STATE OF MICHIGAN
IN THE THIRD JUDICIAL CIRCUIT COURT
COUNTY OF WAYNE

JAMES SHAKE,
an individual,

Plaintiff,

Case No. 19 - 016384 - NZ

-v-

Hon. Kevin J. Cox

INTERNATIONAL UNION,
UNITED AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS OF AMERICAN (UAW),

Defendant.

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COMBINED BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT'S JANUARY 24, 2020 MOTION TO DISMISS

AND

PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

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I. INTRODUCTION

Plaintiff has pled that his employer, the Defendant UAW, misled him into believing that he was required to pay dues to a local union of which he was a member. But there was no such local union, and Defendant kept and used Plaintiff's money for itself.

At the outset, and by way of important background information, it is important to note that the UAW in this instance was not operating as a union representing the Plaintiff employee's interests in the workplace. Although it may seem like a role reversal, the Defendant UAW was at all times relevant to the facts of this case operating as the employer of the Plaintiff employee. An employer cannot function as its employee's union. This is logical because neither an employer nor a union can bargain against itself. But it is more than logic, it is against the law. An employer acting or controlling a union is called a 'company union' or, more derisively, a 'yellow union.' Federal labor law prohibits such company unions. 29 USC § 158(a)(2), being Section 8(a)(2) of the National Labor Relations Act, states in relevant part that: "(a) It shall be an unfair labor practice for an employer - (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it…" The National Labor Relations Board describes this section of the law in the following way:[1]

> Employees have the right to be represented by a union of their choice - not their employer's. Thus, for example, it is unlawful for an employer to recognize a union that lacks majority employee support (except in the construction industry), or that has majority support only because an employer coerced it.
> Section 8(a)(2) of the Act makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." (An employer that violates Section 8(a)(2) also derivatively violates Section 8(a)(1).) For example, you may not:
> Establish and control a "company union."

[1] https://www.nlrb.gov/rights-we-protect/whats-law/employers/interfering-or-dominating-union-section-8a2 Last accessed January 29, 2020.

The significance of this is that, throughout its Motion to Dismiss ("Defendant's Motion") and its Brief in Support of Defendant's Motion to Dismiss ("Defendant's Brief"), the UAW has admitted that there was no "Local X" union, despite the fact that it categorized, coerced, and continued to receive Plaintiff's payments by stating that there existed a local union called Local X to which Plaintiff was paying dues. In Defendant's Brief at pages 1-2, Defendant states, in apparent reference to Plaintiff and similarly-situated employees: "These types of employees are often not eligible for membership because they are not employed at a workplace where the UAW serves as their collective bargaining representative. The Union believes that it is nonetheless important that they – like other members of the International staff – contribute their fair share. The authorization form signed by Plaintiff is the administrative mechanism by which these contributions are made. They are deposited into the Union's general fund along with ordinary dues payments." In Defendant's Motion at page 2, it is more explicit: "there was no local union to which dues would be forwarded." Yet the un-contradicted evidence of the documents which Plaintiff has attached to his Complaint show that the dues authorization was for a "Local Union No. X ", and that it was an "AUTHORIZATION FOR DUES CHECKOFF." (See Exhibit A attached to Plaintiff's Complaint.) Further, on each individual paycheck, the Defendant stated that these payments were deducted for "Staff Dues, Local 000X." See Exhibit I, a copy of Plaintiff's paystub, attached to this Brief. Similarly, Defendant reported this payment as "Dues" on Plaintiff's W-2 forms submitted to the IRS. (See Exhibits B-F attached to Plaintiff's Complaint.) Yet these payments were not dues, an amount for a local union, nor any kind of payment to a union which represented him as his bargaining unit representative in matters related to the UAW employer.

Now Defendant has admitted that these were not dues. These were only a payment by the employee back to his employer under threat of being fired – a kickback. Black's Law Dictionary, Abridged Ninth Edition, defines a kickback as: "A return of a portion of a monetary sum received, esp. as a result of coercion or a secret agreement. … Also termed *payoff*. Cf. BRIBERY."

II. STANDARD OF REVIEW

When addressing a motion under MCR 2.116(C)(7), the court considers all documentary evidence submitted by the parties. See, for example, *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). Furthermore, the court must "accept as true the allegations of the complaint unless contradicted by the parties' documentary submissions." See, for example, *Terlecki v Stewart*, 278 Mich App 644, 649; 754 NW2d 899 (2008).

