ANA-4A's JOINT POLICY COMMITTEE ON BROADCAST TALENT UNION RELATIONS

WITHDRAWAL FROM MULTI-EMPLOYER COLLECTIVE BARGAINING FOR COMMERCIALS CONTRACTS AND TRIGGERING WITHDRAWAL LIABILITY TO PENSION FUNDS

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I. INTRODUCTION

This memorandum discusses the issues and potential liability if and when a signatory to the SAG-AFTRA Commercials Contract and the Radio Recorded Commercials Contract (collectively, the "Contract") decides to withdraw authorization from the Joint Policy Committee on Broadcast Talent Union Relations ("JPC") for collective bargaining and no longer continue its signatory relationship with SAG-AFTRA. This memorandum also discusses the obligations the withdrawing signatory has with the SAG-Producers Pension and Health Plans or the AFTRA-Producers Health and Retirement Funds (collectively, the "Funds"). An obligation may occur to pay pension withdrawal liability to the Funds after disassociating from the ANA-4A's multi-employer bargaining unit responsible for negotiating with SAG-AFTRA. As detailed below, an entity's withdrawal of authorization from the JPC does not automatically trigger a withdrawal from the Funds. Rather, a company's obligations under the Contract and its associated commitments to the Funds endure until the withdrawn employer fulfills or is relieved of its collective bargaining obligations imposed by federal labor law.

In addition, this memorandum analyzes the potential new liabilities non-signatories to the Contract and/or the Funds incur as joint-employers with signatories. These liabilities include the obligation to contribute to the Funds for work performed on behalf of the non-signatory pursuant to the Contract and any ERISA-imposed withdrawal liability incurred when the signatory employer ceases participation with the Contract or Funds. Finally, the memorandum discusses the impact of the National Labor Relations Board's ("NLRB") recent decision expanding federal labor law's definition of "joint-employer," and whether entities incur contractual pension liability as a result of their newly-designated joint-employer status. In summary, a current authorizer may have the potential for various liabilities by withdrawing authorization from the JPC and seeking to terminate its status as a signatory under the Contract.

II. WITHDRAWAL FROM MULTI-EMPLOYER BARGAINING UNIT

A. A JPC Authorizer May Withdraw Authorization Prior to the Commencement of Negotiations for a Successor Contract.

Multi-employer bargaining is voluntary and neither the NLRB nor the courts may force employers to participate in such a framework. *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 412 (1982) [hereinafter *Bonanno*]; *Retail Associates, Inc.*, 120 N.L.R.B. 388 (1958). As a corollary, an employer may withdraw authorization from the multi-employer bargaining unit at-will, provided that it submits adequate written notice prior to the date set for renegotiation of the existing contract or the date on which negotiations actually commence. *Retail Associates, Inc.*, 120 N.L.R.B. at 388.

Following the commencement of negotiations, however, an employer may not withdraw authorization absent unusual circumstances, which are found when an employer is subject to extreme financial pressures or when a bargaining unit is substantially fragmented. *Bonanno*, 454 U.S. at 411. As the NLRB has explained:

> While mutual consent of the union and employers involved is a basic ingredient supporting the appropriateness of a multiemployer bargaining unit, the stability requirement of the Act dictates that reasonable controls limit the parties as to the time and manner that withdrawal will be permitted from an established multiemployer bargaining unit.

Retail Associates, Inc., 120 N.L.R.B. at 393.

The JPC and SAG-AFTRA have calendared February 17, 2016, as the commencement date for renegotiation of the Contract. As such, JPC authorizers wishing to withdraw from the multi-employer bargaining unit must provide written notice of their decision by January 26, 2016.

B. Withdrawing Authorization from the JPC is Not Equivalent to Terminating the Contract or Withdrawing from the Funds.

While an employer may withdraw authorization from the multi-employer collective bargaining unit, it is not permitted to withdraw from a validly adopted collectively bargaining agreement. *Conditioned Air Systems, Inc.*, 360 N.L.R.B. No. 97, n.3 (2014). Even after the labor agreement expires, withdrawal from multi-employer bargaining does not relieve the withdrawn employer of its obligations both to maintain the status quo that existed immediately prior to the withdrawal and to negotiate a new collective bargaining agreement.

Under the National Labor Relations Act ("NLRA"), an employer is obligated to maintain the terms and conditions of a collective bargaining agreement, even after the contract expires. *Laborers Health & Welfare Trust Fund for N. Cal. v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544–46 (1988). This statutory obligation continues until certain events occur, such as the execution of a successor agreement or the union's unequivocal disclaimer of interest in representing the bargaining unit. *See, e.g.*, *Dycus v. NLRB*, 615 F.2d 820, 824 (9th Cir. 1980). Therefore, while there is no continuing contractual obligation to adhere to the labor agreement, there is a continuing, virtually identical statutory obligation to maintain the status quo.

