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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

ED ASNER, CLANCY BROWN, GEORGE COE, TOM BOWER, DENNIS HAYDEN, WILLIAM RICHERT, LOUIS REEKO MESEROLE, TERRENCE BEASOR, ALEX MCARTHUR, ED O'ROSS, ROGER CALLARD, STEVEN BARR, RUSSELL GANNON, STEPHEN WASTELL, JAMES A. OSBURN, and ERIC HUGHES aka JON WHITELEY, collectively known as the United Screen Actors Committee (USAC),

Plaintiffs,

vs.

SCREEN ACTORS GUILD - AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, a labor organization commonly known as SAG-AFTRA and its GUILD INTELLECTUAL PROPERTY REALIZATION LLC,

Defendants.

CASE NO. CV13-3741 R (FFMx)

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

[Fed. R. Civ. P. 12(b)(6)]

Judge: Manuel L. Real

DATE: January 6, 2014
TIME: 10:00 a.m.
CTRM.: 8

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I.

PLAINTIFFS' CHALLENGES TO THE UNION'S HANDLING OF THE RESIDUALS PROGRAM UNDER BUSINESS AND PROFESSIONS CODE SECTION 17200 AND STATE LAW CONVERSION ARE PREEMPTED BY FEDERAL LABOR LAW AND SHOULD BE DISMISSED

The Plaintiffs' Second and Third Causes of Action are preempted because (1) any duty pertaining to the collection and distribution of residuals arises out of rights provided for in the collective bargaining agreements; (2) it will be necessary to interpret terms of the collective bargaining agreement in order to resolve Plaintiffs' claims; and (3) Plaintiffs' claims are preempted by the duty of fair representation.

1. The Supreme Court has held that § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §185,[1] is a broad source of authority for the courts to fashion a body of federal law for the enforcement of collective bargaining agreements. *Textile Workers v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957). The Court has made it clear on a number of occasions that the LMRA preempts claims that are "founded directly on rights created by collective bargaining agreements." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394 (1987); *see also Avco Corp. v. Machinists*, 390 U.S. 557 (1968) (any state-law cause of action for violation of collective bargaining agreements is entirely displaced by federal law under § 301); *Allis–Chalmers Corp. v. Lueck*, 471 U.S. 202, 213, 217–218 (1985) (state tort action for bad-faith handling of an insurance claim "completely preempted"

[1] Section 301 provides: "Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

since the duty allegedly violated was created by the collective bargaining agreement and did not exist independently of the agreement); *IBEW v. Hechler*, 481 U.S. 851 (1987) (individual employee's state-law tort suit against her union for breach of the union's duty of care to provide the employee with a safe workplace must be treated as a claim under federal labor law, when the duty of care allegedly arose from the collective-bargaining agreement between the union and the employer); *Steelworkers v. Rawson*, 495 U.S. 362, 371 (1990) (wrongful death claims preempted since, "[i]f the Union failed to perform a duty in connection with inspection, it was a duty arising out of the collective bargaining agreement signed by the Union as the bargaining agent for the miners. Clearly, the enforcement of that agreement and the remedies for its breach are matters governed by federal law."); *see also Adkins v. Mireles*, 526 F.3d 531, 539 (9th Cir. 2008) (federal law preempts state claims based on rights established by CBA or where interpretation of CBA is necessary to resolve claims); *Cook v. Lindsay Olive Growers*, 911 F.2d 233, 237 (9th Cir. 1990) ("Federal law exclusively governs a suit for breach of a CBA under § 301, whose broad preemptive scope entirely displaces any state cause of action based on a CBA, as well as any state claim whose outcome depends on analysis of the terms of the agreement."); *Bishop v. Avis Budget Group, Inc.*, 2013 WL 2081614 (N.D. Cal. May 14, 2013) (same).

