No. _____

In The
Supreme Court of the United States

UNITE HERE LOCAL 355,

Petitioner,

v.

MARTIN MULHALL; HOLLYWOOD GREYHOUND TRACK, INC. d/b/a MARDI GRAS GAMING,

Respondents.

On Petition For Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

RICHARD G. MCCRACKEN*
ANDREW J. KAHN
PAUL L. MORE
DAVIS, COWELL & BOWE LLP
595 Market Street, Suite 1400
San Francisco, CA 94105
(415) 597-7200
rmccracken@dcbsf.com

Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Section 302 of the Labor-Management Relations Act, 29 U.S.C. § 186 – the federal labor anti-bribery statute – makes it criminal for an employer "to pay, lend, or deliver . . . any money or other thing of value" to a labor union that seeks to represent its employees, and prohibits the labor union from receiving the same. The Third and Fourth Circuits have held that agreements between employers and unions that set ground rules for union organizing campaigns – including employer promises to remain neutral and recognize the union upon a showing of majority support, and union promises to forego the rights to picket, boycott, or otherwise put pressure on the employer's business – are not "payment" of "things of value" proscribed by § 302. The Third Circuit found that a contrary holding would "wreak havoc on the carefully balanced structure of the laws governing recognition of and bargaining with unions." *Hotel Employees & Restaurant Employees, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206, 219 (3d Cir. 2004), *cert. denied*, 125 S.Ct. 1944 (2005). In this case, however, the Eleventh Circuit came to the opposite conclusion. The question presented is:

Whether an employer and union may violate § 302 by entering into an agreement under which the employer exercises its freedom of speech by promising to remain neutral to union organizing, its property rights by granting union representatives limited

QUESTION PRESENTED – Continued

access to the employer's property and employees, and its freedom of contract by obtaining the union's promise to forego its rights to picket, boycott, or otherwise put pressure on the employer's business?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit were Petitioner UNITE HERE Local 355 (the "union"), Respondent Martin Mulhall, and Co-defendant Hollywood Greyhound Track, Inc. d/b/a Mardi Gras Gaming ("Mardi Gras" or the "employer"). None of these parties has a parent corporation or is owned by a publicly held company. The United States Department of Justice; United States Department of Labor; the National Labor Relations Board; the American Federation of Labor and Congress of Industrial Organizations; Change to Win; Communications Workers of America; International Brotherhood of Teamsters; Service Employees International Union; United Automobile Workers; United Food and Commercial Workers International Union; United Steel Workers; and National Federation of Independent Business Small Business Legal Centers appeared as *amici curiae* in the Court of Appeals.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

PETITION FOR WRIT OF CERTIORARI

Petitioner UNITE HERE Local 355 respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit from which this petition for writ of certiorari is taken is reported as *Mulhall v. UNITE HERE Local 355 et al.,* 667 F.3d 1211 (11th Cir. 2012) ("*Mulhall II*"). App. 1-12. A previous appellate decision is reported as *Mulhall v. UNITE HERE Local 355 et al.*, 618 F.3d 1279 (11th Cir. 2010) ("*Mulhall I*"). App. 34-60. The order denying the petition for rehearing and for rehearing *en banc*, App. 61-62, is not reported. The opinions of the district court, App. 13-23 and App. 24-33, are not reported.

JURISDICTION

The Court of Appeals entered its judgment on January 18, 2012. App. 1. It denied the union's petition for rehearing on April 25, 2012. App. 61-62. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 302 of the Labor-Management Relations Act of 1947 ("LMRA" or "Taft-Hartley amendments"), 29 U.S.C. § 186, provides in relevant part:

> (a) [Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations] It shall be unlawful 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 –
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (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;
>
> (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

(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.

(b) [Request, demand, etc., for money or other thing of value]

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) [of this section].

* * *

(c) [Exceptions] (omitted).

STATEMENT OF THE CASE

The Eleventh Circuit has become the first court since the LMRA was enacted to hold that an agreement between an employer and a union setting ground rules for organizing – including promises by the employer not to oppose union representation, to let the union onto its property to talk to employees, and to give the union employees' names and addresses, and promises by the union to forego its rights to picket, boycott or otherwise put pressure on the employer's business – may violate LMRA § 302, 29 U.S.C. § 186. The theory has been pressed on other courts, all of

which have rejected it soundly. *Adcock v. Freightliner LLC*, 550 F.3d 369, 374-76 (4th Cir. 2008); *Sage Hospitality*, *supra*, 390 F.3d at 218-19. This Court and the courts of appeals have unanimously and for decades enforced agreements of the sort at issue here. Only now, 65 years after the passage of the Taft-Hartley amendments to the National Labor Relations Act, 29 U.S.C. §§ 151-169 ("NLRA" or the "Act"), has the propriety of this important part of cooperative labor-management relations been put in doubt.