The courts and the NLRB have held that freezing the status quo ante after a collective bargaining agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to negotiating a new contract. Thus, an employer's failure to abide by the terms and conditions of an expired labor agreement pending negotiations on a new contract constitutes bad faith bargaining in violation of Sections 8(a)(1), 8(a)(5) and 8(d) of the NLRA. Consequently, any unilateral change by an employer—including in the pension and welfare fund arrangements—in employee rights, provided by an expired agreement constitutes an unfair labor practice. *See, e.g.*, *Great S. Fire Prot., Inc.*, 325 N.L.R.B 9, 14 (1997) (finding that the employer violated Section 8(a)(5) and (1) of the NLRA by its failure to timely pay welfare and pension premiums following contract expiration).

Typically, an employer is relieved from abiding by the status quo ante only after it has negotiated a successor labor agreement with the Union or implemented its last best offer after reaching impasse during contract negotiations. *Silverman v. Major League Baseball Player Relations Comm.*, 880 F. Supp. 246, 253 (S.D.N.Y. 1995) ("During the interim between agreements…the parties must honor the terms and conditions of the expired contract that involve mandatory subjects of bargaining, at least until the parties reach a good faith impasse") (citations omitted). Mandatory subjects of bargaining include contributions to multi-employer benefit plans. With respect to pension obligations, this may involve an agreement for the employer to withdraw from the current pension fund and provide alternate retirement benefits, if any. *See Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n. 6 (1988) ("[A]n employer's failure to honor the terms and conditions of an expired collective bargaining agreement pending negotiations on a new agreement constitutes bad faith bargaining…Consequently, any unilateral change by the employer in the pension fund arrangements provided by an expired agreement is an unfair labor practice"); *see also, Peerless Roofing Co. v. N.L.R.B.*, 641 F.2d 734, 735 (9th Cir. 1981) ("[W]hile fringe benefits including trust fund contributions were among the subjects of negotiation, [Employer] never proposed the substitution of cash wages for trust fund payments"). Prior to any such agreement, the employer remains obligated to contribute to the existing fund pursuant to the terms of the expired contract.

Laborers Health & Welfare, 880 F. Supp. at 544 n. 6. Following the execution of a successor agreement and the employer's withdrawal from the fund, the employer's withdrawal liability to the fund attaches. *N.J. Carpenters Pension Fund v. Hous. Auth.*, 68 F. Supp.3d 545, 553 (D. N.J. 2014) ("[A]n employer [is] liable for a withdrawal penalty in the event of a qualifying withdrawal from a multiemployer pension plan"). Consequently, employers that withdraw from multi-employer bargaining relationships often remain obligated to contribute to the associated pension fund for a significant period while negotiating as a single employer. *Laborers Health*, 484 U.S. at 544 n. 6. [1]

On rare occasions, employers are relieved from their statutory obligation to maintain the status quo ante after the union has disclaimed interest in representing the bargaining unit. A bargaining representative may disclaim interest in further representing a unit of employees provided the disclaimer is clear, unequivocal and made in good faith. *Prod. and Maint. Union, Local 101*, 329 N.L.R.B. 247 (1999); *Am. Sunroof*, 243 N.L.R.B. 1128 (1979). Contractual and statutory obligations to maintain the status quo ante persist up until the union provides its clear and unequivocal disclaimer of interest.

While historically, SAG-AFTRA has not pursued its rights under the NLRA and demanded individualized bargaining, the tides have changed.[2] SAG-AFTRA leadership has indicated to the JPC that they will not disclaim interest in representing any signatory who is under contract. In fact, SAG-AFTRA has made clear that it will increase pressure on non-

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[1] As a result, multi-employer plans have filed actions against employers that do not satisfy their withdrawal liability when they cease becoming a contributing employer. *See, e.g.*, Lisa Nagele-Piazza, *Successor May Be on Hook for Pension Withdrawal*, BLOOMBERG BNA (July 28, 2015), http://www.bna.com/successor-may-hook-n17179933975; Hazel Bradford, *Mine Workers Plan Sues Peabody, Arch Coal for Withdrawal Liability*, PENSION & INVESTMENTS (July 17, 2015 at 3:32 PM), http://www.pionline.com/article/20150717/ONLINE/150719883/mine-workers-plan-sues-peabody-arch-coal-for-withdrawal-liability; Ruben Kramer, *Pension Fund Kicks Out Caesars, Demands $462 million*, PRESSOFATLANTICCITY.COM (Mar. 10, 2015 at 10:00 AM), http://www.pressofatlanticcity.com/business/pension-fund-kicks-out-caesars-demands-million/article_6a83a5ca-c6a9-11e4-a730-e393bea457a2.html.