"A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim. When reviewing a decision on a motion under MCR 2.116(C)(10), this Court must examine all relevant documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists on which reasonable minds could differ. Where the moving party has produced evidence in support of the motion, the opposing party bears the burden of producing evidence to establish that a genuine question of material fact exists for trial." *Arthur Land Co v Otsego County*, 249 Mich App 650, 666; 645 NW2d 50 (2002). In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

III. ARGUMENT

A. Fraud was properly pled with sufficient specificity, and Defendant's Motion and Brief have filled in any facts which were in question.

Defendant states that: "These allegations are insufficient under the minimal pleading standards of MCR 2.116(C)(8), let alone the heightened requirements for fraud under MCR 2.116(B(1)." (sic) (Plaintiff believes Defendant is claiming that he has failed to meet the heightened requirements for fraud under MCR 2.112(B)(1), and will treat it as such.) The purpose of the heightened pleading requirement for fraud has been stated as:

> [P]laintiff [must allege] the circumstances of the fraud or misrepresentation "with sufficient particularity to apprise the opposite party of the nature of the case he must prepare to defend." 1 Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), Rule 2.112, p 242; see also MCR 2.111(B)(1).

Kassab v Michigan Basic Prop Ins Assoc, 185 Mich App 206, 213; 460 NW2d 300 (1990), mod on other grounds 441 Mich 433; 491 NW2d 545 (1992).

The elements which must be pled are:

> As a general rule, actionable fraud consists of the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage.

Hi–Way Motor Co v Int'l Harvester Co, 398 Mich 330, 336; 247 NW2d 813 (1976).

It is clear that false representations can be made through documents. Further, when evaluating representations, documents take precedence over any verbal representations:

> A misrepresentation claim requires reasonable reliance on a false representation. See State–*William Partnership v Gale*, 169 Mich App 170; 425 N.W.2d 756 (1988). … Here, plaintiff acknowledged that he read the at-will employment language in the various documents presented to him and that Lerner could not alter the terms of the employment agreement. He chose to believe Lerner rather than the signed contract. [*Webb v First of Michigan Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992)], supra, at p. 475.

Nieves v Bell Industries, Inc, 204 Mich App 459, 464-5; 517 NW2d 235.

The following are the specific instances which Defendant alleges causes Plaintiff's Complaint to be insufficient:

1. Defendant alleges that Plaintiff's allegations that he was told that he was part of a local union were merely conclusory. "Then Plaintiff makes the wholly conclusory allegation that 'Defendant' 'made material representations that Plaintiff was part of a bargaining unit represented by a local union and that dues for this local union had to be deducted from his pay check.' (¶41)"

In response, Plaintiff can again point to Exhibits A-F which accompanied paragraphs 9 – 17 of his Complaint, as well as the newly added affidavit Exhibit H and Exhibit I. Plaintiff has alleged that Exhibit A (with the hand-written notes removed) is identical to the document Plaintiff signed under pressure. The document states on its face that these were dues. Exhibit A clearly states that it was for "dues" to "Local Union No. X ." These documents in Exhibits A-F and I, by their plain language, contain material representations. If an employer presents documents to an employee, surely he is expected to take these at face value. These documents state that they are dues for a local union, and therefore speak for themselves. Exhibits B-F and I repeat material statements that these were "Dues" which were reported to the IRS. Exhibit I, the paystub, shows further misrepresentations each week these were deducted from his paycheck. These were material, and Plaintiff relied on these to his detriment. These were pled "with sufficient particularity to apprise the opposite party of the nature of the case he must prepare to defend." *Kassab*, supra.

2. "Plaintiff does not even allege with specificity the time, place or content of the allged [sic] misrepresentation on which his claim is premised: namely, that a local union would serve as his collective bargaining representative. (¶42)"

Plaintiff has pled that he was told he must join a "Local X." This is clearly represented in paragraphs 9-12 of his Complaint along with Exhibit A, and now the Exhibit H affidavit.[2] The time is specified to a degree reasonable enough for Defendant to know what it is defending against – "mid-November 2014." Furthermore, the exact date is in the possession of Defendant, as Plaintiff has properly pled in a Verified Complaint, that he is not in possession of the actual signed document. See paragraphs 10 and 11 of the Complaint and Exhibit H. Exhibit A was a preliminary and unsuccessful attempt by Plaintiff to negotiate. The actual Local X dues withholding form is in the possession of Defendant.