There is no question but that Plaintiffs' claims regarding the distribution of residuals are entirely based on collective bargaining agreements. Indeed, the rights to residuals payments themselves are extensively addressed in the Producer-Screen Actors Guild Basic Collective Bargaining Agreement ("Basic Agreement").[2]

[2] Since Plaintiffs refer to and rely on the collective bargaining agreements in their First Amended Complaint, it is central to Plaintiffs' claims, and no party can reasonably question the authenticity of the document, the Court can refer to its terms in connection with a Motion to Dismiss without converting it to a summary

(footnote continued)

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Similar provisions regarding residuals payments exist in other SAG and AFTRA collective bargaining agreements, including the Television Agreement and the Network Television Code of Fair Practice. These collective bargaining agreements also set forth the obligation of the Union to distribute residuals, Thus, the Basic Agreement provides at Section 5.E, page 11, and Section 5.G, page 27, that:

> All such payments hereunder shall be made by check, payable to the order of the performer entitled thereto, and delivered to the Union for forwarding to such performer. Producer shall make all Social Security, withholding, unemployment insurance and disability insurance payments required by law with respect to the additional compensation provided for in this Section 5. Compliance herewith shall constitute payment to the performer.

(Declaration of Robert A. Bush ("Bush Decl.") ¶ 7.)

Similarly, the Television Collective Bargaining Agreement provides at page 57, Section 19(f) that:

> All payments of such additional compensation for theatrical rights shall be made promptly by check, payable to the order of the performer entitled thereto, and if not initially paid to the performer, shall be delivered to Screen Actors Guild for forwarding to such performer and compliance herewith shall constitute payment to the performer.

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judgment motion. *E.g. Skilstaf v. CVS Caremark*, 669 F.3d 1005, 1016 n.9 (9th Cir. 2012); *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *Stone v. Writers Guild of Am.*, 101 F.3d 1312, 1314 (9th Cir. 1996); *Grant v. Aurora Loan Services*, 736 F. Supp. 2d 1257, 1264 n.37 (C.D. Cal. 2010).

A copy of those provisions of the Basic CBAs that establish the right to residuals payments, the calculation of those payments, and the obligations of producers and distributors to secure those payments are attached to the Declaration of Robert A Bush that is submitted with this Motion to Dismiss.

(Bush Decl. ¶ 8.)

Thus, the existence of a right to residuals, the formulas for the calculation of amounts owed to individuals, and the obligation of the union to distribute residuals are all wholly created and regulated by the collective bargaining agreement. Since Plaintiffs' claims are based on obligations established by a collective bargaining agreement, state law claims based on an alleged failure to properly distribute those residuals are completely preempted and should be dismissed.

2. Even where claims are not based on rights established in a collective bargaining agreement, such claims are preempted if it will be necessary to interpret terms of the collective bargaining agreement in order to resolve those claims. *See, e.g., Allis–Chalmers Corp.*, 471 U.S. at 220 (disputes involving more than "tangential" consideration of collective bargaining agreement are preempted); *Hernandez v. Pacific Maritime Ass'n*, 379 Fed. Appx. 668 (9th Cir. 2010) (preemption of intentional and negligent interference with prospective economic advantage); *Humble v. Boeing Co.*, 305 F.3d 1004, 1010 (9th Cir. 2002) (preemption where interpretation of CBA will occur); *Cramer v. Consolidated Freightways*, 255 F.3d 683, 691–92 (9th Cir. 2001) (en banc) (preemption where interpretation is more than hypothetical); *Ramirez v. Fox Television Station*, 998 F.2d 743, 748 (9th Cir.1993) (claim based on state anti-discrimination statute still preempted when resolution of the state law claim requires the interpretation of the collective bargaining agreement); *Webb vs. Directors Guild of Am.*, 2007 WL 5022165 (C.D. Cal. Apr. 12, 2007) (addressing issue in context of class action challenges to foreign royalties programs of the Directors Guild and Writers Guild).