[2] SAG-AFTRA has recently stated that they will be very proactive with any non-signatory who attempts to produce non-union commercials or to employ union performers through a third-party "shell company" to produce their union spots. Indeed, on October 12, 2015, SAG-AFTRA sent a Member Alert to its membership notifying members to take action to organize any performers working in commercials for Droga5. *See Take Action to Organize Performers Working in Commercials for Droga5*, SAG-AFTRA (Oct. 12, 2015) ("Now is the time for action. . .SAG-AFTRA will not stand by while agencies undermine wages and benefits while profiting off of professional talent."); Dave McNary, *SAG-AFTRA Takes on Ad Agency Droga5 Over Non-Union Work*, VARIETY (Oct. 12, 2015, 2:54 PM), http://variety.com/t/sag-aftra/.

signatory digital advertising agencies to adhere to union standards and stop from undermining the Contract. The effort to organize Droga5 is the first step in the campaign.

III. JOINT-EMPLOYERS AND WITHDRAWAL LIABILITY

A. Employers that Withdraw from Multi-Employer Pension Funds are Subject to Withdrawal Liability.

Employers that withdraw from the JPC and successfully terminate their signatory status to the Contract may subject themselves to withdrawal liability under the Funds. The "Entertainment Exception" under the Employment Retirement Income Security Act ("ERISA") does not apply to advertisers and advertising agencies. The Funds will be more aggressive than in the past when advertisers and/or agencies cease becoming a signatory employer and trigger a withdrawal liability. Recent changes under the NLRA may make these claims easier to pursue by the Funds.[3]

ERISA, as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), governs multi-employer pension plans. Under ERISA, employers that are "obligated to make contributions to a multi-employer plan under…the terms of a collectively bargained agreement" are not only required to make such contributions contractually, but also pursuant to federal law. 29 U.S.C. § 1145. When an employer obligated to make these payments withdraws from the multi-employer plan, the law subjects the employer to withdrawal liability. 29 U.S.C. § 1381(a). ERISA defines "obligation to contribute" as "an obligation to contribute arising. . .(1) under one or more collective bargaining (or related) agreements, or (2) as a result of a duty under applicable labor-management relations law." 29 U.S.C. § 1392(a). As discussed above, by statute, a labor agreement's pension contribution provisions survive contract expiration even after an employer withdraws from multi-employer bargaining.

Thus, ERISA expressly requires an "employer" that withdraws from a multi-employer pension fund to pay its withdrawal liability. The statute does not define the term "employer" in

[3] During the past few months, the AFTRA Pension Plan began sending information notices to signatory employers who have had a major decline in commercial productions to determine if a partial withdrawal liability has occurred. This is the AFTRA Pension Plan's attempt to see if a current signatory is shifting work to a related company which is a non-signatory, in an attempt to evade its obligations under the Contract.

this context. Instead, this "definition is 'left to the courts' to decide." *Div. 1181 Amalgamated Transit Union v. New York City Dept. of Educ.*, Case No. 13-cv-9112 (PKC), 2014 WL 4370724, at *3 (S.D.N.Y. Aug. 27, 2014) [hereinafter *Transit Union*] (quoting *Korea Shipping Corp. v. N.Y. Shipping Ass'n – Int'l Longshoremen's Ass'n Pension Transit Fund*, 880 F.2d 1531, 1536 (2d Cir. 1989)). Therefore, it is unclear whether an entity that is a non-signatory to a collective bargaining agreement can be liable to the pension plan by virtue of its status as a "joint-employer." This ambiguity has led to a split among courts as to whether the joint employer doctrine applies in the withdrawal liability context.

B. Federal Courts are Split on the Issue of Joint-Employer Withdrawal Liability Under ERISA

1. The Ninth Circuit Has Held That Non-Signatories are Not Subject to Withdrawal Liability Under ERISA.

The Ninth Circuit—a potential forum for adjudicating matters involving the Funds—has declined to impose withdrawal liability on a non-signatory entity using the "joint-employer" doctrine. *Trustees of the Screen Actors Guild-Producers Pension and Health Plans v. NYCA, Inc.*, 572 F.3d 771, 776 (9th Cir. 2009) [hereinafter *NYCA*]. Notably, the Trustees of the SAG-Producers Pension and Health Plans initiated the action in *NYCA*. The employers at issue were an advertising agency (NYCA, the signatory to the collective bargaining agreement) and a golf equipment company (TaylorMade, the non-signatory employer that hired the professional golfer to endorse its products). The Court declined to extend ERISA-imposed pension contribution liability to TaylorMade because it was a non-signatory to the collective bargaining agreement.

