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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MARTIN CUDJOE, individually and on behalf of all persons similarly situated,	
Plaintiff,	
v.	**Civil Action No.:**
BUILDING INDUSTRY ELECTRICAL CONTRACTORS ASSOCIATION;	
	Jury Trial Demanded
UNITED ELECTRICAL CONTRACTORS ASSOCIATION a/k/a UNITED CONSTRUCTION CONTRACTORS ASSOCIATION	**Class Action Complaint**
THE INTERNATIONAL UNION OF JOURNEYMEN & ALLIED TRADES, a/k/a IUJAT;	
UNITED SERVICE WORKERS, LOCAL UNION NO. 363, a/k/a UNITED ELECTRICAL WORKERS OF AMERICA, IUJAT, LOCAL 363;	
ELECTRICIAN'S RETIREMENT FUND; BUILDING TRADES ANNUITY BENEFIT FUND; BUILDING TRADES WELFARE BENEFIT FUND; BUILDING TRADES EDUCATIONAL BENEFIT FUND;	
FRANK RAPPO, a fiduciary; and	
ERIC OLYNIK, a fiduciary.	
Defendants.	

COMPLAINT – CLASS ACTION

Plaintiff Martin Cudjoe ("Cudjoe"), by and through his undersigned counsel, individually and on behalf of all persons similarly situated under Fed. R. Civ. P. 23, hereby files this Class Action Complaint against Defendants seeking all available relief under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et seq*., as well as the Labor Management Relations Act of 1947 ("LMRA" or "Taft-Hartley"), 29 U.S.C. §§ 141, *et seq*.

INTRODUCTION

One of the most basic and central rules of union-sponsored multiemployer benefit fund administration is that "employees and employers are equally represented in the administration of such fund." 29 U.S.C. § 186(c)(5). The Supreme Court has "reiterated that 'the sole purpose of § 302(c)(5) is to ensure that employee benefit trust funds 'are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them. . . .'" *UMW of Am. Health & Ret. Funds v. Robinson*, 455 U.S. 562, 570 (1982) (quoting *NLRB v. Amax Coal Co., Div. of Amax*, 453 U.S. 322, 331 (1981) (alteration in original)). More specifically, the "equal representation" rule is meant to "prevent misuse of funds" by prohibiting sole control of the funds by either labor or management. *Alfarone v. Bernie Wolff Constr. Corp.*, 788 F.2d 76, 79 (2d Cir. 1986).

The Defendants in this case have completely and utterly disregarded this critical rule to the significant detriment of the participants and beneficiaries of the Defendant Benefit Funds[1] and members of Defendant United Service Workers Union, IUJAT, Local 363 ("Local 363" or the "Union"), participants in those funds. Incredibly, the Defendant Benefit Funds were established

[1] The Defendants, Building Trades Welfare Benefit Fund ("Welfare Fund"), Building Trades Annuity Benefit Fund ("Annuity Fund"), Electrician's Retirement Fund ("Pension Fund"), and Building Trades Educational Benefit Fund ("Apprenticeship Fund") will collectively be referred to as the "Benefit Funds" or "Building Trades Funds."

and have continued to operate solely with employer-side trustees appointed by an employer organization[2] and without any trustees appointed by the Union. Indeed, the various Agreements and Declarations of Trust of the Defendant Benefit Funds ("Trust Agreement(s)") expressly provide that each respective "Fund shall be administered by the Board of trustees, which shall consist of two (2) [or five (5)] Trustees appointed by the Association." Despite being multiemployer plans designed to provide retirement, apprenticeship and welfare benefits to its members, there is no indication that Local 363 has any authority under the Trust Agreements (or its collective bargaining agreement ("CBA") with the Association) to appoint its own trustees to the boards of the Benefit Funds – even though Taft-Hartley mandates that it do so, and ERISA's duties of prudence and loyalty require the Trustees to operate the Benefit Funds in a legally compliant manner, in the best interests of plan participants.

This plainly illegal fund structure (and total dereliction by Local 363 of its duty to fairly represent its members) has resulted in exactly that which Congress set out to prevent with the passage of LMRA § 302(c)(5) and the Employee Retirement Income Security Act ("ERISA") thereafter: the trustees paying themselves approximately $1 Million in compensation since 2013 as well as paying Apprenticeship Fund assets to participating employers, in breach of trustees' fiduciary obligations under both the LMRA § 302(c)(5) and ERISA. ERISA requires that fiduciaries discharge their "duties with respect to a plan solely in the interest of the participants

[2] At the time of the establishment of the Benefit Funds, Defendant United Electrical Contractors Association a/k/a United Construction Contractors' Association ("UECA") was the plan sponsor with authority to appoint trustees. In or around February 2006, according the amendments to the Trust Agreements, Defendant Building Industry Electrical Contractors Association ("BIECA," and together the UECA, the "Association") became the plan sponsor with authority to appoint trustees. The UECA and BIECA share the same or similar officers, staff, employer members, business locations, and more. As such, BIECA is a successor in interest to and/or an alter-ego of UECA.

and beneficiaries." 29 U.S.C. § 1104(a). Moreover, such "self-dealing" by these employer trustees with regard to plan assets amounts to a "prohibited transaction' under ERISA, which expressly prohibits a fiduciary from dealing "with the assets of the plan in his own interest or for his own account." 29 U.S.C. § 1106(b)(1). Had those amounts been prudently invested with other plan assets, the Defendant Benefit Funds would have expected to gain significant investment income, which therefore has resulted in millions of dollars in loss of plan assets intended for participants and beneficiaries.

While the misappropriation of the Benefit Funds' plan assets was certainly caused by the employer Trustees and Association, these prohibited transactions could not have taken place without the arbitrary or bad faith action of Local 363.[3] Failing or refusing to appoint (or even bargain for the right to appoint) labor trustees to its members' benefit funds and protect plan assets—a clear legal command since the passage of LMRA § 302(c)(5) in 1947—is without doubt

[3] This "union" appears to go by a number of names, including "United Electrical Workers of America, IUJAT, Local 363. IUJAT apparently stands for International Union of Journeymen and Allied Trades (indicating no actual trade affiliation), but used to be the International Union of Journeymen Horseshoers before (for obvious reasons) becoming near defunct in the 1990's and being taken over by the United Service Workers Union ("USWU") in an apparent sham attempt by USWU to obtain status as a chartered member organization of the AFL-CIO labor federation. *See generally*, *Int'l Union of Journeymen v. AFL-CIO*, No. 03-CV-6070 (ARR) (KAM), 2004 U.S. Dist. LEXIS 28020 (E.D.N.Y. Aug. 3, 2004) (finding it reasonable for the AFL-CIO to have rejected USWU's application for AFL-CIO membership because, among other reasons, USWU was merely "attempting an end-run around" the AFL-CIO's Constitution to gain membership). Additionally, Local 363 used to be affiliated with the International Brotherhood of Teamsters, as is demonstrated by a March 1999 press release from the U.S. Department of Labor, Employee Benefits Security Administration ("EBSA"), in which EBSA announced a consent order requiring the trustees of the then-Local 363 benefit funds, including Patrick Bellontoni, President of the Defendant Association, "to pay more than $1.4 million to the funds as restitution for improper reimbursements made to contributing employers. . . ." *See* https://www.dol.gov/newsroom/releases/ebsa/ebsa19990331 (last accessed August 13, 2021). Bellantoni, who as President of the Association has authority to approve or disapprove of amendments to the Benefit Funds' Trust Agreements, was barred for 10 years from serving a fiduciary of any ERISA benefit plan. *Id.* It appears he also used to be a business manager of Local 363. *See Argano Elect. Corp.*, 248 N.L.R.B. 352 (N.L.R.B. March 12, 1980).

"so far outside a wide range of reasonableness as to be irrational." *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991). Besides being patently illegal and plainly irresponsible, a labor union continuously permitting its' members welfare and retirement benefits to be solely overseen and administered by management is completely unheard of in the American labor-management context (except for perhaps the illegal situation in which the union is completely dominated by management).