Mardi Gras and the union entered into a Memorandum of Understanding ("neutrality agreement"). App. 78-86. The neutrality agreement required Mardi Gras to voluntarily recognize the union as the representative of its employees if a majority gave written authorizations to the union to be their agent. App. 81-82, ¶ 9. It also provided that if the union conducted an organizing campaign among the employees, Mardi Gras would remain neutral and would not try to influence its employees' decision one way or another. App. 79, ¶ 4. Mardi Gras promised to allow the union to communicate with its employees by letting union representatives onto its premises and giving the union its employees' names and addresses. App. 80-81, ¶¶ 7, 8. In return, the union promised not to strike, picket, or engage in other economic action against Mardi Gras while the neutrality agreement was in effect. App. 82, ¶ 11. The decision below states erroneously that the union promised to refrain from taking such actions only "if recognized as the exclusive bargaining agent for Mardi Gras's employees."

App. 3. In fact, the union promised not to take such actions "[d]uring the life of" the neutrality agreement, not merely if it was recognized as the Mardi Gras employees' collective bargaining representative. App. 82, ¶ 11. The parties further agreed that the agreement would not take effect until Mardi Gras had installed slot machines. App. 85, ¶ 15.

The union supported a successful Florida ballot initiative legalizing slot machines at racetracks in the Miami-Dade area, including Mardi Gras. App. 38. After the initiative passed, Mardi Gras installed slot machines, and the union engaged in organizing activity among the employees. There has also been arbitration under the neutrality agreement. App. 38-39.

Plaintiff brought this action against UNITE HERE Local 355 and Mardi Gras, under § 302 of the LMRA, 29 U.S.C. § 186, in the United States District Court for the Southern District of Florida, asserting jurisdiction under 29 U.S.C. § 186(e). App. 63-86. Plaintiff alleges that he is an employee of Mardi Gras. App. 64. He does not contend that the entire neutrality agreement violates § 302. Rather, he claims that the provisions for neutrality, access, and employee names and addresses are each the "delivery" of a "thing of value" under § 302 and therefore illegal. App. 67-70, ¶¶ 14, 17(c), ¶ 20(c), ¶ 25(c).

The District Court dismissed the case on standing grounds, App. 29-33, which the Eleventh Circuit reversed in *Mulhall I*, App. 60. On remand, the District Court dismissed the case for failure to state a

claim under § 302. App. 13-23. Relying on *Adcock*, *supra*, 550 F.3d 369, and *Sage Hospitality*, *supra*, 390 F.3d 206, the district court held that providing employee lists, facility access, and neutrality does not constitute the "delivery" of a "thing of value" prohibited by § 302. The court explained that the purpose of § 302 is to prevent the corruption of union officers and found that "[t]here is no indication of corruption or bribery of Unite Here officials" in this case. App. 19.

A divided panel of the Eleventh Circuit reversed. It held that the complaint sufficiently stated a claim under § 302 and remanded for further proceedings, with Judge Restani dissenting. App. 1-12. The Court of Appeals majority recognized that "intangible organizing assistance cannot be loaned or delivered because the actions 'lend' and 'deliver' contemplate the transfer of tangible items." App. 7. But the majority relied upon its "common sense" in concluding that an employer could improperly influence a union through an agreement facilitating the union's desire to organize the employer's employees because "innocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer." App. 8. The court did not explain how an agreement giving the union the means to realize what the Act promotes – collective bargaining and labor peace – could be illegal or the mechanism by which corruption could be accomplished.

In dissent, Judge Restani pointed out that the complaint does not allege that Mardi Gras offered the organizing assistance as a bribe and "makes no allegation of wrongdoing relating to the formation of the Agreement[.]" App. 10, 11. But more importantly, Judge Restani pointed out that the majority's interpretation of § 302 is inconsistent with the LMRA's purpose: "The LMRA is designed to promote both labor peace and collective bargaining. The LMRA cannot promote collective bargaining and, at the same time, penalize unions that are attempting to achieve greater collective bargaining rights." App. 10-11 (internal citations omitted).