Specifically, in *NYCA*, the Court interpreted ERISA to "impose[ ] no independent obligation upon employers; [but to] merely provide[ ] a federal cause of action to enforce *pre-existing* obligations created by collective bargaining agreements." *Id.* (emphasis in original). Accordingly, a company only has a pre-existing obligation to contribute to the pension fund by executing the operative collective bargaining agreement. *Id.* Thus, in *NYCA*, the Trustees were unable to subject a non-signatory employer to ERISA-imposed withdrawal liability under a joint employer theory. As the *NYCA* court reasoned:

> Because TaylorMade has not signed the Commercials Contract, it follows that it has not incurred any such pre-existing obligations under § 1145. The trustees'

> "joint-employer" theory, by seeking to impose obligations above and beyond those required by collective bargaining agreements, directly conflicts with the plain language of the statute. Therefore, we decline the invitation to extend the joint employer theory to the context now before us.

Id.

Still, in the Ninth Circuit, a non-signatory employer may be subject to withdrawal liability if it is "one and the same" with the signatory employer, *i.e.*, if: (1) it can be considered the "alter ego" of the signing company; (2) the two entities are a "single employer"; or (3) if "the interests of the non-signatory and the signatory are materially inseparable." *Id.* As explained by the Ninth Circuit, "[i]f the non-signatory company is really the same as the signatory company, then it is fair to say that the purported non-signatory is actually a signatory, and therefore an 'employer who is obligated to make contributions'" under ERISA. *Id.*

For a non-signatory entity to be liable under either the "alter ego" theory or the "single employer" theory, the challenging party first must prove that the non-signatory employer and the signatory employer are, for all intents and purposes, a single employer "by measuring the degree of common ownership, management, operations, and labor relations." *UA Local 343 United Ass'n of Journeymen & Apprentices of the Plumbing and Pipefitting Indus. of the United States and Canada, AFL-CIO v. Nor-Cal Plumbing Inc.*, 48 F.3d 1465, 1469-70 (9th Cir. 1994). "If this threshold requirement is met, the next step depends on which theory is pursued." *Id.* at 1470.

Under the "alter ego" theory, the challenging party must next prove that the non-union entity constitutes "a sham effort to avoid collective bargaining obligations." *Resilient Floor Covering Pension Fund v. M&M Installation, Inc. v. Nor-Cal Plumbing, Inc.*, 630 F.3d 848, 852, 854 (9th Cir. 2010) (rejecting the District Court's attempt to replace the second element of the standard alter ego test with an ERISA-specific standard) (internal quotation marks omitted).

Under the "single employer" theory, a non-signatory employer will only be subject to liability on NLRB precedent. *Nor-Cal Plumbing, Inc.*, 630 F.3d at 1470. In determining whether two or more entities are a single employer, the NLRB considers whether the following four factors are met (none of which are controlling): "(1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership." *Carpenters Local Union No. 1476 v. Stevens*, 743 F.2d 1271, 1276 (9th Cir. 1984).

Finally, a non-signatory employer can be liable for the signatory's ERISA contractual obligations where "the interests of the non-signatory and signatory parties are materially inseparable." *See Hotel Emp. and Rest. Emp. Intern. Welfare Union Fund v. Genter*, 50 F.3d 719, 722 (9th Cir. 1995). While the Ninth Circuit has not established an official "test" to determine whether two entities' interests are "materially inseparable," as explained in NYCA, the interests must align so as to make the two entities "one and the same." *NYCA*, 572 F.3d at 776. Thus, where the challenging party can prove (a) the two entities are alter egos, (b) where the corporate veil can be pierced, or (c) where the two entities are considered to be a "single employer," material inseparability of interests necessarily follows. *See id.* at 722.

2. Second Circuit Courts are Split as to Whether Joint-Employers are Liable.

In contrast to the Ninth Circuit, the district courts within the Second Circuit—arguably, also a proper venue for the Funds to initiate an action—are split as to whether joint-employers are liable under ERISA. Recently, the Southern District of New York held that joint-employers, as defined by the NLRB, *are* obligated to pay withdrawal liability. *Transit Union*, 2014 WL 4370724, at *7; *contra Oliveri v. P.M.B. Constr., Inc.*, 383 F. Supp. 2d 393, 403 (E.D.N.Y. 2005) (refusing to apply the joint-employer doctrine in the ERISA context). Given the NLRB's expanded definition of joint-employer as discussed in section III.C below, applying the holding reached in the Southern District of New York will greatly expand the number of non-signatories subject to withdrawal liability.