As will be discussed in more detail below, Local 363's arbitrary and bad faith conduct does not stop at refusing to protect its members' benefits from management malfeasance. By all appearances, Local 363 is an employer-dominated union which exists not to improve the wages, benefits and working conditions of its members, but to actually undermine the area prevailing wages in the local electrical industry by negotiating wages and benefits for its electrician members that are *below* the industry standard for unionized electricians.

The CBA between Local 363 and the Association makes clear that the wages and benefits it negotiates for its members are *far below* the wages and benefits that are required to be paid to electricians on publicly funded jobs, i.e., projects where employees (regardless of union representation) must be paid the locally prevailing minimum wage for the classification and type of work performed, 40 U.S.C § 3142(b), as determined by the Secretary of Labor. *See generally*, 29 CFR Part 1 – Procedures for Predetermination of Wage Rates. While the prevailing wage and benefit rate for electricians on publicly funded jobs in the New York City area is approximately $115.22, the wage rate for the *highest classification of worker* in the Local 363 CBA is a mere $47.12.

The CBA repeatedly explains that, despite the lower wage and benefits rates negotiated in the agreement, signatory employers still must comply with prevailing wage laws on public jobs. For example, Article 31 of the CBA, Prevailing Rates Wages, expressly provides:

> Notwithstanding anything to the contrary contained in this Agreement, or otherwise, it is expressly understood and agreed that the EMPLOYER shall pay a wage scale (including fringe benefits) and provide working conditions in full compliance with the pursuant to [sic] the rules, regulations, requirements and directives required by and incorporated in public work contracts which they execute and undertake with and Federal State [sic] or Municipal agency or authority or subdivision thereof.

In other words, an employer signatory to the Local 363 CBA would be in violation of the federal Davis Bacon Act and/or New York state prevailing wage laws if it paid its electrician employees the wage and fringe benefit rates negotiated in the Local 363 CBA on publicly funded jobs.

Local 363's breach of its duty of fair representation and complete capitulation to the Association is unsurprising when one looks to the very events that led to the establishment of the Defendant Benefit Funds. According to the Trust Agreements of the Benefit Funds, the funds were established pursuant to a December 7, 1995 Settlement Agreement between the Association and the National Labor Relations Board ("NLRB Settlement"). The NLRB Settlement makes clear that the Association was coercing its employees to recognize Local 363 (rather than International Brotherhood of Electrical Workers Local 3, the prevailing electrician's union) as the exclusive collective bargaining representative of its employees and was lending unlawful assistance to Local 363 by making contributions to the then-Local 363 funds.

This relationship has led to the breach of duty of fair representation, LMRA violations, breach of ERISA fiduciary duties, and ERISA prohibited transactions discussed more in the body of this Complaint. Accordingly, Plaintiff, on behalf of himself and other similarly situated Benefit Funds' participants since 2013, seeks injunctive relief to remove the current trustees, require the

Association and Union to appoint new trustees and pay for an independent trustee to oversee fund operation, reform the Trust Agreements and other plan documents of the Benefit Funds to require joint administration, and restore to the Benefit Funds all compensation and other illegal payments made to the Trustees and participating employers, plus lost profits and interest.

JURISDICTION AND VENUE

1. Jurisdiction over Plaintiff's ERISA claims is proper under 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331.

2. Venue in this Court is proper pursuant to 29 U.S.C. § 1132(e)(2) and 28 U.S.C. § 1391. The events giving rise to Plaintiff's claims occurred within this District, Defendants conduct business in this District, and Defendants are headquartered in this District.

PARTIES

3. Plaintiff Martin Cudjoe ("Cudjoe") is an individual currently residing in Lawrenceville, Georgia. He is and was a participant in the Building Trades' Funds and was represented by the Union and/or its constituent entities and/or predecessors since approximately 1990, in that he worked for electrical contractor employers which were signatory to CBAs with the Union from approximately 1990 to 2004 and 2008 to 2019.

4. Defendant United Electrical Contractors Association ("UECA") is an unincorporated association and tax-exempt organization with the meaning of 26 U.S.C. § 501(c) and represents the interests of employers whose employees are represented by co-Defendant Local 363. UECA is headquartered in this District, in Holbrook, New York.

5. Defendant Building Industry Electrical Contractors Association ("BIECA" and jointly with UECA, the "Association") is an unincorporated association and tax-exempt organization within the meaning of 26 U.S.C. § 501(c) and represents the interests of employers

whose employees are represented by co-Defendant Local 363. BIECA is a successor-in interest to, predecessor of, or alter ego of, the UECA. BIECA is headquartered in this District, in Holbrook, New York.

6. Defendant The International Union of Journeymen and Allied Trades, a/k/a United Service Workers Union f/k/a the International Union of Journeymen Horseshoers ("IUJAT"), is a labor organization within the meaning of 29 U.S.C. § 152(5). IUJAT is headquartered in Danbury, Connecticut.

7. Defendant United Service Workers Union Local 363, a/k/a United Electrical Workers of America, IUJAT, Local 363 f/k/a International Brotherhood of Teamsters, Local 363, is a labor organization within the meaning of 29 U.S.C. § 152(5) and is subordinate to its parent international union, IUJAT. As of January 1, 2001, IUJAT assumed all assets and liabilities of Local 363. *See* Local 363 U.S. Department of Labor Form LM-4 Annual Reports. As a result, IUJAT is jointly and severally liable for any judgment against Local 363 in this case. Local 363 is headquartered in Queens, New York.

8. Defendant Electrician's Retirement Fund is a "multiemployer plan," "employee benefit plan" and "employee pension benefit plan" within the meaning of 29 U.S.C. §§ 1002(37), (2), (3). The Pension Fund is headquartered in this District, in Uniondale, New York. Co-Defendants Frank Rappo and Eric Olynik are trustees and fiduciaries of the Pension Fund.

9. Defendant Building Trades Annuity Benefit Fund is a "multiemployer plan," "employee benefit plan" and "employee pension benefit plan" within the meaning of 29 U.S.C. §§ 1002(37), (2), (3). The Annuity Fund is headquartered in this District, in Uniondale, New York. Co-Defendants Frank Rappo and Eric Olynik are trustees and fiduciaries of the Annuity Fund.

10. Defendant Building Trades Welfare Benefit Fund is a "multiemployer plan," "employee benefit plan" and "employee welfare benefit plan" within the meaning of 29 U.S.C. §§ 1002(37), (1), (3). The Welfare Fund is headquartered in this District, in Uniondale, New York. Co-Defendants Frank Rappo and Eric Olynik are trustees and fiduciaries of the Welfare Fund.

11. Defendant Building Trades Educational Benefit Fund is a "multiemployer plan," "employee benefit plan" and "employee welfare benefit plan" within the meaning of 29 U.S.C. §§ 1002(37), (1), (3). The Apprenticeship Fund is headquartered in this District, in Uniondale, New York. Co-Defendants Frank Rappo and Eric Olynik are trustees and fiduciaries of the Apprenticeship Fund.

12. Defendant Frank Rappo ("Rappo") is an adult individual who resides in Woodside, Queens, New York. Rappo is a trustee and fiduciary of the Building Trades Funds. Rappo used to be an owner and managing officer of R&L Systems, Inc., an Association member employer.

13. Defendant Eric Olynik ("Olynik") (collectively with Rappo, "Trustees") is an adult individual who resides in Manheim, Pennsylvania. Olynik is a trustee and fiduciary of the Building Trades Funds. Olynik used to be an owner and managing officer of D&E Electrical Contractors, Inc., an Association member employer.

14. Defendants, individually and jointly are engaged in commerce and in industry(ies) affecting commerce, within the meaning of the National Labor Relations Act ("NLRA"), LMRA, and ERISA.

CLASS DEFINITIONS

15. Plaintiff brings Count II through VI of this lawsuit as a class action pursuant to Fed. R. Civ. P. 23,[4] on behalf of himself and the following class:

> All individuals who were participants in the Electrician's Retirement Fund, the Building Trades Annuity Benefit Fund, the Building Trades Welfare Benefit Fund, or the Building Trades Educational Benefit Fund from March 1, 2013 through present (the "Class").