The union filed a timely petition for rehearing or rehearing *en banc*. The United States Department of Justice, the United States Department of Labor, and the National Labor Relations Board filed a joint brief for the United States as *amicus curiae* disagreeing with the Eleventh Circuit's analysis and supporting the petition for rehearing. The petition for rehearing was denied. App. 61-62.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT DECISION GIVES § 302 A MEANING CONTRARY TO CONGRESS'S INTENT.

Section 302 makes it unlawful for an employer "to pay, lend, or deliver . . . any money or other thing of value" to a labor organization that represents or

seeks to represent the employer's employees. 29 U.S.C. § 186(a)(2). The Court described the purpose of § 302 in *Arroyo v. United States*, 359 U.S. 419, 425-26 (1959) (internal citations omitted):

> 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[.]

See Turner v. Local Union No. 302, Int'l Bhd. of Teamsters, 604 F.2d 1219, 1227 (9th Cir. 1979) ("The dominant purpose of § 302 is to prevent employers from tampering with the loyalty of union officials and to prevent union officials from extorting tribute from employers."); *Toth v. USX Corp.*, 883 F.2d 1297, 1300 (7th Cir. 1989) ("It is fairly universally acknowledged that a central purpose of section 302 as a whole was to prevent employers from bribing union officials."); *U.S. v. Phillips*, 19 F.3d 1565, 1574 (11th Cir. 1994); *Bricklayers, Masons & Plasterers Intern. Union, Local 15 v. Stuart Plastering Co., Inc.*, 512 F.2d 1017, 1024 (5th Cir. 1975). That purpose has remained constant throughout the later evolution of § 302. "In enacting amendments [to § 302 in 1959, 1969 and 1973] . . . Congress reaffirmed the purpose of § 302 as the limited one of 'prevent[ing] bribery, extortion, shakedowns, and other corrupt practices.'" *BASF Wyandotte Corp.*

v. Local 227, Int'l Chem. Workers Union, 791 F.2d 1046, 1053 (2d Cir. 1986) (internal citation omitted).

This case does not implicate at all § 302's primary concern with union use of welfare trusts as "slush funds." Therefore, Plaintiff must show that the neutrality agreement somehow corrupts the union's representation of employees. This aspect of § 302(a)'s purpose is to "protect employers from extortion and to insure honest, uninfluenced representation of employees[.]" *United Steelworkers of America v. U.S. Gypsum Co*., 492 F.2d 713, 734 (5th Cir. 1974).

The paradigm of a § 302 violation is a kickback to a union official to not organize or to favor the employer in bargaining. *See, e.g., Phillips*, *supra,* 19 F.3d at 1566-69 (union representatives conditioned the acceptance of an unfavorable local collective agreement on the employer's agreement to make retroactive pension payments for themselves and several other union employees); *United States v. Pecora*, 798 F.2d 614, 618 (3d Cir. 1986) (union officials received employer payments in return for influencing union to allow employer to hire non-union drivers in violation of its collective bargaining agreement); *United States v. Ferrara*, 458 F.2d 868, 870 (2d Cir. 1972) (company representative paid union officials to eliminate provision in collective bargaining agreement that allowed employees to eat free of charge while on duty); *United States v. Bloch*, 696 F.2d 1213, 1214 (9th Cir. 1982) (payoffs to union officials in return for officials' excepting them from union local hiring requirement), *abrogated on other grounds by United States v.*

Jimenez Recio, 123 S.Ct. 819, 823 (2003); *United States v. Novak*, 443 F.3d 150, 153-54 (2d Cir. 2006) (union vice president received employer-paid kickbacks in return for allowing contractors to use non-union labor in violation of collective bargaining agreement).

The neutrality agreement in this case does the opposite. The union gets the means to make organizing easier and less acrimonious, and there is no compromise of the union's duty of fair representation if it succeeds in being recognized. The agreement does not require employees to join the union or pay dues. It does not require them to accept union representation if the majority does not want it. It does not limit the ability of employees like Plaintiff to campaign with their co-workers against unionization. The agreement does not corrupt the bargaining process in any way and hence is not contrary to § 302's purpose.

In fact, it is the Eleventh Circuit's ruling that undercuts the NLRA's most important policies. Employers have freedom of contract (to make a contract when they see fit, or not). *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970). They have freedom of speech (to speak or not to speak). *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 68 (2008). They have the right to exclude from their property non-employee union organizers (or to allow them). *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-38 (1992). They have the right – and, at times, the obligation – to provide unions with the names and addresses of their employees, something this Court has already held raises

no § 302 issue. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969); *see infra*, at p. 20. All of these core principles are endangered by the decision below, which effectively means that an employer must speak against collective bargaining, must forbid union organizers from entering its property, and must not give a union the means to contact employees about organizing.