If Defendant is alleging that the single paragraph 42, taken in isolation, contains no specific allegations, Plaintiff notes that the Complaint states that the allegations in that Count III are taken together with the general allegations: "The allegation stated in Count III, along with the general allegations, state with particularity the circumstances surrounding this fraud." Fn 3, page 7. Defendant cannot reasonable claim it lacks notice of what conduct it is accused of engaging in that was fraudulent.

3. Defendant states, at page 4 of Defendant's Brief, that Plaintiff:

> [C]an only allege "on information and belief" that "Defendant" made the representations with the intention that Plaintiff would act on them. (¶44) As the Sixth Circuit has explained under the analogous federal rule, Fed. R. Civ. P. 9(b):
>
> > [G]eneralized and conclusory allegations that the defendant's conduct was fraudulent do not satisfy Rule 9(b). It necessarily follows that allegations of [fraud] cannot be based on "information

[2] Plaintiff is away on vacation and has written and approved the language of the attached Affidavit. Plaintiff's counsel will file a notarized affidavit saying the same as soon as possible.

> and belief," except where the relevant facts lie exclusively within the knowledge and control of the opposing party, and even then, the plaintiff must plead a particular statement of fact upon which his belief is based.
>
> *Craighead v E.F. Hutton & Co, Inc*, 899 F.2d 485, 489 (6th Cir 1999) (citations omitted).

In response, Plaintiff points out that Defendant ignores the wording of the passage it cited. There is an important exception to when a plaintiff can base an allegation on "information and belief." "[E]except where the relevant facts lie exclusively within the knowledge and control of the opposing party, and even then, the plaintiff must plead a particular statement of fact upon which his belief is based." *Craighead*, supra.

In all of Plaintiff's allegations that include "upon information and belief," these were regarding things in the knowledge and control of the opposing party. Plaintiff pled matters "on information and belief" where he alleged that: (1) The UAW used the supposed Local X funds for the UAW's own use, and not for that of any union representing the Plaintiff. See paragraphs 23, 34, and 51 of the Complaint. Where the money went after it was taken from Plaintiff's paycheck and what accounts it was deposited into is something within the exclusive control of Defendant. Furthermore, that the UAW used Plaintiff's money for its own purposes is now something that has been admitted by Defendant: See Defendant's Brief at pages 1-2, and Defendant's Motion at page 2. (2) That the signed dues withholding form is in the possession of Defendant. See paragraph 11 of the Complaint.[3] (3) That there was no Local X or any other union representing Plaintiff. See paragraphs 27, 41, and 42. Again, Defendant has now admitted this and it cannot say that there has been insufficient pleading on a crucial factual matter that it has now admitted. (4) The state of mind of the UAW officials. Plaintiff cannot be expected to

[3] Defendant has not yet produced the signed agreement at issue. Discovery has not yet occurred.

read minds and state with certainty in a verified complaint what the UAW officials were thinking. That is within the exclusive knowledge and control of the opposing party.

4. Defendant states that: "The fatal flaw in Plaintiff's fraud claim is that he never identifies any individual who made the alleged representations, nor does he specify when the representations were made or precisely what was said. Although Plaintiff describes in some detail a meeting he had with Chuck Browning in November 2014 (¶11), Plaintiff conspicuously fails to allege that Browning, or anyone else, ever said anything about membership in any local union, told him that his dues would be going to any local union or a 'Local X,' or that he would be represented by any local union."

In response, Plaintiff again restates what he said in points 1 and 2 – the documents themselves refer to a local union and dues for a local union. As regards Exhibit A, the document itself said that it was an "AUTHORIZATION FOR DUES CHECKOFF." It says there is a "Local Union No. X." Exhibits B-G clearly show that the withholding was for "DUES." Exhibit I says it was for "Staff Dues, Local 000X." Defendant seems to be alleging that Plaintiff has failed to reproduce everything which was said verbally surrounding the contract. But as shown in *Nieves*, supra, it is the representations in the documents that take precedence over any accompanying verbal statements. For that reason, among others, Plaintiff has a right to rely on the representations made in the documents to make his case. And, of course, in paragraph 11 of his Complaint, Plaintiff does include specific allegations as to what Chuck Browning said to him.

5. Defendant, in its Brief at pages 5-6, says that Plaintiff, despite the explicit wording of the dues withholding agreement and the IRS filings, could not have reasonably believed that he was being represented by a local union:

> More important, Plaintiff cannot state a claim for fraud because the complaint on its face shows that his reliance on the alleged misrepresentation was not reasonable.