As noted above, since Plaintiffs' claims are based on the collective bargaining agreements, they are preempted even if it were not necessary to interpret those agreements. In this case, however, Plaintiffs' claims *do* require an interpretation of those provisions of the collective bargaining agreements and therefore, even if the

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claims were not based on the collective bargaining agreements, they would be preempted.

While the CBAs require producers to forward residuals payments to the Union for distribution, those provisions do not expressly require the Union to distribute the residuals in any particular time-frame or in any particular manner. Plaintiffs' allegations – that the Union has failed to pay residuals "in a time frame acceptable under any reasonable business practice" (FAC ¶ 60, p. 51/16–17)[3] and that the Union has "understaffed" the residuals distribution function with individuals "with questionable credentials" (FAC ¶ 54, p. 48/14–16) – would require an analysis of whether the CBA requires distribution in any particular manner or within any particular time-frame, and whether the Union's practices over the period scrutinized in this litigation satisfy the CBA's requirements and thus shield it from any state law claim. Thus, in terms of the elements of a conversion cause of action,[4] this Court would be required to interpret the CBA to provide content to the questions of whether the Union wrongfully interfered with the Plaintiffs' right to possession of residuals, or could be deemed as Plaintiffs allege, within the meaning of the CBA

[3] References to pages and line numbers of the First Amended Complaint are referred to by the reference "FAC" with the page number and line number separated by a "/".

[4] "A cause of action for conversion requires allegations of plaintiff's ownership or right to possession of property; defendant's wrongful act toward or disposition of the property, interfering with plaintiff's possession; and damage to plaintiff. (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1066, 80 Cal.Rptr.2d 704.) Money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved, such as where an agent accepts a sum of money to be paid to another and fails to make the payment. (*Fischer v. Machado* (1996) 50 Cal. App. 4th 1069, 1072–1073, 58 Cal. Rptr. 2d 213.) Thus, in *Chazen v. Centennial Bank* (1998) 61 Cal. App. 4th 532, 543, 71 Cal. Rptr. 2d 462, the plaintiffs stated a cause of action for conversion where the bank took funds from trust accounts to pay the trustee's personal indebtedness." *McKell v. Washington Mut.*, 142 Cal.App. 4th 1457, 1491 (2006).

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and the practices that have developed under it, to have failed to make a payment. *Cf. Hernandez*, 379 Fed. Appx. 668 (affirming this Court's ruling that a determination of whether plaintiff was wrongfully removed from dispatch list required interpretation of CBA). In addition, Plaintiffs' allegation that the Union has taken an "unauthorized commission" for the distribution of residuals (FAC ¶ 61, p. 51/19) would require an analysis of whether any such commission is authorized, regulated or prohibited by the CBA. Similarly, Plaintiffs' residuals distribution claim under Business and Professions Code § 17200, which derives its force from alleged violations of other substantive law, would require the Court to determine whether the Union's practices and procedures satisfied the CBA's intent and/or, as explained below, the Union's duty of fair representation owed to Plaintiffs.

Since resolution of Plaintiffs' conversion and 17200 claims would require interpretation of the CBAs, those claims are preempted and must be dismissed.

3. Whether or not Plaintiffs' claims are based on the CBA or require interpretation of the CBA, those claims are preempted by the duty of fair representation since Plaintiffs allege that the union has not acted properly or fairly in connection with the distribution of residuals or foreign royalties, *Adkins*, 526 F.3d at 539 (in addition to preemption where claims are based on, or require interpretation of CBA, the DFR "displaces state law that would impose duties upon unions by virtue of their status as the workers' exclusive collective bargaining representative"); *Richardson v. Steelworkers*, 864 F.2d 1162, 1169 (5th Cir. 1989) (claim that union breached duty to advise regarding possible consequences of strike preempted); *Culfin v. IBEW Local 11*, 2010 WL 2465393 (C.D. Cal. June 15, 2010) (Cal. Bus. & Prof. § 17200 claim against union, among other state law claims, preempted by DFR); *Streeter v. Steel Workers*, 2008 WL 4394893 (C.D. Cal. Aug. 27, 2008) (plaintiff's right to union representation in employment-related proceedings, if any, governed by DFR); *Flathau v. Machinists*, 2003 WL 21219032 (W.D. Wa. Feb. 7, 2003) (promissory estoppel claim preempted by DFR);