16. Plaintiff also brings Count II through VI of this lawsuit as a class action pursuant to Fed. R. Civ. P. 23, on behalf of himself and the following subclasses:

> All individuals who were participants in the Electrician's Retirement Fund, from March 1, 2013 through present (the "Pension Subclass");
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> All individuals who were participants in the Building Trades Annuity Benefit Fund, from March 1, 2013 through present (the "Annuity Subclass");
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> All individuals who were participants in the Building Trades Welfare Benefit Fund, from March 1, 2013 through present (the "Welfare Subclass");
>
> All individuals who were participants in the Building Trades Educational Benefit Fund, from March 1, 2013 through present (the "Apprenticeship Subclass").

17. The Pension Subclass, Annuity Subclass, Welfare Subclass and Apprenticeship Subclass are referred to jointly as the "Subclasses." Unless otherwise specified, the "Class" shall also include its component Subclasses.

18. Plaintiff reserves the right to redefine the Class or Subclasses, and reserves the right to assert claims on behalf of other classes prior to notice or class certification, and thereafter, as necessary.

[4] Although styled as a Class Action Complaint, where applicable, Plaintiff alternately seeks to bring this case in a non-class capacity on behalf of the Benefit Funds under 29 U.S.C. § 502(a)(2). See *Coan v. Kaufman*, 457 F.3d 250, 263–64 (2d Cir. 2006).

Taft-Hartley Trust Fund Joint Representation Requirements

19. The Taft-Hartley Act of 1947, 29 U.S.C. § 185, *et seq.*, was a major amendment to the NLRA,[5] 29 U.S.C. § 151, *et seq.* Among other things, Taft-Hartley was designed to root out corruption within labor unions and their leadership, as well as relatedly, to stop employers from attempting to "buy off" union officials who might as a result fail to effectively advocate for the union's membership.

20. As explained by the Supreme Court in *Arroyo v. United States*:

> … When Congress enacted § 302 its purpose was not to assist the States in punishing criminal conduct traditionally within their jurisdiction, but to deal with problems peculiar to collective bargaining. The provision was enacted as part of a comprehensive revision of federal labor policy in the light of experience acquired during the years following passage of the Wagner Act, and was aimed at practices which Congress considered inimical to the integrity of the collective bargaining process.
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> Throughout the debates in the Seventy-ninth and Eightieth Congresses there was not the slightest indication that § 302 was intended to duplicate state criminal laws. **Those members of Congress who supported the amendment were concerned with corruption of collective bargaining through bribery of employee representatives by employers**, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control. Congressional attention was focused particularly upon the latter problem because of the demands which had then recently been made by a large international union for the establishment of a welfare fund to be financed by employers' contributions and administered exclusively by union officials. See *United States v. Ryan*, 350 U.S. 299.
>
> Congress believed that if welfare funds were established which did not define with specificity the benefits payable thereunder, a substantial danger existed that such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain. See 92 Cong. Rec. 4892-4894, 4899, 5181, 5345-5346; S. Rep. No. 105, 80th Cong., 1st Sess., at 52; 93 Cong. Rec. 4678, 4746-4747. **To remove these dangers, specific standards were established to assure that welfare funds would be established only for purposes which Congress considered proper and expended only for the purposes for which they were established**. …

[5] The NLRA is also known as the "Wagner Act."

Arroyo v. United States, 359 U.S. 419, 424-27, 79 S. Ct. 864, 867-69 (1959) (emphasis added, footnotes omitted).

21. In furtherance of this general congressional purpose, Taft-Hartley sets criminal penalties for:

> any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
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> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
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> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
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> (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or
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> (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

29 U.S.C. § 186(a), Taft-Hartley Section 302(a) (emphasis added).

22. There are specifically delimited exceptions to Taft-Hartley's ban on an employer paying a thing of value to a labor union or other group of employees: most relevant here, the ability to create jointly-trusteed employee benefit plans.

23. Taft-Hartley provides a frequently-used exception to liability for jointly-sponsored union-management benefit plans, such as pension and welfare plans:

> The provisions of this section shall not be applicable…

> with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That
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> (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance;
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> (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, **and employees and employers are equally represented in the administration of such fund**, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and
>
> (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities[.]

29 U.S.C. § 186(c)(5), Taft-Hartley Section 302(c)(5) (emphasis added).

24. In other words, union-sponsored benefit plans, such as pension, healthcare or apprenticeship plans, must be jointly trusteed by union and management, and the trustees must act as prudent fiduciaries, in the best interests of plan participants.

ERISA's Fiduciary Duties and Prohibitions Against Certain Transactions

25. In large part inspired by union-negotiated Taft-Hartley employee benefit plans, ERISA was enacted in 1974 to further codify fiduciary standards of conduct, as well as to prohibit transactions between benefit plans and those dealing with the plans, such as employer and union representatives.

26. ERISA requires a fiduciary to act prudently and loyally with respect to a benefit plan. See 29 U.S.C. § 1103(c)(1) ("…the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."); 29 U.S.C. § 1104(a)(1)(A),(B) ("a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and [A] for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan [B] with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.").

27. The twin fiduciary duties of prudence and loyalty are "the highest known to the law." *Donovan v. Bierwirth*, 680 F. 2d 263, 272 n.8 (2d Cir. 1982); *see also Severstal Wheeling v. WPN Corporation*, 659 F.Appx. 24 (2d Cir. 2016).

28. A corollary of these duties is to administer an ERISA-covered plan in accordance with other federal law, including the LMRA. *See, e.g.*, *NLRB v. Amax Coal Co., Div. of Amax*, 453 U.S. 322, 332 (1981) ("ERISA essentially codified the strict fiduciary standards that a § 302(c)(5) trustee must meet."); *cf. Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 588-89 (1993) ("The trustees' failure to *comply* with these latter purposes [of Section

302(c)(5)] may be a breach of their contractual or fiduciary obligations and may subject them to suit for such a breach . . . .") (emphasis in original).

29. It is beyond reasonable dispute that any prudent and loyal ERISA fiduciary would seek to comply with Taft-Hartley's clear mandate at 29 U.S.C. § 186(c)(5), by ensuring that the plan has equal union and management representation on the board of trustees.

30. Beyond basic fiduciary duties, ERISA also restricts fiduciaries from causing transactions of plan assets between a plan and a party in interest, unless an applicable exemption applies. *See generally*, 29 U.S.C. §§ 1106, 1108. However, no exemption can apply to a transaction which was caused by a fiduciary's self-dealing, 29 U.S.C. § 1106(b); *Acosta v. City Nat'l Corp.*, 922 F.3d 880 (9th Cir. 2019) ("the 'reasonable compensation' exemption does not apply to prohibited self-dealing under ERISA § 406(b).").

A Labor Union's Duty of Fair Representation

31. "The duty of fair representation is a 'statutory obligation' under the NLRA, requiring a union 'to serve the interests of all members without hostility or discrimination . . . , to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.'" *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378 (2d Cir. 2015) (quoting *Vaca v. Sipes*, 386 U.S. 171, 177 (1967)).

32. "The duty of fair representation is thus akin to the duty owed by other fiduciaries to their beneficiaries." *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 74 (1991). Members of the Supreme Court have likened this duty to the duty a trustee owes trust beneficiaries, an attorney owes their client, and corporate officers and directors owe shareholders. *See id.* at 74-75 (internal citations omitted).

33. The Supreme Court has held that this duty "applies to *all union activity*[.]" *Id.* at 67 (emphasis added). This duty applies to a union's duty to appoint trustees to its members' multiemployer benefit funds, collective bargaining, and other union activity pertaining to its benefit funds.

34. "A union breaches its duty of fair representation if its actions with respect to a member are arbitrary, discriminatory, or taken in bad faith." *Fowlkes*, 790 F.3d at 388 (quoting *O'Neill*, 499 U.S. at 67).