> From the beginning, Plaintiff knew that there was no local union representing him and that his dues would not be going to any local union. This is obvious from Exhibit A itself, which is attached to and part of the complaint. This "Authorization For Dues Checkoff" form presented to Plaintiff states that "This is to advise you that I wish to avail myself of the monthly dues checkoff for *International Union* staff. (emphasis supplied)
> ***
> Thus, on its face, the form cannot possibly be read to say what Plaintiff alleges: that the form states he was represented by a local union and that his dues would be going to a local union.

In response, Plaintiff states that this is nonsensical. First, as clearly pled in paragraphs 11 and 12 of the Complaint, Plaintiff made it clear that the copy of the dues withholding agreement provided as Exhibit A, which contains the handwritten changes, was his unsuccessful attempt to negotiate. (See also the attached affidavit, Exhibit H.) It is not the actual agreement itself. The actual agreement is in possession of Defendant, and Plaintiff has averred that it does not contain any alterations. The actual agreement is, in content, like Exhibit A without the handwritten changes. That un-altered form is the agreement/contract which is at issue.

But even if the court where to consider the handwritten notes as some sort of extrinsic evidence (which it cannot due if the actual contract is clear and unambiguous on its face – see, for example, *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010)), the handwritten notes are not capable of the interpretation Defendant attributes to them. For example, Defendant emphasizes the language of the agreement which states, "I wish to avail myself of the monthly dues checkoff for International Union staff." Defendant seems to believe that this means that Plaintiff knew he was not being required to pay local union dues (despite the form's language) because it was a "dues checkoff for International Union staff." But Defendant's interpretation makes no sense. Plaintiff *was* a member of the International Union staff, but the International Union, Defendant UAW, could not have been the union representing him. He could not have expected to pay dues to the UAW. As discussed in the introduction, a union cannot represent its

own employees. Another, third-party union has to come in to do that. Plaintiff noted in his Complaint, at paragraph 21, that there were at least two other such unions that represented International Union headquarter staff. Staffers of a union can themselves be represented by unions, but these cannot be the union that employs them. And one would not need to be familiar with 29 USC § 158(a)(2) to know that a union cannot represent its own employees as their union – common sense says that it cannot bargain against itself. So the form gave no indication to Plaintiff that he was represented by any other union that the non-existent Local X to which he was told he was paying dues.

The fact that Plaintiff tried to avoid paying dues altogether and initially noted "N/A - no UAW Local dues" in an attempt to negotiate has no bearing on what was the final agreement. Same for where Defendant claims that Plaintiff's attempt to pay no dues shows he knew that there was no Local X: "This blank was not filled in and remained blank. In other words, no amount, i.e. zero, was identified as local union dues." Again, this was a preliminary negotiation that was not in the final agreement, and is meaningless as to what the final agreement says as we don't need or allow extrinsic evidence to interpret a contract which is clear on its face. But even if it were considered, the attempt by Plaintiff to avoid paying local dues until he was pressured to do so under the threat of losing his job is entirely consistent with what he has pled.

6. In an amazing footnote 7, Defendant's Brief page 6, Defendant essentially argues what amounts to saying that no one can ever bring a cause of action for fraud and win. Because if a plaintiff is able to prove fraud, then the plaintiff could have found out before bringing his legal action that he was being defrauded; and therefore he cannot bring his cause of action. Consider what Defendant points out Plaintiff and his lawyers did to bring this Complaint:

> Even if Plaintiff had been unaware that there was no "Local X" acting as his collective bargaining representative, this knowledge was a matter of public record

> and available to him, as it was to anyone. Every labor organization subject to the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. §§453, et seq., must file a financial report, Form LM-2, LM-3 or LM-4, each year with the Office of Labor-Management Standards ("OLMS") of the U.S. Department of Labor. The OLMS makes these documents readily available to the public, https://olms.dol-esa.gov/olpdr/. Here, any member of the public can find Forms LM-2, LM-3, LM-4, Simplified Labor Organization Financial Reports, as well as union Constitutions and Bylaws. As Plaintiff concedes, he has researched this information and "found no union which could be the mysterious Local X by that or any other name." (¶22) Thus Plaintiff in his complaint tacitly concedes that he had the means to discover that "Local X" is not a labor organization representing him. Whether or not he knew this at the time he signed the form, he reasonably should have known, and thus his fraud claim fails because he cannot establish reasonable reliance.