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Madison v. IATSE Local 729, 132 F. Supp. 2d 1244 (C.D. Cal. 2000); *Eisenberg v. TWA*, 654 F. Supp. 125, 127–128 (S.D. Fla. 1987) (promissory estoppel and other claims against union preempted by the DFR imposed on union by federal labor law); *Ray v. W.S. Dickey Clay*, 584 F. Supp. 1225, 1227–29 (D. Kan. 1984) (union's alleged fraudulent and negligent acts in establishing, maintaining, and advising employees about pension plan preempted by DFR and time-barred).

For all of the above reasons, Plaintiffs' Second (Conversion) and Third (§17200) Causes of Action – both of which are based on state law – addressing duties of the Union in connection with the distribution of both residuals and foreign royalties are 1) entirely based on obligations established under the CBA, 2) would require the interpretation of the CBA or 3) are based on the reasonableness of the Union's representational conduct. Thus, those Causes of Actions are completely preempted by federal labor law and must be dismissed.

II.

THIS COURT MUST AGAIN DISMISS ALL CLAIMS PURPORTING TO BE PRESENTED ON BEHALF OF NON-PARTIES

A. Notwithstanding this Court's previous order, Plaintiffs repeatedly and improperly continue to seek relief for non-parties to this action

Even if the Second and Third Causes of Action were not preempted by federal labor law, the Court still must dismiss, once again, all claims purporting to be presented on behalf of non-parties. Plaintiffs defy this Court's October 7, 2013 order by continuing to assert two claims for relief for conversion and violation of California Business and Professions Code § 17200 in connection with both foreign royalties and residuals on behalf of others who are not named plaintiffs, notwithstanding the Court's order to the contrary.

Despite the Court's previous Order regarding the res judicata effect of the *Osmond* class action settlement and the Court's previous Order confining Plaintiffs

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to representation of their own claims,[5] Plaintiffs continue to attempt to represent all members of the Union and others with regard to both foreign royalties and residuals. Thus, in the second cause of action (conversion), Plaintiffs:

- allege that Defendants have exercised dominion over a specific sum of money capable of identification "rightfully belonging to the membership of SAG-AFTRA as well as individuals whose monies have been wrongfully collected on 'non-covered' works" since June 2007 (FAC ¶ 52, p. 47/6–13);
- allege that Defendants collected monies "on behalf of SAG-AFTRA members and others" that they have no right to collect (*Id.* p. 47/15–19);
- allege that Defendants have engaged in these actions "with the intent to oppress Plaintiffs and others" and have "precluded Plaintiffs and others from collecting earned residuals" (FAC ¶ 54, p. 48/11–23); and
- seek imposition of a constructive trust on "*all* monies wrongfully obtained by Defendant SAG-AFTRA" (FAC ¶ 56, p. 49/16–17).

In the third cause of action (violation of Business and Professions Code Section 17200), Plaintiffs:

- explicitly state that they are seeking in this Complaint to obtain class wide relief with regard to "'*National Treatment Rights*' afforded US Performers pursuant to Foreign Treaties" (FAC p. 50/23–25 n.1);
- allege that the Defendants have "failed to pay Plaintiffs and others" (FAC ¶ 60, p. 51/15);
- allege that Defendants have taken "an unauthorized commission or fee for the collection and distribution of Residuals and Foreign

[5] (Dkt. No. 40 ¶¶ 1–2.)

