claimed was the Fund’s primary purpose had died the previous month; the lack of transparency surrounding the PEF transactions; giving one person sole discretion for the amount and timing of these transfers and permitting them to take place without adequate documentation; the retention by the PEF of Arthur Fox, a well-known LMRDA specialist; what the International

considered to be uncooperative behavior by the UHW's officers in responding to the IP's request for the delivery of documents; and PEF expenditures, most of which seemed more appropriate for a union than a nonprofit created to promote health education. The UHW argues that the PEF was created for legitimate health education purposes, but it actually did very little on health education before or after the transfer of \$2 million in February 2005.

The UHW and its experts emphasize that the \$3 million actually transferred was not at risk because the PEF board was made up of 10 UHW board members, including its principal officers—thus maintaining unified control. However, there is no doubt that the UHW and PEF officers considered the PEF to be a separate legal entity—as indicated by the UHW's and PEF's refusal to give the International President information requested because it belonged to PEF. Moreover, if a trusteeship had been established, the UHW leaders could have been removed from their union positions but would have retained their membership on the self-perpetuating and unelected PEF board, whose assets would have been beyond the reach of a trustee.

After the International started its investigation, the PEF board returned most of the \$3 million to the UHW, so the PEF never got to the stage of having a board that was actually and legally independent of the UHW.

Although both the UHW and the IP presented conflicting witnesses on the real purposes of the PEF, I was prevented from gaining more knowledge about the organization's real purposes by limited power to penetrate shields erected by perjury and attorney-client privilege claims. However, I nevertheless am persuaded that the IP had considerable

reason to believe that a trusteeship hearing was necessary to protect UHW's assets and democratic union oversight and accountability.

Another issue that caused the IP to be suspicious of the UHW's intentions was the transfer of \$475,000 to an attorney's client trust account in late March 2008. This transfer raised the International's suspicions because of its size relative to the \$25,000 retainer fee the UHW had with that firm, and was not requested by the local's counsel at that firm. The International likewise was suspicious of this transaction because it was authorized by a decision of the March 7-8, 2008 UHW Executive Board meeting but was not discovered by the International until mid-August 2008 when the International's concerns caused it to send Bob Hauptman to examine UHW's books and records.

Another source of suspicion was the local's failure to send the minutes of the March 7-8 Executive Board meeting that authorized the \$500,000 attorney client trust fund transfer along with documents the International requested covering that period because, the UHW alleged, they were not officially approved until April 1, 2008. The International therefore considered the UHW's March 31, 2008 email saying that all of the documents it requested had been sent to be false and suspected that the transfer was to create at least a temporary fund for UHW officers in the event of trusteeship. There was general agreement that, unlike the PEF, a trustee would have access to the funds in the attorney's trust account, but it might have taken some time for the trustee to gain access to those funds.

Other major causes of the International's suspicions of the UHW were related to the discovery that the UHW had the SEIU's stolen confidential, proprietary convention

delegate database, which, the IP contended, was in violation of Article XVIII, Section 9 of the SEIU Constitution. After having previously denied that it possessed the SEIU's property, UHW admitted in its October 31, 2008 proffer, in connection with this hearing, that it had the database. This came after the International's July 10 order that the UHW "cease and desist immediately from the unauthorized use of this mailing list," (IP. Ex. 72) and, after no response to the July 10 letter, a letter from President Stern on July 22 directing Sal Rosselli to comply with this request. In a July 22 letter, UHW's Secretary-Treasurer responded by accusing Stern of inquiring about the database, which she did not deny having, as an attempt by the International to interfere with free speech, declaring "[o]ur ability to speak is meaningless if we are unable to communicate with other SEIU members and leaders." (IP Ex. 54)

After it finally admitted having it, UHW leaders said that they did not solicit the database but received it as an anonymous email attachment without identifying notation that it was "proprietary" or "confidential." The UHW incorporated it into its own database, making it difficult to return it to the SEIU.

The UHW's response to the database and other matters identified in the Amended Notice caused International leaders to question whether the UHW would ever deal forthrightly in their communication with the International.