The decision is also destructive of the Act's fundamental policies favoring collective bargaining and labor peace. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996). The neutrality agreement in question here accomplishes both goals. It makes organizing easier for the union – toward the ultimate goal of bargaining collectively on employees' behalf – and the union therefore agrees not to take any action that might harm the employer's business.

II. THE ELEVENTH CIRCUIT DECISION CONFLICTS WITH SETTLED PRECEDENT AND THREATENS TO WREAK HAVOC ON BASIC LABOR LAW TENETS.

The decision below conflicts directly with the law of the other circuits that have considered the question. *Adcock*, *supra*, 550 F.3d 369; *Sage Hospitality*, *supra*, 390 F.3d 206. *See also Patterson v. Heartland Indus. Partners, LLP*, 428 F.Supp.2d 714, 723-24 (N.D. Ohio 2006). As the Third and Fourth Circuits have recognized, the notion that neutrality agreements

may violate § 302 cannot be squared with Congress's purpose.

> In this case, the concessions made by Freightliner do not involve bribery or other corrupt practices. By no stretch of the imagination are the concessions a means of bribing representatives of the Union; indeed, no representative of the Union personally benefited from these concessions. Rather, the concessions serve the interests of both Freightliner and the Union, as they eliminate the potential for hostile organizing campaigns in the workplace. In this sense, the concessions certainly are not inimical to the collective bargaining process.

Adcock, 550 F.3d at 375; *Sage Hospitality*, 290 F.3d at 219.

The Eleventh Circuit's decision also conflicts with the long, unbroken line of cases under LMRA § 301 enforcing neutrality agreements like the one at issue here. At the same time Congress enacted LMRA § 302, it enacted LMRA § 301, 29 U.S.C. § 185. Pub. L. No. 80-101, 61 Stat. 136, 156-157. Section 301(a) gives the federal courts jurisdiction over "suits for violation of contract between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act. . . ." 29 U.S.C. § 185(a). The purpose of § 301(a) was to make labor contracts equally binding on both employers and unions, to the end of promoting industrial peace through the enforcement of these contracts, including

the no-strike clauses Congress expected would be included in them. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 453-54 (1957).

The "contracts" enforceable under § 301(a) are not limited to collective bargaining agreements with incumbent unions. Section 301 gives federal courts jurisdiction over agreements "between employers and labor organizations significant to the maintenance of labor peace between them." *Retail Clerks v. Lion Dry Goods*, 369 U.S. 17, 28 (1962). It confers jurisdiction even where the contracting union is not currently the bargaining representative for the employees. *Id*. at 27. The contract this Court enforced in *Lion Dry Goods* was between an employer and two unions that did not represent its employees. The contract granted the unions access to the employer's premises, reinstated strikers, established employment terms, and limited the parties' right to demand a National Labor Relations Board ("NLRB") election. *Lion Dry Goods*, 369 U.S. at 20, n.4.

Following *Lion Dry Goods*, every court facing the issue has held that agreements between employers and non-incumbent unions governing procedures for future organizing and recognition – and containing the same types of provisions as the agreement here – are lawful and enforceable under § 301. *Sage Hospitality*, 390 F.3d at 218-19; *N.Y. Health & Human Svs. Union v. N.Y.U. Hosp. Ctr.*, 343 F.3d 117, 119 (2d Cir. 2003); *Service Employees Int'l Union v. St. Vincent Med. Ctr.*, 344 F.3d 977, 984-85 (9th Cir. 2003); *Int'l Union, UAW v. Dana Corp.*, 278 F.3d 548, 558-59 (6th

Cir. 2002); *AK Steel Corp. v. United Steelworkers*, 163 F.3d 403, 407-08 (6th Cir. 1998); *Hotel & Restaurant Employees Union, Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561, 566-67 (2d Cir. 1993); *Hotel & Restaurant Employees Union, Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1465-66 (9th Cir. 1992); *Amalgamated Clothing & Textile Workers Union v. Facetglas, Inc.*, 845 F.2d 1250, 1253 (4th Cir. 1988). Neutrality agreements with provisions like the one here are very common.[1] The decision of the Eleventh Circuit casts doubt, for the first time, on this prominent aspect of labor relations and will therefore have widespread, profound effects if it stands.

If the Eleventh Circuit were correct, the agreements in *Lion Dry Goods* and its progeny were illegal and unenforceable because they "paid" a "thing of value" under § 302. But Congress could not have intended that agreements that were illegal – criminal – under § 302 would nevertheless be enforceable under its companion, § 301(a). *Lion Dry Goods* and the line of cases flowing from it would be legally impossible if Plaintiff's contention were right.