Plaintiff responds in the following way: First, even extensive research could not conclusively prove that there was no Local X. The absence of proof is not proof of absence. Plaintiff properly alleged that he never saw evidence of union representation of himself or a bargaining unit which represented him and similarly-situated employees. See Complaint paragraph 20 and Exhibit H. But sadly, such lack of action does not prove that such a union does not exist. Until Defendant admitted in its Motion and Brief that there was no Local X, nor any other union by any name representing Plaintiff, he had no way of being sure of that. But that is all a moot point because we now know through Defendant's admissions that there was no such union and Defendant took Plaintiff's money for itself.

Next, as we have seen in *Nieves*, a person can reasonably rely on documents that are before him. To rely on extrinsic knowledge outside of the documents is what is unreasonable:

> Here, plaintiff acknowledged that he read the at-will employment language in the various documents presented to him and that Lerner could not alter the terms of the employment agreement. He chose to believe Lerner rather than the signed contract.

Nieves, supra. Here, Plaintiff read the language of the dues withholding agreement and his UAW-provided paycheck stubs and tax statements presented to him. If he had believed anything else, including representations of UAW officials, *that belief would have been unreasonable*

under Nieves. Similarly, see *Webb v First of Michigan Corp*, 195 Mich App 470, 474-5; 491 NW2d 851 (1992), wherein a plaintiff who complained of fraud was denied his claim. In *Webb*, the plaintiff claimed to have relied on statements by an investment broker that promised results were "risk free." *Webb* at page 474. But the court denied his claims because he had been given a prospectus which clearly stated that there where risks. "Beginning on page four of the prospectus, the risk factors involved are explained in detail and cover 3½ pages. Even a cursory review of any of these documents would have enlightened plaintiffs that the investment was not "risk free" as represented by the broker." *Id* at 474-5. Notice again how this is the opposite of what Defendant is claiming – Plaintiff read the documents and believed them, but Defendant claims that it would have been more reasonable to rely on rumor and suspicions, and therefore his case must be dismissed. *Schuler v. American Motors Sales Corp*, 39 Mich App 276; 197 NW2d 493 (1972), is another one. In *Schuler*, the plaintiff claimed to have relied on verbal misrepresentations about inventory in a business sale. However, "The representations made by the defendants as to the above-mentioned inventories were contained in a financial statement and supporting schedules, which spoke as of March 31, 1966. The statement and schedules were given to plaintiff and reviewed with him by a representative of defendants on April 19, 1966. Although plaintiff testified that he did not read all of the supporting schedules, he did admit that he had signed each one." *Schuler* at 279. Again, and at the risk of repetition, if a plaintiff has the documents he has to rely on those. This is entirely different from what Defendant states is the law.

Lastly, the standard is what the plaintiff should have "reasonable known." The standard is not what he could have found out by hiring a team of lawyers, filing a case, and receiving a response. Look back at the research Defendant accurately recites in his footnote 7:

> Every labor organization subject to the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. §§453, et seq., must file a financial report, Form LM-2, LM-3 or LM-4, each year with the Office of Labor-Management Standards ("OLMS") of the U.S. Department of Labor. The OLMS makes these documents readily available to the public, https://olms.dol-esa.gov/olpdr/. Here, any member of the public can find Forms LM-2, LM-3, LM-4, Simplified Labor Organization Financial Reports, as well as union Constitutions and Bylaws. As Plaintiff concedes, he has researched this information and "found no union which could be the mysterious Local X by that or any other name." (¶22) Thus Plaintiff in his complaint tacitly concedes that he had the means to discover that "Local X" is not a labor organization representing him.

This degree of research is not reasonably necessary to engage in when a plaintiff is provided with documents that clearly state a matter. Plaintiff and counsel did do this research before bringing this case, but even then could not ascertain for certain whether or not Local X existed. As noted before, the absence of proof is not proof of absence. Just because they could not find a likely local union to which he was paying dues did not prove that one did not exist. Until Defendant's admission in response to this lawsuit, Plaintiff did not have concrete proof that the documents he was presented with did not mean what they said, or that the Defendant misrepresented to Plaintiff and the IRS the true nature of what was being withheld.

Defendant's entire request for dismissal of the count of fraud can be summed up as: 'Yes, we misrepresented the existence of a local union, and filed fraudulent documentation with the IRS. But you cannot recover. It's your error – you trusted us.'

B. Plaintiff's reading of the contract is the only meaning that can reasonably be attributed to the dues withholding agreement.