FACTS

Problems with the Apprenticeship Fund and "Apprentices"

35. In 1975, the New York State Department of Labor ("NYDOL") deregistered Local 363's (then affiliated with the Teamsters International union[6]) apprenticeship program for failure to conform to apprenticeship standards, including failure to graduate a single apprentice in twelve years. *See Joint Apprenticeship & Training Council of Local 363 v. N.Y. State Dep't of Labor*, 984 F.2d 589 (2d Cir. 1993) ("JATC Local 363").

36. In addition to not qualifying any of its apprentices as journeymen electricians, Local 363 was permitting its signatory contractors to utilize an excessive number of (lower-paid) apprentices on public projects, making it possible for Local 363 contractors to underbid other contractors that utilized a ratio of three journeymen electricians to each apprentice. *See* https://www.nytimes.com/1975/05/06/archives/electricians-training-is-decertified.html (last accessed August 13, 2021).

[6] In approximately 2000, Local 363 was disaffiliated from the Teamsters and became affiliated with IUJAT and its various incarnations. Supra, n. 2.

37. In September 1981, Local 363's apprenticeship program was approved for re-registration with the NYDOL. However, on April 25, 1990, a Complaint was filed against Local 363's apprenticeship program for premature graduation of apprentices and violation of state and federal law by Local 363 signatory contractors. "After investigating these charges, NYSDOL issued a Notice of Proposed Deregistration of Apprenticeship Program." *JATC Local 363*, 984 F.2d at 592.

38. To this day, neither the Apprenticeship Fund, nor any other Local 363 or Association-sponsored apprenticeship program is approved by any Registration Agency: neither the Office of Apprenticeship nor the NYDOL, a State Apprenticeship Agency. *See* https://dol.ny.gov/list-active-sponsors (last accessed 8/18/2021); 29 C.F.R. § 29.2. Not being a registered apprenticeship program, Association member employers are ineligible to pay their "apprentices" at less than journeymen rates on public works projects. *See, e.g.*, 29 C.F.R. § 5.5(a)(4)(i) ("Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer and Labor Services, or with a State Apprenticeship Agency recognized by the Office"); N.Y. Lab. Law § 220 3(a) ("Serving laborers, helpers, assistants and apprentices shall not be classified as common labor and shall be paid not less than the prevailing rate of wages as hereinafter defined. No employee shall be deemed to be an apprentice unless he is individually registered in an apprenticeship program which is duly registered with the commissioner of labor in conformity with the provisions of article twenty-three of this chapter."); § 220 3-e ("Apprentices will be permitted to work as such only when they are registered, individually, under a bona fide program registered with the New York

State Department of Labor. The allowable ratio of apprentices to journeymen in any craft classification shall not be greater than the ratio permitted to the contractor as to his work force on any job under the registered program. Any employee listed on a payroll at an apprentice wage rate, who is not registered as above, shall be paid the wage rate determined by the New York State Department of Labor for the classification of work he actually performed.").

39. Per the December 1, 2019 through November 30, 2022 CBA between Local 363 and the Association (and in all relevant preceding CBAs), Local 363 has relinquished its apprenticeship and training program to the sole control and authority of the Association, further demonstrating the Union's domination by management. The CBA provides, "The UNION hereby authorizes the EMPLOYERS to establish and/or participate in a Federal and/or State Apprenticeship and/or Training Program." Furthermore, Local 363 has failed or refused to appoint trustees (or even bargain for the right to appoint trustees) to the board of trustees of the Apprenticeship Fund, in violation of the LMRA, 29 U.S.C. § 186(c)(5). Per the Apprenticeship Fund Trust Agreement, only the Association has authority to appoint trustees to the board, and only management trustees sit on its board.

40. The practice of over-utilizing lower-paid apprentices (and other classifications of worker) has continued to the present day. Unlike most building and construction trade union CBAs, the Local 363 CBA and the Apprenticeship Fund Plan contain no limits or ratios as to the number of apprentices that an employer may utilize on a job in comparison to the number of journeymen electricians, further demonstrating the Association's domination of Local 363. *See, e.g.*, 29 C.F.R. § 29.5(b)(7) ("An apprenticeship program, to be eligible for approval and registration by a Registration Agency, must confirm to the following standards . . . (b) The program standards must contain provisions that address . . . A numeric ratio of apprentices to

journeyworkers consistent with proper supervision, training, safety, and continuity of employment, and applicable provisions in collective bargaining agreements, except where such ratios are expressly prohibited by the collective bargaining agreements. The ratio language must be specific and clearly described as to its application to the job site, workforce, department or plant.").

Association Domination of the Union

41. The Union has a long history of failing to meet its minimum duty of fair representation, much less to serve its members' best interests. Indeed, the Association and its predecessors and affiliated have long dominated the Union.

42. To begin with, President of Defendant Association, Pat Bellantoni, used to be the Business Manager of Local 363. *See Argano Elect. Corp., Argano Elec. Corp.*, 248 N.L.R.B. 352 (N.L.R.B. March 12, 1980).

43. On December 7, 1995, the United Electrical Contractors Association a/k/a United Construction Association and its 91 members ("UECA"),[7] entered into the NLRB Settlement Agreement with the NLRB based on charges that UECA was unlawfully assisting Local 363 and coercing their employees to recognize Local 363 (as opposed to International Brotherhood of Electrical Workers, Local 3 ("IBEW Local 3")) as their exclusive bargaining agent, in further demonstration that Local 363 is an employer-dominated union. In the NLRB Settlement Agreement, the Association stated:

> a. WE WILL NOT interfere with restrain [sic] or coerce our employees by recognizing Local 363 … as the exclusive bargaining representative of our

[7] As of February 2006, according to Amendment No. 4 to the Apprenticeship Fund Trust Agreement, the "UECA [was] no longer the association representing the majority of the Fund's contributing employers," and the trustees approved the amendment naming Defendant BIECA as the "Association" and Plan Sponsor. The UECA continued in existence after this amendment and continued to represent employers that bargained with Local 363. *See, e.g.*, *Bldg. Indus. Elec. Contractors Ass'n ex rel. United Elec. Contractors Ass'n v. City of N.Y.*, 678 F.3d 184 (2d Cir. 2012).

employees for purposes of collective bargaining until that Union demonstrates its majority status pursuant to a Board conducted election.

b. WE WILL NOT render unlawful assistance to Local 363 by making contributions on behalf of our bargaining unit employees to the Local 363 Welfare Fund 'E' or the Local 363 Annuity Fund 'E' or the Joint Education Fund.

c. WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed under Section 7 of the [National Labor Relations] Act.

d. WE WILL provide forthwith an equivalent to any insurance or indemnity coverage maintained through the Local 363 Welfare Fund 'E', the Local 363 Annuity Fund 'E' and the Joint Education Fund so that no such coverage shall be discontinued or lapse until UECA/UCCA reaches agreement on any alternative health benefit, annuity or joint education coverage or bargains to impasse with Local 3, IBEW, AFL-CIO."

44. The Defendants Annuity Fund, Welfare Fund and Apprenticeship Fund (but not the Pension Fund) were purportedly established pursuant to the NLRB Settlement. Attachments to the Annuity Fund's Form 5500 for the years ended December 31, 2019 and 2018 state, "The Plan is a multiemployer defined contribution profit sharing plan established under the provision of an Agreement and Declaration of Trust effective February 1, 1996, pursuant to a settlement agreement between the [UECA] and the [NLRB]."

45. The Annuity Fund Trust Agreement states, "WHEREAS, members of the [BIECA] … have an obligation to continue to comply with the terms of the [CBA] with Local 363, International Brotherhood of Teamsters, AFL-CIO … with regard to members of Local 363 who are currently represented by Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO; and WHEREAS pursuant to a December 7, 1995, Settlement Agreement between, among others, the Association and [NLRB]…, members of the Association are required to maintain pension benefits that are equivalent to the benefits provided through the Local 363 Annuity Fund 'E'…."

46. The Apprenticeship Fund and Welfare Fund Trust Agreements similarly state that the Association is required to comply with the terms of the Local 363 CBA with regard to members

represented by IBEW Local 3, and that the Association and its members are required to maintain such benefits pursuant to the NLRB Settlement.