---

[1] *See* James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 828-31 (2005); Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42, 45-46 (2001); *see also In Re Lamons Gasket Co.*, 357 N.L.R.B. No. 72 (Aug. 26, 2011), slip op. at 7 (noting that NLRB received 1,333 notices of employers' voluntary recognition of a union between September 2007 and May 2011).

As Judge Chertoff wrote in *Sage Hospitality, supra*, the logic behind the idea that a neutrality agreement like the one here could violate § 302 would "wreak havoc" on existing federal labor law far beyond neutrality agreements. *Sage Hospitality, supra*, 390 F.3d at 219. A collective bargaining agreement is something of much greater value to a union than a neutrality agreement, as it sets employees' terms and conditions of employment and may contain a union-security clause and dues checkoff provision, as well as provisions providing for union-representative access. *See NLRB v. Gen. Motors Corp*., 373 U.S. 734, 744-45 (1963) (valid union-security clause is mandatory subject of bargaining); *Marquez v. Screen Actors Guild*, 525 U.S. 33, 44-48 (1998) (union may negotiate valid union-security clause without violating duty of fair representation); *Bethlehem Steel Co.*, 136 N.L.R.B. 1500, 1501-02 (1962) (union security and dues check-off are mandatory subjects of bargaining); *NLRB v. Great Western Coca-Cola Bottling Co.*, 740 F.2d 398, 403 (5th Cir. 1984) ("It is clear that access by the employees' representatives constitutes a mandatory bargaining subject[.]"). Under the Eleventh Circuit's formulation, a neutrality agreement's provisions for neutrality, worksite access, and employee lists are "things of value" that can "operate as a payment" if their "performance fulfills an obligation." App. 8. But this reasoning applies equally to the identical benefits conferred on labor unions in collective bargaining agreements.

Congress could never have dreamed anyone would argue – or that a court would accept – that it intended to make illegal under § 302 the very same labor-management agreements it made enforceable under § 301(a). Because § 302(c), 29 U.S.C. § 186(c), contains no explicit exceptions for collective bargaining agreements or any other labor agreements between employers and unions, the Eleventh Circuit's view of § 302 would make every collective bargaining agreement an illegal "payment" of a "thing of value."

III. THE SPECIFIC PROVISIONS OF THIS NEUTRALITY AGREEMENT ALLEGED TO BE ILLEGAL ARE COMMONPLACE AND HAVE NEVER PREVIOUSLY BEEN QUESTIONED UNDER SECTION 302.

The destabilizing effect of the Eleventh Circuit's decision is strongly demonstrated when each provision of the neutrality agreement that Plaintiff alleges to be illegal is considered separately. Each has been approved and occupies a long-standing and well-established place in labor law.[2]

---

[2] The provisions Plaintiff attacks are similar or identical to those in many contracts existing around the time Congress adopted § 302, but the legislative history of the Taft-Hartley amendments lacks any suggestion these were being outlawed. *See* COLLECTIVE BARGAINING CONTRACTS: TECHNIQUES OF NEGOTIATION AND ADMINISTRATION WITH TOPICAL CONTRACT CLAUSES (BNA, 1941), at 149 (presenting clauses giving unions access to bulletin boards); *id.* at 586 ("In many agreements union representatives are granted the right to visit the plant at any time

(Continued on following page)

Neutrality. Employers have a right of free speech under § 8(c) of the NLRA, 29 U.S.C. § 158(c). This provision was added by the Taft-Hartley amendments, at the same time as § 302. *See Chamber of Commerce*, 554 U.S. at 67. "We have characterized this policy judgment, which suffuses the NLRA as a whole, as 'favoring uninhibited, robust, and wide-open debate in labor disputes,' stressing that 'free-wheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB.'" *Id.* at 68 (quoting *Letter Carriers v. Austin*, 418 U.S. 264, 272-73 (1974)). Employers may oppose unionization, but they can also speak in favor,

---

without special permission from the employer."); Prentice-Hall, 4 *Labor Equipment*, "Union Contracts and Collective Bargaining" (Prentice-Hall 1946) at Para. 53,280 ("Union Activities in the Plant" notes 60% of several thousand contracts surveyed had clauses allowing union access to company bulletin boards and 24% allowed outside union representatives access to the facility); *id.* at Para. 53,352 ("contracts frequently contain the equivalent of what in international relations is referred to as a non-aggression pact. In the field of labor relations, these mutual pledges are something called non-discrimination or harmony clauses. . . . [T]hese clauses contain: . . . mutual pledges by employer and union not to engage in antagonistic propaganda."); *id.* at Para. 56,754.6 (companies agree with United Auto Workers to provide lists of employee names and addresses). *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 659 (1982) (prevalence of subcontracting clauses in construction-industry collective bargaining agreements relevant to interpreting Congress's intent in passing NLRA Section 8(e), 29 U.S.C. § 158(e)); *BASF Wyandotte Corp. v. Local 227, Int'l Chem. Workers Union*, 791 F.2d 1046, 1050 (2d Cir. 1986) (congressional silence about existing contracting practices significant in construing § 302).