Defendant alleges, based on the notes by Plaintiff during his attempt to negotiate the agreement, that the agreement does not say what Plaintiff says it does. But stripped away of those notes, as the final document was, the contract clearly says what Plaintiff claims it does. Stripped of the handwritten notes, the contract states:

Name _____

Employee No. _____
Local Union No. _____
Dept. _____

AUTHORIZATION FOR DUES CHECKOFF

THIS IS TO ADVISE YOU THAT I WISH TO AVAIL MYSELF OF THE MONTHLY DUES CHECKOFF FOR INTERNATIONAL STAFF.
IT IS UNDERSTOOD THAT THE MONTHLY DEDUCTION WILL BE BASED ON THE FOLLOWING FORMULA.

YEARLY SALARY DIVIDED BY 2080 HOURS (52 TIMES 40 HOURS) TIMES 2.5 HOURS.
MY LOCAL UNION HAS DUES IN THE AMOUNT OF _____ PER MONTH.
PLEASE ADD THIS AMOUNT TO MY REGULAR TWO HOURS PAY MONTHLY DUES DEDUCTION.

THIS AUTHORIZATION SUPERCEDES (sic) ANY PREVIOUS DUES AUTHORIZATION

It is uncontested that the Defendant proffered this agreement. This agreement was between the Defendant UAW and the Plaintiff. The agreement is named "Authorization for dues checkoff." It is explicit in that these were "dues" that where being withheld. These were not contributions to Plaintiff's employer. "Dues." This was a dues checkoff "for International Union Staff." It is undisputed that Plaintiff was a staff member of the International Union. The full name of the UAW, as spelled out in caption, is "International Union, United Automobile, Aerospace and Agricultural Implement Workers of America." Therefore, this agreement was for him, as a staff member and an employee, to have his dues deducted. Deducted for and forwarded to whom? The only indication was that it was for Local X. Local X is the only non-UAW union listed on the form. But even if that was not clear on the face of the contract, these could not have been dues for the employer UAW. As noted in the introductory section, an employee cannot pay union dues to his employer, even if his employer is a union. A union cannot charge its own employees dues because it cannot represent them. Therefore the only reading that makes any

sense is that the agreement was for the Plaintiff's dues for Local X to be withheld from his paycheck.

Therefore, if Defendant UAW took these "dues" and applied those amounts to anything other than Local X or some other union representing Plaintiff in a bargaining unit, it failed to perform its end of the bargain. It took money and kept it for itself. No reading of the contract can be read to say that 'I am agreeing to pay an amount equivalent to dues back to my employer.' It is clear on its face that this is not what the agreement says. Therefore, Defendant has not performed what it said it would do in the agreement, and Plaintiff's claim for breach of contract is valid. Moreover, Defendant has already admitted that it kept these amounts. No further factual development is necessary to rule for Plaintiff.

Lastly, as previously noted, the handwritten notes provide no admissible evidence where, as here, the contract at issue (which is in possession of Defendant and does not include those notes) is clear on its face and does not allow for extrinsic evidence. *Shay*, supra. Nevertheless, the notes lend credence to what Plaintiff has alleged. He did not want to pay any dues to a local union – that is clear in his handwritten notations. Yet when his job was threatened if he did not pay these 'local dues,' he relented. This was pled in paragraphs 10 and 11 of the Complaint.

There is no further factual matter to be determined. The agreement states that it is was for withholding dues for a local union. Defendant admits that there is and was no such local union and that it kept the proceeds.

C. Plaintiff has established his fraud claim, and the conversion claim follows from the same set of actions as well.

Defendant claims that Plaintiff has not established the elements of fraud. In Argument A above, Plaintiff has spelled out how he has properly pled and proven the elements of fraud. Defendant alleges that its possession of Plaintiff's money, despite the agreement he signed which

said that the money was destined for a local union, was nevertheless lawful because it alleges (without proof) that Plaintiff knew that there was no local union. As above, the sole evidence offered for this assertion is that he initially tried to avoid paying any local dues. Defendant's Brief at page 8:

> An essential element of conversion is that it must be premised on wrongful conduct. Conversion claims are based on "dominion wrongfully exerted over another's personal property…" *Citizens Ins Co of America v Delcamp Truck Center Inc*, 178 Mich App 570, 576; 444 NW2d 210 (1989) (emphasis supplied). For claims involving conversion of money, "[t]he defendant must have obtained the money without the owner's consent to the creation of a debtor and creditor relationship." Id. … Plaintiff obviously knew when he signed the form that there was no local union to which his dues would be sent -- as his own handwriting on the form clearly shows.

This doesn't require any refutation other than what has already been argued above. Defendant has admitted that it kept the money in contravention of what the agreement said.