Failure to Jointly Administer Benefit Funds

47. The Benefit Funds are ERISA "multiemployer plans," which are required by the LMRA and ERISA to be jointly administered by union and management trustees. 29 U.S.C. §§ 186(c)(5), 1102(a).

48. The Trust Agreements of each Benefit Fund states, "It is the intent that this Agreement and Plan, to the extent permitted by applicable law, be administered and operated as a multiemployer plan." The Trust Agreements of the Apprenticeship Fund, Pension Fund and Welfare Fund (but not the Annuity Fund) also state that the Trusts and plans are intended to be qualified as exempt from taxation as provided under the Internal Revenue Code, as amended, and to be administered in accordance with ERISA. Each Trust Agreement also states that the validity, construction and administration of each fund shall be determined in accordance with ERISA.

49. Despite the LMRA and ERISA's clear legal mandate that multiemployer plans must be jointly administered, the Benefit Funds were established and continue to operate with only management-side trustees appointed by the Defendant Association, in demonstration of the Association's domination of Local 363.

50. Per the Trust Agreements of the Benefits Funds, Defendant Association has sole authority to appoint trustees to the boards of each fund. The Trust Agreements of each Benefit Fund state, "The Fund shall be administered by the Board of Trustees, which shall consist of two (2) [or five (5)] Trustees appointed by the Association."

51. The Pension Fund Summary Plan Description ("SPD") refers to the Plan Sponsor as the Association only. The Pension Fund SPD further unequivocally states that "[t]he Plan is

administered by the Board of Trustees that consists of 2 Trustees appointed by the Association." The Annuity Fund SPD states the same.

52. The SPDs refer to the Trustees as Frank Rappo and Eric Olynik, who were both appointed by (and act in the interest of) the Association. See also, e.g., 2019 Annuity Fund Form 5500, accountant's opinion at pp. 5 ("The Plan is a multiemployer defined contribution profit sharing plan…the Plan was established to provide and maintain retirement benefits for employees of employers who participate in the Plan. The Plan is sponsored by the Building Industry Electrical Contractors Association, Inc. (the Association). The Plan is administered by a Board of Trustees (Trustees) that are appointed by the Association and is subject to the provisions of [ERISA].") (emphasis added). *See also* 2019 Pension Fund Form 5500; 2019 Welfare Fund Form 5500; 2019 Apprenticeship Fund Form 5500.

53. Per the Trust Agreements of the Benefit Funds, Defendant Association also has the authority to approve removal of a trustee or trustees from the boards of trustees of the Benefits Funds.

54. Per the Trust Agreements of the Benefit Funds, any amendment to the Trust Agreements and/or the plan documents of those funds must be approved by the Association. Pat Bellantoni—who was barred by the U.S. Department of Labor, Employee Benefits Security Administration from acting as a fiduciary with regard to any ERISA plan for 10 years—signs and approves amendments to the Trust Agreements on behalf of the Association.

55. Local 363 has failed or refused to appoint union trustees to its members' employee benefit funds. It has failed or refused to bargain for authority under the terms of its CBA with the Association, or the Trust Agreements of the Benefit Funds, to appoint union trustees to the boards of the Benefit Funds, as required by 29 U.S.C. § 186(c)(5) and ERISA.

56. Local 363 has acted arbitrarily or with bad faith with respect to its oversight of the Benefit Funds and its failure to appoint trustees to the Benefit Funds. Local 363 is required by law to appoint trustees to its members' pension and welfare benefit funds, and yet, since the Benefit Fund's establishment in 1996, Local 363 has continued to neglect this critical duty. Its decision to allow the Benefit Funds to be solely trusteed by its bargaining opponent is a clear breach of its duty of fair representation to its members as it is "so far outside a wide range of reasonableness as to be irrational." *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991).

57. The NLRB Settlement Agreement is no defense to any of the Defendants' failure or refusal to abide by the LMRA's command that "employees and employers are equally represented in the administration of such [multiemployer] fund." 29 U.S.C. § 186(c)(5).

Monetary Losses Due to Defendants' Continuing Breaches

58. On or about September 21, 2015, the (employer) Trustees of the various Benefit Funds, with the signed approval of the Association's President Pat Bellantoni, amended the Trust Agreements of the Benefit Funds in order to allow for themselves to be paid (out of plan assets) for performance of their duties as trustees. The Trust Agreements purported to make this change retroactive to March 1, 2013.[8] Pursuant to these amendments, Trustees selected themselves as "service providers" to the Benefit Funds. The Trustees' actions are clear self-dealing, and thus a violation of ERISA, 29 U.S.C. §§ 1106(b) and (a), in addition to the basic duties of prudence and loyalty under 29 U.S.C. §§ 1103, 1004, as discussed herein.

[8] The statute of limitations (and thus the Class Period) applicable to this action is at least six years, 29 U.S.C. § 1113. However, as the September 21, 2015 trust amendment to each of the Benefit Funds retroactively approved compensation paid to the Trustees, the Class Period may properly start on March 1, 2013. Other than Form 5500s, without discovery, Plaintiff is without access to information concerning compensation paid prior to the trust amendment. Further, Plaintiff does not have access to information to confirm whether or not the compensation stated in the Forms 5500 are accurate or are understated.

59. During the Class Period, Schedule C's to the Form 5500's for each of the Building Trades Funds reveals that the trustees approved and paid from plan assets over $600,000 in compensation to employer trustees Rappo and Olynik:

Plan Year	Pension		Annuity		Welfare		Apprenticeship		TOTALS
	Rappo	Olynik	Rappo	Olynik	Rappo	Olynik	Rappo	Olynik	
2013									
2014		$8,000				$8,000		$7,134	$23,134
2015		$12,375		$12,571		$12,375		$12,375	$49,696
2016		$15,000		$15,000		$15,000		$15,000	$60,000
2017		$20,000		$20,000		$20,000		$20,000	$80,000
2018	$18,750	$25,000	$18,750	$25,000	$18,750	$25,000	$18,750	$25,000	$175,000
2019	$31,667	$31,667	$25,000	$25,000	$31,667	$31,667	$25,000	$25,000	$226,668
TOTALS	$50,417	$112,042	$43,750	$97,571	$50,417	$112,042	$43,750	$104,509	$614,498
Rappo Total Comp:		$188,334							
Olynik Total Comp:		$426,164							

60. ERISA Form 5500 plan filings are typically made in October of each year. Thus, without discovery, Plaintiff does not have access to the exact compensation paid to Rappo and Olynik in plan years 2020 and 2021. However, based on prior years, it appears that the total compensation paid to Rappo and Olynik from 2014 through present exceeds $1 Million.

61. In addition to the trustee compensation being per-se illegal, due to the illegal structure of the funds and the self-dealing of the Trustees and Association, upon information and belief, discovery will show that the Trustees did not perform compensable services for the Building Trades Funds with a fair market value anywhere near the level of compensation they received. This is made plausible and apparent by at least the following circumstances:

a. The Trustees delegated the management and administrative duties of the Benefit Funds to a third-party administrator, Dickinson Group, LLC ("Dickinson").

b. For all time relevant to this lawsuit, per the Benefit Fund's Form 5500's, Dickinson was the Funds' Administrator responsible for the day-to-day operations of the Benefit Funds.

c. The Benefit Funds employed a Fund Manager, Albert J Alimenia, Managing Director of Dickinson's Fund Administration Team.

d. In 2019, per the Pension Fund Form 5500, the Pension Fund paid Dickinson $225,755.00 for its services to the Pension Fund.

e. In 2019, per the Annuity Fund Form 5500, the Annuity Fund paid Dickinson $196,850.00 for its services to the Annuity Fund.

f. In 2019, per the Apprenticeship Fund Form 5500, the Apprenticeship Fund paid Dickinson $117,563.00 for its services to the Apprenticeship Fund.

g. In 2019, per the Welfare Fund Form 5500, the Welfare Fund paid Dickinson $364,926.00 for its services to the Welfare Fund.

h. The over $1 Million in compensation to the Trustees cannot in any way be fairly characterized as "reasonable compensation for performance of his or her duties for the Trust[s]" within the meaning of the plan amendments and/or ERISA.