NLRB v. O'Keefe & Merritt Mfg. Co., 178 F.2d 445, 447-48 (9th Cir. 1950); *Coamo Knitting Mills*, 150 N.L.R.B. 579, 581-82 (1964), or stay neutral, *Kimbrell v. NLRB*, 290 F.2d 799, 801-02 (4th Cir. 1961). Under the neutrality agreement at issue here, the employer agreed to stay neutral and not try to influence its employees' decisions. An employer is not required to speak against unionization. Requiring it to do so – on threat of criminal sanction – is inimical to the free-speech policy "which suffuses the NLRA." Moreover, an employer may not be forced to do so constitutionally:

> Among the frequently litigated issues under the Wagner Act were charges that an employer's attempts to persuade employees not to join a union – or to join one favored by the employer rather than a rival – amounted to a form of coercion prohibited by § 8. The NLRB took the position that § 8 demanded complete employer neutrality during organizing campaigns, reasoning that any partisan employer speech about unions would interfere with the § 7 rights of employees. See 1 J. Higgins, The Developing Labor Law 94 (5th ed. 2006). In 1941, this Court curtailed the NLRB's aggressive interpretation, clarifying that nothing in the NLRA prohibits an employer "from expressing its view on labor policies or problems" unless the employer's speech "in connection with other circumstances [amounts] to coercion within the meaning of the Act." *NLRB v. Virginia Elec. & Power Co*., 314 U.S. 469, 477, 62 S.Ct. 344, 86 L.Ed. 348. We

> subsequently characterized Virginia Electric as recognizing the First Amendment right of employers to engage in noncoercive speech about unionization. *Thomas v. Collins*, 323 U.S. 516, 537-538, 65 S.Ct. 315, 89 L.Ed. 430 (1945).

Chamber of Commerce, 554 U.S. at 66-67. *See Wooley v. Maynard,* 430 U.S. 705, 714 (1977); *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). "[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796-97 (1988) (emphasis in original). The decision below violates this right not to speak by threatening civil and criminal punishment of employers who choose not to speak against unionization and are not afraid to promise neutrality.

Union access. Under the NLRA, employers can exclude union organizers from their property in most instances. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535-38 (1992). In some circumstances, however, they can be required to let them on the premises. *Id.* at 539-540. Employers can also agree to permit access, and when they do so, the agreement is binding and enforceable. *Lion Dry Goods*, 369 U.S. at 20 n.4; *Beverly Health v. NLRB*, 317 F.3d 316, 322 (D.C. Cir. 2003); *Unbelievable, Inc. v. NLRB*, 71 F.3d 1434, 1438-39 (9th Cir. 1995); *Facet Enters., Inc. v. NLRB,* 907 F.2d 963, 983 (10th Cir. 1990) (plant access among the "important areas of labor-management relations"); *Great*

Western Coca-Cola Bottling Co., 740 F.2d at 402-04; *Boyer Bros*., 217 N.L.R.B. 342, 344 (1975); *Precision Anodizing & Plating*, 244 N.L.R.B. 846, 856 (1979). This longstanding doctrine, *see supra*, n.2, would be legally impossible if providing access to a union were "delivering" or "paying" a "thing of value" and a § 302 violation.

Employees' names and addresses. The NLRB has long required employers to supply lists of names and addresses of employees eligible to vote in union elections, following *Excelsior Underwear Inc*., 156 N.L.R.B. 1236 (1966). It adopted this approach in order to benefit employees by opening up communication. *Id*. at 1240. This Court approved in *NLRB v. Wyman-Gordon Co.*, *supra*, 394 U.S. 759, rejecting the notion that such a requirement was somehow unlawful: "The respondent [employer] also argues that it need not obey the Board's order because the requirement of disclosure of employees' names and addresses is substantively invalid. This argument lacks merit." *Id*. at 767. One challenge rejected by the Court was that the provision of names and addresses would violate § 302. *See* Brief for Wyman-Gordon Company to the Supreme Court, *NLRB v. Wyman-Gordon Co*. (No. 463), 1969 WL 120290, at 38-44; *Wyman-Gordon Co. v. NLRB*, 397 F.2d 394, 396 (1st Cir. 1968) ("[W]e are not greatly impressed by the contention that compelling a list of names and addresses forces appellant . . . to give a 'thing of value' to a labor organization, in violation of 29 U.S.C. § 186.").