D. Defendant misstates the status of the law regarding repeated harmful actions in Michigan.

Defendant alleges that Plaintiff is outside the statute of limitations because the original dues withholding agreement was signed in November 2014. "The limitations period applicable to conversion is the three year period in MCL 600.5805(10) for 'actions to recover damages for . . . injury to a person or property.'"[4] Defendant correctly cites MCL 600.5827:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838,1 and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

[4] MCL 600.5805(10) is an older statute. Previously, MCL 600.5805(10) provided a three-year statute of limitations period for injuries to a person or property. MCL 600.5805(10), as amended by 2012 PA 582. Now, as of 2018, MCL 600.5805(2) provides for that same three-year statute of limitations period. See 2018 PA 183.

Defendant correctly cites our Supreme Court's decisions which abrogated what had previously been allowed under what is called the "continuing harms" doctrine. See *Henry v Dow Chemical Co*, 501 Mich 965; 905 NW2d 601 (2018), *Trentadue v Buckler Automatic Sprinkler Co*, 479 Mich 378, 388; 738 NW2d 664 (2007) and *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 282; 696 NW2d 646 (2005).[5] However, Plaintiff does not rely on the continuing harms doctrine. Plaintiff relies on the different doctrine related to repeated discrete violations:

> Courts have long distinguished continuing violations, which toll the applicable statutes of limitations, from repetitive discrete violations, which constitute independently actionable individual causes of action. For instance, in *Gandy* [v *Sullivan County*, 24 F.3d 861, 864 (6th Cir.1994)], we noted that each check based on a discriminatory method of calculating pay constitutes a separate violation of the Equal Pay Act, and we concluded that the plaintiff was entitled to a recovery based on any such checks received within the limitations period. 24 F.3d at 863–64.

National Parks Conservation Ass'n, Inc v Tennessee Valley Authority, 480 F.3d 410, 417 (CA6 2007).

First, in *Garg*, the Supreme Court held that the plain language of MCL 600.5827 abrogates the common-law continuing harms or violation doctrine which had allowed plaintiffs to look back beyond the period outside the statute of limitations to prove factual matters: "the 'continuing violations' doctrine allowed the introduction of factual allegations going back more than three years before plaintiff filed her lawsuit and thus the statute of limitations was not a bar to the facts plaintiff presented to the jury." *Garg* at 271. Next, *Trentadue*, also based on the language of MCL 600.5827, abrogated the discovery rule which had allowed a tolling of the

[5] *Henry* involved nuisance and negligence. *Trentadue* was a wrongful death action. *Garg* was a civil rights employment claim. None of these Supreme Court decisions discussed conversion or fraud directly, but as all rely on interpretation of MCL 600.5805 and MCL 600.5827, Plaintiff believes that these apply to fraud and conversion as well.

accrual date when an element of the wrongful act was present, and not known by the plaintiff, or could not reasonably have been discovered by the plaintiff. *Trentadue* at 407. *Henry* adopted the reasoning of a court of appeals dissent, at 965. The court of appeals dissent by Judge Gadola in *Henry v Dow*, 319 Mich App 704, 720-1; 905 NW2d 422 (2017), which was adopted by our Supreme Court, sums up the previous two opinions:

> Although defendant argues otherwise, we find that our conclusion is consistent with our Supreme Court's holdings in *Trentadue and Garg v. Macomb Co. Community Mental Health Servs.*, 472 Mich. 263, 696 N.W.2d 646 (2005). In *Trentadue*, the Supreme Court abrogated the discovery doctrine after finding that the "the statutory scheme is exclusive and thus precludes th[e] common-law practice of tolling accrual based on discovery in cases where none of the statutory tolling provisions apply." *Trentadue*, 479 Mich. at 389, 738 N.W.2d 664. The Court explained that "[u]nder a discovery-based analysis, a claim does not accrue until a plaintiff knows, or objectively should know, that he has a cause of action and can allege it in a proper complaint." Id. at 389, 738 N.W.2d 664. However, the *Trentadue* Court confirmed that a claim accrues when the wrong is done, and "[t]he wrong is done when the plaintiff is harmed[.]" Id. at 388, 738 N.W.2d 664. In *721 other words, *Trentadue* abrogated the discovery rule, which had applied to extend the period of limitations on a claim for which all of the elements were present, but one or more of the necessary elements was unknown, or should not reasonably have been known, to the plaintiff. It does not follow that application of the discovery doctrine was necessary to extend the period of limitations on a claim that had not yet accrued because one of the elements was not yet present. Presence of a necessary element and knowledge of an existing cause of action are simply not the same. Application of the discovery doctrine was not necessary to save plaintiffs' claims from the period of limitations, which did not begin to run until all the elements of plaintiffs' nuisance and negligence claims were present. The *Trentadue* Court's abrogation of the discovery doctrine does not limit our decision here.
>
> Similarly, in *Garg*, 472 Mich. at 290, 696 N.W.2d 646, the Michigan Supreme Court expressly abrogated the "continuing-wrongs doctrine" after finding that use of the doctrine was contrary to the express intent of the Legislature. The continuing-wrongs doctrine, an exception to the statute of limitations that was previously recognized by our courts, states that "[w]here a defendant's wrongful acts are of a continuing nature, the period of limitation will not run until the wrong is abated; therefore, a separate cause of action can accrue each day that the defendant's tortious conduct continues."