62. But the Trustees' self-enrichment did not constitute all of the Benefit Funds' monetary losses. Indeed, as the Apprenticeship Fund is not itself recognized by the federal or state government, **the Apprenticeship Fund appears to have paid plan assets to Association-member employers to assist them in applying for and creation their own individual apprenticeship programs**. See http://bteducationfund.org (last accessed 8/18/2021) ("…To employers who wish to have a registered apprenticeship program with the New York State Department of Labor, we offer all services for application of your registered program."). There is

no legal basis for any fiduciary to cause plan assets to be paid to employer-association members to create their own ERISA apprenticeship plans (or similarly to use plan employee resources to "assist" participating employers) – those costs should be borne by employers. Such transactions are clearly prohibited, and evidence imprudent and disloyal fiduciary conduct. The Apprenticeship Fund's Form 5500s do not shine any light on how plan assets were spent. For example, the 2019 Schedule H reflects plan expenses as follows:

Expenses			
e Benefit payment and payments to provide benefits:			
(1) Directly to participants or beneficiaries, including direct rollovers..	2e(1)		
(2) To insurance carriers for the provision of benefits..	2e(2)		
(3) Other	2e(3)	579,022	
(4) Total benefit payments. Add lines 2e(1) through (3)	2e(4)		579,022
f Corrective distr butions (see instructions)	2f		
g Certain deemed distributions of participant loans (see instructions)	2g		
h Interest expense	2h		
Administrative expenses: (1) Professional fees	2i(1)	143,607	
(2) Contract administrator fees	2i(2)	117,563	
(3) Investment advisory and management fees	2i(3)	10,599	
(4) Other	2i(4)	739,170	
(5) Total administrative expenses. Add lines 2i(1) through (4)..	2i(5)		1,010,939
Total expenses. Add all expense amounts in column (b) and enter total.	2j		1 589 961

Apprenticeship Fund 2019 Schedule H at pp. 3. With over $1.3 Million in "other" expenses in a single year, Plaintiff has no way of quantifying the extent of these prohibited payments to member employers without discovery. Based upon publicly available information, and upon further information and belief, prohibited uses of plan assets occurred from at least 2013 through present.

63. In the eyes of the law, these prohibited transactions are no different than the illegal payments by Local 363 funds to signatory employers in the 1990s, in which Association President Pat Bellantoni was a fund trustee and removed by the Department of Labor from his position. *Supra*, n. 2.

64. In each of these actions, the Trustees acted in their own self-interest, as well as in the prohibited interest of the Association.

65. By Trustees acting in their capacity as agents of the Association and its member employers, causing Apprenticeship Fund compensation to be paid to Association members, and retroactively ratifying the trustee compensation via Trust Agreement amendments, the Association too became an ERISA fiduciary responsible for the over $1 Million improperly paid to the Trustees. *See, e.g.*, *Whitfield v. Tomasso*, 682 F. Supp. 1287 (E.D.N.Y. 1988) ("By virtue of its authority to appoint and remove the union trustees, and by effectively controlling the selection of employer trustees, [the] defendant [union] both had and exercised discretionary authority and control respecting management of the Fund. Accordingly, [the union] was a fiduciary with respect to the Fund within the meaning of ERISA § 3(21)."); *Liss v. Smith*, 991 F. Supp. 278, 310-11 (S.D.N.Y. 1998) ("It is by now well-established that the power to appoint plan trustees confers fiduciary status. . . . A failure to monitor appointees and to remove non-performing fiduciaries thus renders the appointing fiduciary jointly and severally liable for the appointed fiduciaries' breaches"). Further, the Association's failure to appropriately monitor and remove Rappo and Olynik also demonstrates the Association's fiduciary status, and breach of its ERISA duties.

66. Similarly, due to the Union's complete failure to exercise its duty to appoint competent trustees to the Benefit Funds (much less adequately monitor any trustees), the Union too was an ERISA fiduciary responsible for the losses suffered by the Benefit Funds.

67. Had the $1 Million in prohibited Trustee compensation, as well as any amounts illegally paid by the Apprenticeship Fund to participating employers, instead been properly invested, the Benefit Funds would have earned millions more. For example, the value of the S&P 500 index has nearly tripled in value since March 2013.

68. Had the Benefit Funds not lost money due to the Trustee, Union, and Association breaches, assuming the same level of employer compensation (and subject to prevailing wage

requirements on public works), Union members and Class Members would have received either greater cash wages and/or richer benefits.

69. Had Local 363 not breached its duty of fair representation by ceding all authority and control of the Benefit Funds to the Association (and instead ensured balance by appointing its own prudent trustees and properly monitoring all plan trustees), the employer Trustees would not have been able to engage in the illegal self-dealing and other prohibited transactions which resulted in significant damages to Union members' benefits. Local 363 had an affirmative duty to both ensure equal representation on the boards of the funds, as well as to prevent such co-trustee malfeasance. Union-appointed trustees would have had a similar duty. *See* 29 U.S.C. § 1105 (co-fiduciary liability).

CLASS ACTION ALLEGATIONS

70. Plaintiff brings this action as a class action pursuant to Fed. R. Civ. P. 23 on behalf of himself and the Class defined above.

71. The members of the Class are so numerous that joinder of all members is impracticable. Upon information and belief, there are in excess of 6,000 members of the Class and well in excess of 1,000 members of each of the Subclasses.

72. Plaintiff will fairly and adequately represent and protect the interests of the Class because there is no conflict between the claims of Plaintiff and those of the Class, and Plaintiff's claims are typical of the claims of the Class. Plaintiff's counsel are competent and experienced in litigating ERISA and other complex labor matters, including class actions like this one.

73. There are questions of law and fact common to the proposed Class, which predominate over any questions affecting only individual Class members, including, without limitation: whether Defendants have violated and continue to violate ERISA by failing to maintain

the Building Trades Funds in harmony with other federal law, such as the Taft-Hartley Act, by allowing the Association to have complete control over the funds, whether the Union breached its duty of fair representation by failing to appoint prudent and loyal trustees to the funds and failing to monitor their performance, and whether these breaches led to prohibited transactions and other monetary losses as a result of the funds paying unjustifiable compensation to fund trustees Rappo and Olynik, and Association member employers.

74. Plaintiff's claims are typical of (and in common with) the claims of the Class in the following ways, without limitation: (a) Plaintiff is a member of the Class and each of its Subclasses; (b) Plaintiff's claims arise out of the same policies, practices and course of conduct that form the basis of the claims of the Class; (c) Plaintiff's claims are based on the same legal and remedial theories as those of the Class and involve similar factual circumstances; (d) there are no conflicts between the interests of Plaintiff Cudjoe and the Class Members; and (e) the injuries suffered by Plaintiff is similar to the injuries suffered by the Class members.

75. Class certification is appropriate under Fed. R. Civ. P. 23(b)(1) because prosecuting separate actions by individual Class Members would create: a risk of (1) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; and (2) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests. ERISA plan fiduciaries generally act with respect to plans as a whole,[9] not with respect to individual participants.

[9] For example, with respect to investment of plan assets, selection of plan service providers and setting their compensation.

76. Class certification is appropriate under Fed. R. Civ. P. 23(b)(2) because (by establishing and continually operating the Building Trades Funds solely with Association-appointed trustees and dominating the Union and the funds to serve the Association's own interest) Defendants have acted or refused to act on grounds that apply generally to the Class, so that final injunctive or declaratory relief is appropriate with respect to the Class as a whole. Plaintiff seeks injunctive relief to: (1) remove and forever bar trustees Rappo and Olynik from serving in any trustee or fiduciary capacity for the Building Trades Funds; (2) reform the Building Trades Funds to require joint union-management representation; (3) order the Union and the Association to appoint equal numbers of new trustees; and (4) appoint independent trustee(s) to be compensated at the Union's and Association's expense. If granted, such relief would clearly apply to and benefit the Class as a whole.

77. Class certification is appropriate under Fed. R. Civ. P. 23(b)(3) because questions of law and fact common to the Class predominate over any questions affecting only individual Class members.