4. The Underlying Issue is Conflict over Jurisdiction. As both the UHW and the IP came to realize, however, the underlying issue in this case is not one of the charges in the Amended Notice, which were really symptoms of the fundamental relationship between the international union and the UHW. As noted earlier, there are important policy

differences between the International and the UHW, but the basic problem appears to be the local union's reluctance to accept the IEB's jurisdiction decision that would cause the UHW to lose its 65,000 LTC members.

## 5. Conclusions

There are natural differences between local and international unions, especially over matters of local union autonomy. If these differences can be resolved through democratic means, they contribute to the vitality of local and international unions. Indeed, local union democracy is a major source of international unions' organizing, bargaining, and political strength.

But democracy also is important in internal *international* union affairs. Democratic processes require that once decisions are made, all members of the union agree to accept those decisions, and to continue to work within international union processes to change policies they disagree with. However, no democratic labor organization can permit local unions to nullify international decisions reached through the democratic processes specified in their Constitution and Bylaws.

The UHW-SEIU conflict is hurting both organizations at a critical time in the development of the labor movement and progressive policies in the country. The main beneficiaries of this conflict are anti-union employers and politicians who have geared up to use this conflict against our efforts to pass legislation to help workers, especially the Employee Free Choice Act. Anti-union employers gain when unions and union members are divided. The principal losers, besides the combatants themselves, are underpaid and

underrepresented workers who are denied the benefits of collective bargaining because resources are wasted in internal conflicts and costly litigation.

The coming months and years should provide great opportunities for strong unions like the UHW and the SEIU. I therefore hope you can settle your differences and prepare your organizations to take advantage of what I hope and think will be a period of great opportunity.

6. Recommendations.

In view of the foregoing, I recommend that the International Executive Board *not* establish a trusteeship on the basis of the specific issues raised in the Amended Notice but establish a trusteeship if the UHW refuses to abide by and cooperate with the January 2009 decision of the IEB to have California LTC workers unite into a single local union.

This recommendation addresses the basic cause of the conflict between the International Union and UHW. This central issue was fully argued, both at the hearing and in the parties' briefs. The recommended action also would give the UHW and the SEIU an opportunity to avoid the great damage that could be done to the International Union and the UHW from protracted conflict over trusteeship at this critical point in the development of the SEIU's and UHW's legislative, organizing, and collective bargaining agendas.

I therefore recommend that a trustee be appointed at UHW-W if that organization fails to comply with the following conditions:

1. Within 5 days of receiving my report and the decision of the International Executive Board, UHW-W must confirm in writing to the International President and me that UHW-W will abide by the International Executive Board's decision on long-term care in California, will fully cooperate with the implementation of that decision and will not use any UHW-W resources to undermine or interfere with the implementation of the decision.
2. Thereafter, UHW-W must continue to abide by the International Executive Board's decision on long-term care in California, fully cooperate with the implementation of that decision and not use any UHW-W resources to undermine and interfere with the implementation of the decision.
3. Within one week of receiving my report and the decision of the International Executive Board, UHW-W must mail to all of its members, post on its website and bulletin boards a copy of my report and the decision of the International Executive Board.
4. To the extent possible, UHW-W must purge its database to the satisfaction of the International President of all of the names which came from the International Union's Convention database.
5. UHW-W must cooperate fully with the monitor appointed by the International President to review in advance all expenditures of UHW-W.
6. UHW-W must abide by the International Union Constitution and Bylaws and all of the orders of the International President and the International Executive Board rendered pursuant to the Constitution and Bylaws.

If these conditions are not fully complied with, I recommend that a trusteeship be imposed on UHW-W including an emergency trusteeship if the International President deems that to be appropriate under the circumstances. I further recommend that I retain jurisdiction over this matter for 18 months to ensure that my recommendations are fully carried out.

Once the International President determines that UHW-W has fully complied with the International Executive Board's decision on California long-term care jurisdiction and fully cooperated with its implementation, I strongly urge the parties to undertake discussions on how they can work together to continue to build a strong union, to organize the unorganized, and to accomplish other shared goals.

Roy Marshall

January 21, 2009