Henry at 720-721.

Note that none of these dealt with nor barred recovery for repeated actions which, while they may have begun before the time allowed under the statute of limitations, continued and repeated with each new act meeting the elements of the cause of action. Rather, *Garg* explicitly restated that a plaintiff could recover for those injuries within the period of time allowed for within the statute of limitations period. "Accordingly, plaintiff's plaintiff's (sic) claims of retaliatory discrimination arising from acts occurring before June 21, 1992, are untimely and cannot be maintained. Without these untimely acts, ***plaintiff's claim is limited to acts occurring five to eleven years after she filed her grievance***." *Garg* at 286 (emphasis added). And, importantly: "Nothing in these provisions permits a plaintiff to recover for injuries ***outside*** the limitations period when they are susceptible to being characterized as 'continuing violations.'" *Garg* at 282 (emphasis added). Recovery for separate acts within the statute of limitations is allowed.

To hold otherwise would be absurd. Consider what Defendant here is arguing: If a defendant conducts repeated fraudulent acts, each fraudulent act discrete and repeated at different times (such as withholding fraudulent dues from each paycheck), the defendant can defeat all of a plaintiff's claims if he just avers that he actually began the fraudulent conduct more than three years prior to the complaint being filed. This would bar a plaintiff from any recovery for fraud or conversion, even for individual acts conducted separately after the statute of limitations began to toll. There is no opinion that holds this. Nor does it matter whether the discovery rule bars the November 2014 meeting (which is still very much an evidentiary part of this case as it is allowed under the contract claim), because although Defendant threatened and initially induced Plaintiff on November 2014, each withdrawal from his paycheck, and each W-2 tax form was a new and separate violation which falsely reported that dues were being withheld

for Local X. (See Exhibit I, which reproduces Plaintiff's pay stub from September 6, 2018, clearly showing $157.36 withheld for "Staff Dues, Local 000X" during that pay period, and $1,463.64 for that year up through that date.) Each withdrawal was for the ostensible stated purpose of paying dues to a local union, and each was instead used by the UAW, per the admissions of Defendant. The claim that it was being taken for dues was false each and every time it was made, despite when the initial claim was made. Nothing bars Plaintiff from recovering the majority of his claims for fraud and conversion, nor all of his contract claims.[6]

III. CONCLUSION

For the reasons stated herein, Defendant's Motion to Dismiss under MCR 2.116(C)(7) and (8), should be denied. Instead, Plaintiff's counter Motion to Dismiss under MCR 2.116(C)(10) should be granted as there are no genuine issues of material fact that need to be resolved, and Plaintiff is entitled to judgment on all his Counts as a matter of law.

In the alternative, per MCR 2.116(I)(2), in response to Defendant's Motion this court could rule on Defendant's Motion that it is the opposing party, and not Defendant, who is entitled to judgment, and the court could render judgment in Plaintiff's favor, and award Plaintiff his damages, costs and attorney fees.

Respectfully Submitted,
February 6, 2020

MACKINAC CENTER LEGAL FOUNDATION

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[6] Plaintiff's Local X dues withdrawn in 2016 were $1,985.67. The amounts paid from December 6, 2016 through the end of the year amount to 6.8% of the total (25 days/366 days = 6.8%) comes to $135.63. Nothing bars recovery of $1,961.49 in 2017, and $1,463.64 in 2018. The total within these three years comes to $3,560.76, and when treble damages are allowed per MCL 600.2919a, these damages amount to $10,682.28. For the period before December 6, 2016, Plaintiff is still entitled to his contract damages as the statute of limitations is six years, per MCL 600.5807(9).