78. Class action treatment is superior to the alternatives for the fair and efficient adjudication of the controversy alleged herein because it will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the duplication of effort and expense that numerous individual actions would entail. No difficulties are likely to be encountered in the management of this class action that would preclude its maintenance as a class action, and no superior alternative exists for the fair and efficient adjudication of this controversy. The Class is readily identifiable from Defendants' own employment and benefits records. Prosecution of separate actions by individual members of the

Class would create the risk of inconsistent or varying adjudications with respect to individual Class members that would establish incompatible standards of conduct for Defendants.

79. A class action is superior to other available methods for adjudication of this controversy because joinder of all members is impractical. Furthermore, the amounts at stake for many of the Class members are not great enough to enable them to maintain separate suits against Defendants.

80. Without a class action, Defendants will retain the benefit of their wrongdoing, which will result in further damages to Plaintiff and the Class. Plaintiff envisions no difficulty in the management of this action as a class action.

COUNT I
Injunctive Relief, 29 U.S.C. § 186(e)
(Plaintiff v. Defendants)

81. All previous paragraphs are incorporated as though fully set forth herein.

82. 29 U.S.C. § 186(e) empowers a Court to issues injunctions to remedy structural violations of union-sponsored benefit plans where such structural defects existed, as described herein, at the establishment of such plan, and are ongoing and will continue into the future. That is, Section 186(e) allows a court to require such plans to have joint labor and management representation on the Benefit Funds' board of trustees.

83. As described above, Defendants blatantly violated Taft-Hartley by establishing and failing to maintain the Building Trades Funds in accordance with the requirement for equal trust fund representation, 29 U.S.C. § 186(c)(5).

84. Defendants established the Building Trades Funds on what was supposed to be a temporary basis (per the NLRB Settlement, "until UECA/UCCA reaches agreement on any alternative health benefit, annuity, or joint education coverage or bargains to impasse with Local

3"), not for the sole and exclusive benefit of the employees, but to settle unfair labor practice charges with the NLRB.

85. Without an injunction, Plaintiff and the Class would suffer irreparable harm by being held captive to employer domination and employer self-dealing, in direct conflict with the interests of the Class and the Building Trades Funds, causing monetary harm and serious harm to the integrity of the funds and their future proper operations.

86. Monetary relief is inadequate to compensate Plaintiff and the Class for their injuries because structural conflicts of interest in existence since the establishment of the Funds subject the Building Trades Funds to likely ongoing injuries in the form of continuing prohibited transactions to insiders. The risk of further substantial losses to the relatively small plans endangers the Funds' ongoing existence.

87. Any harm caused by an injunction is outweighed by the harm that would be caused in the absence of an injunction.

88. An injunction would be in the public interest, as federal labor policy requires joint fund representation, and as Taft-Hartley plans must be operated in the best interest of plan participants and beneficiaries, not the interests of plan sponsors such as employers.

89. **Wherefore**, Plaintiff, on behalf of himself and the Class, seeks an order: (1) removing Defendant Trustees from their positions with respect to the Building Trades Funds; (2) amending the terms of the Building Trades Funds Trust Agreements and other necessary documents to require equal trustee representation between the Association and the Union; (3) requiring the Association and the Union to appoint an equal number of trustees to the Building Trades Funds; and (4) appointing an independent trustee(s), reasonable compensation to whom shall be paid for equally by the Association and the Union.

COUNT II
Breaches of Duties of Prudence and Loyalty and Co-Fiduciary Breaches –Monetary Relief
(Plaintiff and Class v. Trustees, Association and Union)

90. All previous paragraphs are incorporated as though fully set forth herein.

91. At all relevant times, the Association, Union and Trustees were fiduciaries within the meaning of ERISA, 29 U.S.C. § 1002(21)(A) in that they exercised discretionary authority and control over the administration and/or management of the Building Trades Funds, and/or, *any* authority or control with regard to management or disposition of their assets. Furthermore, the Association and Union were fiduciaries in that they had the power and legal duty to appoint trustees to the Building Trades Funds, as well as the duty to monitor the performance of these trustees and (where needed) remove non-performing trustees.

92. As fiduciaries, the Association, Union and Trustees were subject to ERISA's fiduciary standards 29 U.S.C. §§ 1103(c)(1), 1104(a)(1)(A), (B) to manage the assets of the Building Trades Funds for the exclusive benefit of its participants and beneficiaries (i.e., not in their own interests) and to act with prudence as a reasonably prudent expert would under the circumstances.

93. The Association, Union and Trustees were also subject to ERISA's co-fiduciary liability standards and were required to adequately monitor (and where needed, take steps to prevent and/or correct) the performance of each other. 29 U.S.C. § 1105.

94. As ERISA fiduciaries, the Association, Union and Trustees utterly failed in their duty to the Building Trades Funds and its participants and beneficiaries by: (1) establishing and allowing the funds to continue to operate with an illegal structure that fails to comply with the Taft-Hartley Act's requirement of joint union and management representation, 29 U.S.C. § 186(c)(5); (2) approving Trustees as service providers to the funds under a clear conflict of interest;

(3) providing compensation to Trustees, who (at best) provided services with a reasonable value far less than the compensation they received; (4) providing Apprenticeship Fund assets and services to participating employers to apply for and create their own individual apprenticeship plans; and (5) failing to adequately monitor the performance of their co-fiduciaries, in violation of 29 U.S.C. § 1105.

95. The Association, Union and Trustees directly and proximately caused monetary losses to the Building Trades Funds by allowing the Association to unilaterally dominate the funds and approving compensation to the Trustees that did not benefit the funds and their participants and beneficiaries. Rather than retroactively approving the Trustee compensation via amendments to the Trust Agreements of the Benefit Funds, the Association should have removed the Trustees for engaging in such self-dealing and prohibited transactions, and the Union should have appointed prudent trustees and adequately monitored all trustees' performance.

96. Under 29 U.S.C. § 1109, "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary."

97. **Wherefore**, Plaintiff, on behalf of himself, the Building Trades Funds and the Class, seeks: payment to the Building Trades Funds of all compensation paid to the Trustees and participating employers, plus any lost profits and interest, with the Association, Union and Trustees to be jointly and severally liable for payment of these amounts.

COUNT III
Prohibited Transactions – Monetary Relief
(Plaintiff and Class v. Trustees, Association and Union)

98. All previous paragraphs are incorporated as though fully set forth herein.

99. At all relevant times, the Association, Union and Trustees were parties in interest within the meaning of ERISA, 29 U.S.C. § 1002(14).

100. As fiduciaries the Association, Union and Trustees had duties to avoid causing the Building Trades Funds to engage in prohibited transactions.

101. In violation of 29 U.S.C. § 1106(a), the Association, Union and Trustees caused transfer and an exchange of property between, on the one hand, the Building Trades Funds, and on the other, the Trustees (in the form over more than $1 Million compensation) and Association-member employers (Apprenticeship Fund assets and services), each parties in interest.

102. Furthermore, in violation of 29 U.S.C. § 1106(b), the Association and Trustees dealt with the assets of the Building Trades Funds in their own interest and for their own account by the Trustees selecting themselves as "service providers," as well as by approving and paying themselves over $1 Million in compensation from Benefit Fund assets. The Association and Trustees also acted in these transactions with an interest adverse to the interests of the funds.

103. The prohibited transactions described herein harmed the Building Trades Funds and its participants and beneficiaries.

104. The prohibited payment of compensation to the Trustees was not exempt under ERISA.

105. **Wherefore**, Plaintiff, on behalf of himself, the Building Trades Funds and the Class, seeks: payment to the Building Trades Funds of all compensation paid to the Trustees and

participating employers, plus any lost profits and interest, with the Association, Union and Trustees to be jointly and severally liable for payment of these amounts.

COUNT IV
Injunctive Relief, 29 U.S.C. § 1132(a)(2), (3)
(Plaintiff and Class v. Defendants)

106. All previous paragraphs are incorporated as though fully set forth herein.

107. 29 U.S.C. § 1109, states that "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries … shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." Alternately, 29 U.S.C. § 1132(a)(3)(A) empowers a plan participant, such as Plaintiff Cudjoe, "to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan."