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Royalties/Foreign Levies" (FAC ¶ 61, p. 51/19–21) without restricting that allegation to a fee in connection with amounts owed to named Plaintiffs;

- allege that Section 17200 "operates like a Class Action challenge" (FAC ¶ 62, p. 51/25);
- allege that Defendants' "scheme" kept foreign royalties from the three opt-out plaintiffs "if not others as well" (FAC ¶ 63, p. 52/20);
- allege that the Union's postings regarding the distribution of foreign royalties and residuals deceived "not only Plaintiffs but other members and non-members alike" (page 52/23-25);
- allege that Defendants have "intentionally moved all Residuals and Foreign Royalties monies into a general fund and/or trust account and are borrowing against said monies, even though the monies rightfully belong to the members of SAG-AFTRA" (FAC ¶ 65, p. 53/8–10);
- purport to seek relief for "Plaintiffs, including on behalf of the public" (FAC ¶ 66, p. 53/24–25);
- seek injunctive relief "authorizing an independent body to collect and pay all monies received from Foreign Collecting Societies, subject to Court supervision" (FAC ¶ 70, p. 55/6–9); and
- seek "imposition of a constructive trust on all monies wrongfully obtained by Defendants . . . for the benefit Plaintiffs and SAG-AFTRA members and non-members alike." (FAC ¶ 71, p. 55/12–16).

These continuing efforts by Plaintiffs to represent the 160,000 members of SAG-AFTRA and other nonmembers, and to challenge matters resolved in the *Osmond* litigation, are repeated in Plaintiffs' Prayer for Relief in which they seek:

- an accounting with regard to "all Residuals and Foreign Royalties" (FAC p. 55/24 (emphasis added));

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- an injunction preventing Defendants from "infringing upon the rights of Plaintiffs and others in any manner, and further requiring the paying out of monies collected from Residuals to Plaintiffs and their rightful owners, and further preventing SAG-AFTRA from ever again negotiating Residuals checks issued by Producers to performers" (FAC p. 57/9–20);
- establishment of an independent body "to collect and pay all Foreign Royalties subject to Court supervision" (FAC p. 58/8–9); and
- an order that Defendants "restore to Plaintiffs and the members and non-members of SAG-AFTRA all monies collected and/or retained by means of any act or practice" found to be a violation of Section 17200 (FAC p. 59/11–22).

B. <u>For all of the reasons addressed in Defendants' First Motion to Dismiss, and in the Court's ruling on that Motion, claims for anyone other than named Plaintiffs should be dismissed for lack of standing</u>

As set forth in Defendants' first Motion to Dismiss (Dkt. No. 5, p. 14–16), it is black letter law that one who has neither title nor possession, nor any right to possession, may not sue for conversion. *See, e.g., Burlesci v. Petersen*, 68 Cal. App. 4th 1062, 1066 (1998). Thus, while Plaintiffs can maintain a cause of action on their own behalf alleging that their own funds have been converted, Plaintiffs have no right to possession or transfer of amounts allegedly owed to others and therefore their claims for others must once again be dismissed.

Furthermore, as also set forth in Defendants' initial Motion to Dismiss (Dkt. No. 5, p. 17–18) the California Unfair Competition Law ("UCL") confines standing to those actually injured by a defendant's business practices. As amended by Proposition 64, approved by the voters in 2004, the UCL provides that an individual may not prosecute a UCL claim unless the individual "has suffered injury in fact and has lost money or property as a result of the unfair competition." Cal. Bus. & Prof.

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§ 17204; *see also Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 320 (2011). Thus, Plaintiffs' assertions that section 17200 "operates like a Class Action" (FAC ¶ 62, p.51/25) and can be brought "on behalf of the public" are utterly without merit and ignore the current state of the law as set forth in detail in Defendants' initial Motion to Dismiss.