A union is also entitled to get employee information – including names and addresses – from an employer pursuant to the bargaining duty imposed once a union is recognized as the employees' collective bargaining representative. This was the law before enactment of § 302. *Aluminum Ore Co. v. NLRB*, 131 F.2d 485, 487 (7th Cir. 1942) (enforcing Board order requiring employer to provide names, classifications and wages; rejecting employer's argument that the information was confidential). It has never been doubted since then. *See Yawman & Erbe Mfg. Co.*, 89 N.L.R.B. 881, 883 (1950), *enforced, NLRB v. Yawman & Erbe Mfg. Co.*, 187 F.2d 947 (2d Cir. 1951); *Leland-Gifford Co.*, 95 N.L.R.B. 1306, 1310 (1951), *enforced in rel. part, NLRB v. Leland-Gifford Co.*, 200 F.2d 620 (1st Cir. 1952); *Hearst Corp.*, 102 N.L.R.B. 637, 638 (1953); *Verona Dyestuff Division Mobay Chemical Corp*., 233 N.L.R.B. 109, 112 (1977); *Masonic Hall*, 261 N.L.R.B. 436, 439 (1982); *Maple View Manor, Inc.*, 320 N.L.R.B. 1149, 1149-50 (1996), *enforced mem.,* 107 F.3d 923 (D.C. Cir. 1997); *Stanford Hosp. & Clinics*, 338 N.L.R.B. 1042, 1042-43 (2003), *enforcement denied on other grounds by, Stanford Hosp. & Clinics v. NLRB*, 370 F.3d 1210, 1211 (D.C. Cir. 2004); *Beverly Health & Rehabilitation Services*, 346 N.L.R.B. 1319, 1326 (2006). There is no exemption from § 302(a)(2) under § 302(c) for providing this information, although it is seen as "presumptively relevant" to the performance of the union's bargaining duty on behalf of employees. *In Re Baker Concrete Const., Inc*., 338 N.L.R.B. No. 48 (Oct. 28, 2002), slip op. at 2. Indeed, *all* information an employer is

required to give a union as part of the bargaining process under the Court's decision in *NLRB v. Truitt Manufacturing Co.,* 351 U.S. 149 (1956) has some "value." Yet that obligation – not one expressed in the statute at all but drawn from the general duty to bargain – is not made an exemption under Section 302(c).

By considering agreements for employer neutrality, worksite access, and the provision of employee lists to be the "payment" of "things of value," the Eleventh Circuit calls into question decades of settled precedent.

IV. THE ELEVENTH CIRCUIT DECISION THREATENS TO UNDERMINE VOLUNTARY RECOGNITION.

The complaint does not allege that the employer's promise to recognize the union upon a showing of a majority status – without an NLRB election – violates § 302. Yet this is the very object of the neutrality agreement. It does not confer recognition on the union as the bargaining agent of any employees and does not entitle it to receive dues or any other payments from employees. A neutrality agreement only provides a process through which a union might in the future obtain the support of a majority of the employees and gain recognition. *New Otani Hotel*, 331 N.L.R.B. 1078, 1080-81 (2000). The agreement's provisions allowing for facility access, requiring employer neutrality, and entitling the union to employee

names and addresses are only means to this end. They have no independent benefit or value to a union.

There is no market for a neutrality agreement or for its constituent provisions. The union cannot trade or sell them. They do not give the union the right to receive any employee payments, so there is nothing in them to assign or pledge. The union cannot derive any present value from them. "Congress clearly intended § 302's 'thing of value' to have at least some ascertainable value. In this case, unquestionably, the concessions made by [the employer] . . . have no such value whatsoever." *Adcock*, 550 F.3d at 375; *Sage Hospitality*, 390 F.3d at 219 ("[A]ny benefit to the union inherent in a more efficient resolution of recognition disputes does not constitute a 'thing of value' within the meaning of the statute.").