108. As described above, Defendants committed serious breaches of fiduciary duty and knowingly caused serious prohibited transactions by failing to maintain the Building Trades Funds in accordance with federal law (including Taft-Hartley's requirement for equal trust fund representation), as well as approving significant compensation to be paid to Defendant Trustees, which were non-exempt prohibited transactions, well in excess of the reasonable value of the services (if any), actually provided. Defendants committed further breaches by using plan assets to establish apprenticeship programs for the benefit of Association-member employers, not participants, similar to the "improper reimbursements made to contributing employers" in the *Herman v. Cardillo* action which resulted in Patrick Bellantoni being barred from serving as a fiduciary of an ERISA plan. *See supra* n.3. These breaches caused losses to the Building Trades Funds and their participants.

109. Where serious breaches of fiduciary duty and/or prohibited transactions have occurred, federal courts have exercised their authority under Sections 1132(a)(2), (3)(A) to remove trustees and other fiduciaries from positions relating to an ERISA plan, and to forever bar them from holding such positions.

110. Without an injunction, Plaintiff, the Building Trades Funds and the Class would suffer irreparable harm by being held captive to employer domination and employer self-dealing, in direct conflict with the interests of the Class and the Building Trades Funds, causing monetary harm and serious harm to the integrity of the funds and their future proper operations.

111. Monetary relief is inadequate to compensate Plaintiff, the Building Trades Funds and the Class for their injuries because structural conflicts of interest in existence since the establishment of the Funds subject the Building Trades Funds to likely ongoing injuries in the form of continuing prohibited transactions to insiders. The risk of further substantial losses to the relatively small plans endangers the funds' ongoing existence.

112. Any harm caused by an injunction is outweighed by the harm that would be caused in the absence of an injunction.

113. An injunction would be in the public interest, as federal labor policy requires joint fund representation, and as Taft-Hartley plans must be operated in the best interest of plan participants and beneficiaries, not the interests of plan sponsors such as employers.

114. **Wherefore**, Plaintiff, on behalf of himself, the Building Trades Funds and the Class, seeks an order: (1) removing Defendant Trustees from their positions with respect to the Building Trades Funds and forever barring them from serving in any such positions with respect to any ERISA plan; (2) amending the terms of the Building Trades Funds to require equal trustee representation between the Association and the Union; (3) reform the Trust Agreements and all

plan documents, by requiring the Association and the Union to appoint an equal number of trustees to the Building Trades Funds; and (4) appointing an independent trustee(s), reasonable compensation to whom shall be paid for equally by the Association and the Union.

COUNT V
Breach of Duty of Fair Representation – Monetary Relief
(Plaintiff and Class v. Union)

115. All previous paragraphs are incorporated as though fully set forth herein.

116. The Union owed a fiduciary duty of fair representation to those employees whom it represented. This duty required the Union to act in good faith in the employees' best interest, and refrain from arbitrary, capricious, irrational, or discriminatory conduct. 29 U.S.C. § 158(b)(1)(A). "The duty of fair representation is a 'statutory obligation' under the NLRA, requiring a union 'to serve the interests of all members without hostility or discrimination . . . , to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.'" *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378 (2d Cir. 2015) (quoting *Vaca v. Sipes*, 386 U.S. 171, 177 (1967)).

117. The Union has acted arbitrarily and with bad faith with respect to its oversight of the Building Trades Funds and its failure to appoint trustees to the funds. The Union is required by law to appoint trustees to its members' pension and welfare benefit funds, and yet, since the Building Trades Funds' establishment, the Union has continued to neglect this critical duty. Its decision to continually allow the Benefit Funds to be solely trusteed by its bargaining opponent and by continuing to fail to monitor the Trustees' actions is a clear breach of its duty of fair representation to its members as it is "so far outside a wide range of reasonableness as to be irrational." *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991).

118. The Union's breach caused the Building Trades Funds to be dominated by the Association such that Apprenticeship Fund assets were paid to contributing employers, and the Trustees engaged in self-dealing by selecting themselves as service providers for each Benefit Fund and paying themselves over $1 Million in compensation.

119. The Union's breach caused monetary harm to those employees it represented, including Plaintiff and Class Members, and the Union should be held jointly and severally liable with the Trustees and Association for these monetary losses.

COUNT VI
Breach of Duty of Fair Representation – Injunctive Relief
(Plaintiff and Class v. Union)

120. All previous paragraphs are incorporated as though fully set forth herein.

121. Pursuant to *Vaca v. Sipes*, 386 U.S. 171, 64 LRRM 2369 (1967), and its progeny, Courts may issue injunctions upon a showing that the Union has breached its duty of fair representation. *See Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 587 (1990).

122. The Union's failure to ensure joint fund representation as required by federal law, as well as its complete abdication of its bargaining responsibilities with respect to the Benefit Funds has caused irreparable damage to the Building Trades Funds and the Class.

123. Without an injunction, Plaintiff, the Building Trades Funds and the Class would suffer irreparable harm by being held captive to employer domination and employer self-dealing, in direct conflict with the interests of the Class and the Building Trades Funds, causing monetary harm and serious harm to the integrity of the funds and their future proper operations.

124. Monetary relief is inadequate to compensate Plaintiff, the Building Trades Funds and the Class for their injuries because structural conflicts of interest subject the Building Trades

Funds to likely ongoing injuries in the form of continuing prohibited transactions to insiders. The risk of further substantial losses to the relatively small plans endangers the Funds' ongoing existence.

125. Any harm caused by an injunction is outweighed by the harm that would be caused in the absence of an injunction.

126. An injunction would be in the public interest, as federal labor policy requires joint fund representation, and as Taft-Hartley plans must be operated in the best interest of plan participants and beneficiaries, not the interests of plan sponsors such as employers.

127. **Wherefore**, Plaintiff, on behalf of himself, the Building Trades Funds and the Class, seeks an order: (1) requiring the Union to appoint (and thereafter adequately monitor) an equal number of trustees to the Building Trades Funds; and (2) appointing an independent trustee(s), reasonable compensation to whom shall be paid for equally by the Association and the Union.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff seeks the following relief individually, and on behalf of the Building Trades Funds and all others similarly situated:

a. An order permitting this litigation to proceed as a class action pursuant to Fed. R. Civ. P. 23 on behalf of the Class and each of the Subclasses;

b. A declaration that the Building Trades Funds have been established and operated in violation of 29 U.S.C. § 186(a)-(b), in that the funds never had equal Union and Association representation on the board of trustees as required by the exemption at 29 U.S.C. § 186(c)(5);

c. Payment of all compensation paid to Defendant Trustees, and any compensation paid by the Building Trades Funds to any Association-member employer, plus any profits made by Trustees or profits which would have been earned by the Building Trades Funds, and interest, to be paid to the Building Trades Funds, jointly and severally at the expense of Defendants Trustees, Association and Union;

d. An Order Reforming and Amending the Building Trades Funds' Trust Agreements and other plan documents to require equal board representation by the Association and the Union;

e. An Order Removing Defendants Rappo and Olynik from their positions as trustees and fiduciaries of the Building Trades Funds and forever barring them from serving in any such capacity in the future with respect to any ERISA plan;

f. An Order Directing Defendants Association and Union to appoint new trustees to the Building Trades Funds and to thereafter adequately monitor all plan trustees;

g. Appointment of neutral trustee(s) to serve on the boards of the Building Trades Funds, the neutral trustee(s)' compensation to be paid jointly and severally by Rappo, Olynik, the Association and the Union;

h. Litigation costs, expenses, and attorneys' fees to the fullest extent permitted under the law; and

i. Such other and further relief as this Court deems just and proper.

JURY TRIAL DEMAND

Plaintiff demands a trial by jury for all issues of fact.

Dated: September 13, 2021

Respectfully Submitted,

GOODLEY MCCARTHY LLC

by: /s/ James E. Goodley

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** Pro hac vice motion forthcoming*