Moreover, Plaintiffs' request to this Court in a footnote (FAC p. 50) for permission to pursue their section 17200 claim as a class action is inappropriate and does not provide Plaintiffs with license or authority to assert this claim for any individuals other than themselves. While Plaintiffs may allege that they have in fact suffered an injury, that does not give them the right to represent other individuals without correctly pleading and meeting the requirements of Federal Rule of Civil Procedure 23. *Wal-Mart Stores v. Dukes*, 564 U.S. ___, 131 S.Ct. 2541 (2011) (litigation must be conducted only on behalf of the individual named parties unless the requirements of Rule 23 are satisfied). Nothing in California or federal law permits a plaintiff to circumvent this basic principle. *See, e.g., Astana v. Kashi Co.*, 291 F.R.D. 493 (S.D. Cal. 2013) (efforts to represent group claims under Business and Professions Code § 17200 analyzed under Rule 23).

Since Plaintiffs do not correctly plead or satisfy the requirements of Rule 23, they do not have authority to sue on behalf of anyone other than themselves. Accordingly, the Complaint must be dismissed for a second time with respect to the second and third causes of action with regard to anyone other than named Plaintiffs.

III.

PLAINTIFFS' FIRST CAUSE OF ACTION TO EXAMINE RECORDS UNDER 29 U.S.C. § 431 IS NOT RIPE AND SHOULD THEREFORE BE DISMISSED

A federal court only has jurisdiction over claims that are ripe. The ripeness doctrine rests in part on the Article III requirement that federal courts decide only cases and controversies. *Maldonado v. Morales*, 556 F.3d 1037, 1044 (9th Cir.

2009). The ripeness inquiry is "intended to 'prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Id.* (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)).

To determine whether a case is ripe, courts consider two factors: "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Yahoo! v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1211–12 (9th Cir. 2006). "If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed." *S. Pac. Transp v. City of L.A.*, 922 F.2d 498, 502 (9th Cir. 1990).

Section 201(b) of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 431(b), requires unions to annually file a financial report with the Secretary of Labor. This document is known as the "LM-2 report." Section 201(c) states in relevant part that

> [e]very labor organization required to submit a[n LM-2] report . . . shall make available the information required to be contained in such report to all of its members, and every such labor organization and its officers shall be under a duty enforceable at the suit of any member of such organization . . . to permit such member for just cause to examine any books, records, and accounts necessary to verify such report.

29 U.S.C. § 431(c).

Obviously, if a union *has* permitted an examination of books, records and accounts necessary to verify the LM-2, there is no basis for a claim under Section 431(c) to obtain that information. Without a refusal by the Union, Plaintiffs are not entitled to a court order requiring disclosure. *English v. Cowell*, 117 F.R.D. 128, 130 (C.D. Ill. 1987) (dismissing section 431(c) claim on mootness grounds because "Plaintiff has been given access to or opportunity to have access to [the union's] financial records"); *Dinko v. Wall*, 421 F. Supp. 207, 213 (S.D.N.Y. 1976) ("The complaint does not allege any . . . failure to make . . . annual reports available to the

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membership."); *McCraw v. United Ass'n of Journeymen & Apprentices of Plumbing & Pipe Fitting Indus.*, 216 F. Supp. 655, 663 (E.D. Tenn. 1963) ("[Plaintiff's] general request is not sufficient for the Court to identify . . . whether [the records] have been denied . . . ."); *Bembry v. New York Metro Postal Union*, 2009 WL 690245 (S.D.N.Y. Mar. 12, 2009) (holding that section 201(c) "allows for suits by union members against labor organizations that have refused to make available the 'books, records, and accounts necessary to verify' the financial reports"); *ILA Local 1419 v. Smith*, 301 F.2d 791, 794 (5th Cir. 1962) (holding that the case did not "become moot during the course of litigation as it is undisputed that the union management never consented to an inspection of the books and records").