Given the more favorable holding in the Second Circuit, it is likely the Funds will file claims in the Second Circuit against any advertiser or agency who terminates its status as a signatory to the Contract. The Funds' Trustees have instructed Funds' counsel to be more aggressive in collecting withdrawal liability based upon the current financial status of the Funds. The recent changes in the law and having jurisdiction in the Second Circuit may make the claims against the withdrawing employer easier to enforce.

C. The NLRB May Extend Contractually Mandated Withdrawal Liability to Non-Signatory Joint Employers.

While some courts have declined to extend ERISA obligations to a joint-employer that is not party to the applicable collective bargaining agreement, the NLRB may impose such liability pursuant to the NLRA. As a likely corollary to the NLRB's recent expansion of its definition of joint-employer, the NLRB may conclude that joint-employers must adhere to applicable labor agreements as if they were signatories. By logical extension, joint-employers are also responsible for contractual and statutory liabilities created as a result of the collective bargaining agreement; *e.g.*, pension contributions and withdrawal liability resulting from a joint-employer's CBA-mandated participation in a pension fund.

In *Browning-Ferris Industries of California, Inc.*, 362 N.L.R.B. No. 186 (2015) [hereinafter *BFI*], the NLRB vastly expanded its definition of "joint-employer." Reversing decades' old precedent, the NLRB now holds that "two or more entities are joint-employers of a single workforce if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment." *Id.* at *19. Notably, this definition does not require direct and immediate control over the terms and conditions of employment to create a joint-employer relationship. *Id.* at *17-18, 19. Rather, the mere right to indirectly control terms and conditions of employment, even if never exercised, creates a joint-employer relationship. *Id.* at *17, 19-20. Under this standard, advertisers and agencies arguably satisfy the definition of joint-employer, as well as any third-party signatories that non-signatory advertisers or agencies use to produce commercials under the Contract.

Indeed, the analysis employed by the NLRB amplifies this point. In evaluating whether two entities are, in fact, joint-employers, the NLRB applies a two-step inquiry to determine that: (1) a common-law employment relationship exists, and (2) the putative joint-employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining. *Id.* at *19.

Relevant factors the NLRB will consider include possessing the power (regardless of whether this power is exercised) to:

- Hire, fire and discipline employees;
- Supervise and direct the work/hours of employees;
- Set the wages, hours, schedules, seniority and overtime; and
- Assign work and determine the manner and method of work performance.

Id. at *21-24.

Even where an entity does not actively exert its authority in these areas, the company may still constitute a joint-employer. For example, imposing specific hiring criteria or conditions such as mandating a drug test is sufficient to share or codetermine the outcome of which employees are hired. *Id.* at *22. Likewise, where a non-signatory entity sets peripheral work policies, such as product quality or efficiency standards, the entity shares the right to supervise and direct the work of employees with the signatory employer. *Id.* at *23.

The expansion of this definition subjects "countless entities to unprecedented new joint-bargaining obligations that most do not even know they have." *Id.* at *25. Consequently, joint-employers must adhere to collective bargaining agreements and/or the status quo ante post-contract expiration to which they are not signatories, including paying the contractually mandated contributions to the employees' pension fund. Yet untested is whether the NLRB will find an unfair labor practice where a non-signatory joint employer fails to contribute to the withdrawal liability incurred by the signatory joint-employer. If found, the remedy for such a violation would include an order directing the non-signatory to contribute to the signatory-employer's withdrawal liability.

SAG-AFTRA leadership has already expressed their intentions to apply the NLRB's expansive definition of "joint-employer" to any non-signatories who think they can use third-party "shell" signatories to produce commercials. With its action against Droga5, SAG-AFTRA has made it clear that it will enforce the terms and conditions of the Contract, even against a non-signatory where such employer uses SAG-AFTRA talent. How the courts will enforce these claims is yet to be determined.

IV. CONCLUSION

Withdrawing from multi-employer bargaining will not provide employers with immediate relief from pension fund or other costs associated with the Contracts. Rather, financial savings are typically best accomplished through the collective bargaining process itself. Moreover, when seeking givebacks or other economic relief, multi-employer bargaining committees, especially those that enjoy "most favored nation" contractual protections like the JPC does in the Contract, are generally better positioned to extract such concessions from unions than an outlier single-employer engaged in its own negotiations with the union.