Plaintiffs admit on the face of the FAC that "[s]ince filing the instant lawsuit, SAG-AFTRA by and through its counsel has stated a willingness to afford access to documents Plaintiffs are entitled to . . . ." (FAC ¶ 45, p. 41/6–10.) Additionally, Plaintiffs admit that "a meeting finally convened for Plaintiffs to commence a review of accounting records" on October 28, 2013. (FAC ¶ 45, p. 41/12–15.) At that meeting, Plaintiffs admit that "certain information about $98,489,475.44 of the presently $132,263,183.00 'monies held in trust' [was] provided by the Union's Chief Financial Officer Arianna Ozzanto and National Controller David Metz." (FAC ¶ 11, p. 12/25 to 13/5.)

Plaintiffs do not allege that the Union has refused to permit further review[6] or that any relevant documents, books or records have been withheld. Plaintiffs have therefore not only failed to allege a refusal by the Union to provide the documents required by section 201(c) but have specifically alleged that the Union is in full compliance with the law. Plaintiffs thus admit on the face of their FAC that there

[6] Nor could Plaintiffs so allege, as the parties have continued meeting to permit Plaintiffs to review documents and information.

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are presently no "issues for judicial decision." *Yahoo!*, 433 F.3d at 1212. Any decision by this Court regarding the Union's compliance with LMRDA section 201(c) would constitute "premature adjudication." *Abbott Labs.*, 387 U.S. at 148.

Withholding judicial consideration would not work a direct and immediate hardship on Plaintiffs. "To meet the hardship requirement, a litigant must show that withholding review would result in 'direct and immediate' hardship and would entail more than possible financial loss." *Winter v. Cal. Med. Review*, 900 F.2d 1322, 1325 (9th Cir. 1990). Plaintiffs do not and cannot allege any hardship they would suffer from the dismissal of this case. Were the Union to later fail to comply with its obligations under the LMRDA, Plaintiffs could file a lawsuit at that time and receive the remedy they now seek. For now, however, that remedy would be premature.

Plaintiffs attempt to keep their section 201(c) claim alive by alleging that the Union "has refused to provide copies of pertinent Collective Bargaining Agreements." (FAC ¶ 45, p. 41/9–11.) Plaintiffs appear to refer to the agreements spelled out in Paragraph 46(B) of their FAC – the agreements with foreign collecting societies. Although Plaintiffs admit that they have been provided copies of these agreements to review (FAC ¶ 37, p. 35/20–23), they assert that since, in their view, these agreements are "collective bargaining agreements," they are entitled to copies of them.

Section 104 of the LMRDA requires unions to provide copies of collective bargaining agreements to members. 29 U.S.C. § 414. Defendants do not agree that

these agreements are "collective bargaining agreements" under Section 104[7] and therefore do not agree that Plaintiffs are entitled to copies of these agreements.

The FAC does not contain a cause of action any rights under Section 104 and therefore whether the agreements with foreign collecting societies are "collective bargaining agreements" within the meaning of Section 104 is not an issue in this case. Instead, Plaintiffs' claims are based on LMRDA section 201(c)'s right, for "good cause," to "verify [the LM-2] report." 29 U.S.C. § 431(c). These agreements – whether they are collective bargaining agreements or not – cannot possibly be pertinent to any legitimate inquiry under Section 201(c).

The LM-2 report concerns money that is actually received, disbursed and held in a given year. *See* 29 U.S.C. § 431(b)(1), (2), (6). Section 201(c) does not provide the right to delve into every record of the Union. *Brown v. IBEW Local 701*, 996 F. Supp. 781, 790 (N.D. Ill. 1998). Instead, that provision provides that, upon good cause, members may be entitled under Section 201(c) to review books, records and accounts supporting the Union's representations on the LM-2 reports regarding that money. *Id.* ("Members are . . . entitled to the disclosure of documents upon which statements contained in the annual and financial reports are based.").

An agreement requiring collecting societies to pay certain sums of money to a union cannot possibly be useful or relevant to any review of books, records or

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[7] This issue was addressed in one of the entertainment-industry class actions that challenged the foreign collecting society agreements – a case on which one of the current plaintiffs, William Richert, was a named party. *See Webb v. Directors Guild of Am.*, 2007 WL 5022165 (C.D. Cal. Apr. 12, 2007). In that case, the Court held that foreign levy agreements entered into by the Directors Guild and Writers Guild fall within the purview of federal labor law despite not being collective bargaining agreements. *Id.* at *4–5 (citing *General Teamsters, Auto Truck Drivers and Helpers Local 162 v. Mitchell Bros. Truck Lines*, 682 F.2d 763, 765–66 (9th Cir. 1982) (strike settlement agreement is not a collective bargaining agreement)).

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accounts regarding the Union's LM-2 reporting of its handling of money that it has received.[8] An agreement requiring payment of money to a union has nothing to do with the handling of that money once it has been sent. There is therefore no possible right to have copies of those agreements pursuant to any right the Plaintiffs may have under Section 201(c).

With regard to documents even arguably relevant to the LM-2 report, Plaintiffs have not alleged (and could not allege) that the Union has withheld these records. Section 201(c) requires more than a simple demand for any document Plaintiffs want to see—they must allege why they are entitled to see them. As to these supposed collective bargaining agreements, Plaintiffs have failed to make the appropriate allegations.[9]

Plaintiffs' true reason for desiring review of these "collective bargaining agreements" has nothing to do with verification of the LM-2 reports. Instead, the

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[8] As Plaintiffs state in their FAC, these agreements govern the money sent to the Union on behalf of its members by foreign collecting societies. (FAC ¶ 3, p. 5/8–9 (referring to "Agreements designed to access the monies flowing from the '*National Treatment*' rights of the performers").) Plaintiffs make no allegations that the agreements relate in any way to the Union's handling of that money after it has been received.

[9] If it is ultimately determined that SAG-AFTRA must disclose these agreements pursuant to Section 201(c), the Union would seek a protective order prior to disclosure because of the sensitive nature of the documents and the competitive disadvantage at which the Union's members would be placed in negotiating successor collecting society agreements. *See Conley v. USW Local 1014*, 549 F.2d 1122, 1125 (7th Cir. 1977) (noting that "the Union is, of course, free to seek a protective order from the District Court to prevent . . . copying of protected materials"); *McGinnis v. Teamsters Local 710*, 664 F. Supp. 1212, 1215 (N.D. Ill. 1987) (same). As stated above, however, Plaintiffs have not stated a viable claim that they are entitled to these agreements and Defendants would be concerned about whether Defendants would honor the terms of any Protective Order. See *In re: Contempt Proceedings re James Osburn et al, IATSE 695 et al. v. IATSE*, 611 F.2d 266 (9th Cir. 1977).

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FAC makes it clear that they seek copies of these agreements because they are upset with their substance. (FAC ¶ 4, p. 5/27 to 7/6 (arguing *inter alia* that performers are entitled to "100% of the *Performers Share*," and that the agreements should not include a "*SAG share*" and a "*Producers Share*" (emphasis in original)).) Plaintiffs' policy disagreement with their Union regarding collection and/or disbursement of foreign royalties has nothing to do with their right under Section 201(c) to verify the LM-2 reports, and Plaintiffs have failed to allege any such connection.

Plaintiffs' statements in their First Amended Complaint that the Union has acceded to review of financial documents and that review has in fact commenced suffice to dispose of Plaintiffs' Section 201(c) claim. The Court should dismiss that cause of action for lack of jurisdiction because it is not ripe.

IV.

ALL CLAIMS AGAINST DEFENDANT GUILD INTELLECTUAL PROPERTY REALIZATION, LLC. SHOULD BE DISMISSED

The FAC contains no claims particular to Defendant Guild Intellectual Property Realization LLC ("GIPR") and therefore all Causes of Action against GIPR should be dismissed for the reasons stated above.

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V.

CONCLUSION

For all of the above-stated reasons, Plaintiffs' First Amended Complaint should be dismissed in its entirety.

DATED: November 20, 2013

Respectfully submitted,

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