Plaintiff did not allege, and the Eleventh Circuit did not find, that the employer's agreement to voluntarily recognize the union without an NLRB election violates § 302. Surely, Plaintiff did not do so because the law is so clear that this has always been allowed under the NLRA. A union must show the support of a majority of employees before it may be recognized as the exclusive representative. *ILGWU v. NLRB (Bernhard-Altmann Texas Corp.)*, 366 U.S. 731, 738 (1961). This requirement may be satisfied by the union's presentation of authorization cards signed by a majority of employees. This Court stated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 600 (1969), "[i]n short, we hold that the 1947 amendments did not restrict an employer's duty to bargain under Section

8(a)(5) solely to those unions whose representative status is certified after a Board election." The Court thoroughly analyzed the issue and concluded that union authorization cards could lawfully be used to support recognition. 395 U.S. at 596-600 & n.17; *see Bernhard-Altmann Texas Corp.*, 366 U.S. at 737 ("If an employer takes reasonable steps to verify union claims [of majority status] . . . he can readily ascertain their validity and obviate a Board election."); *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 280 (1973); *Broad Street Hosp.*, 452 F.2d at 305 ("a voluntary recognition by employers of bargaining units would be discouraged, and the objectives of our national labor policy thwarted, if recognition were to be limited to Board-certified elections. . . ."); *Georgetown Hotel v. NLRB*, 835 F.2d 1467, 1470-71 (D.C. Cir. 1987); *NLRB v. Lyon & Ryan Ford*, 647 F.2d 745, 750 (7th Cir. 1981) ("An employer's voluntary recognition of a majority union remains 'a favored element of national labor policy.'"), *cert. denied*, 102 S.Ct. 391 (1981); *NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978) (same). In Section 9(c)(1)(A)(i) of the Act, 29 U.S.C. § 159(c)(1)(A)(i), Congress provided that employees may file a petition for an election if "their employer declines to recognize their representative." This language makes unmistakably clear that Congress recognized – and even preferred – the practice of voluntary recognition and that a Board-supervised election is necessary only when an employer declines.

The complaint and the Eleventh Circuit's decision divorce specific provisions of the neutrality agreement from the agreement's purpose. The provisions of the neutrality agreement that the Eleventh Circuit found potentially criminal under § 302 are simply means to the end of voluntary recognition. If these provisions are the illegal payment of things of value under § 302, then the voluntary recognition requirement at the agreement's heart must be too. But there is no room in decades of established case law for Plaintiff's assertion that an agreed-upon process for fostering voluntary recognition should suddenly be regarded as criminal.

The use of a card-check procedure – voluntary recognition without resort to an NLRB-sponsored election – has been specifically recommended to improve union-management relationships. The Commission on the Future of Worker Management Relations, chaired by President Ford's Secretary of Labor, John T. Dunlop, stated in its 1995 report: "We encourage employers and unions who desire a cooperative relationship to agree to determine the employees' preference via a 'card check.'" U.S. Commission on the Future of Worker-Management Relations, Final Report (1994), *Federal Publications*, Paper 2, at 42.[3] The Commission explained that "[c]ard check agreements build trust between union and employer and avoid

[3] http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1004 &context=key_workplace.

expending public and private resources on unnecessary election campaigns." *Id*. If the Eleventh Circuit is correct, Secretary Dunlop's Commission was advocating an illegal act.

Accepting the Eleventh Circuit's reasoning would revolutionize, and upset, the fundamental understanding of the recognition process under the NLRA that has persisted since its enactment and through the Taft-Hartley amendments and the Landrum-Griffin Act, 29 U.S.C. § 401 *et seq*.

V. THE FACT THAT THE UNION LOBBIED FOR FAVORABLE LEGISLATION IS IRRELEVANT: BOTH THE ACT AND THE PETITION CLAUSE FAVOR LABOR-MANAGEMENT COOPERATION.

The Eleventh Circuit found it relevant, and apparently suspect, that the union lent its "financial support to a ballot initiative regarding casino gaming." App. 3, 8. There is no question that the union wanted the neutrality agreement enough to give up its right to take economic action against the employer and to expend resources helping the employer get into the casino business. The question under § 302, however, is not whether the union wants something from the employer but whether it is the type of thing that Congress intended to stop. Sixty-five years of jurisprudence before the Eleventh Circuit's decision shows the opposite: this kind of agreement is something the NLRA is designed to encourage.

The NLRA was designed to promote labor-management cooperation. Its policy is "encouraging the practice and procedure of collective bargaining." 29 U.S.C. § 151; *Auciello Iron Works*, *supra*, 517 U.S. at 785 ("The object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employees."). The Act is "designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers." *NLRB v. Am. Nat. Ins. Co*., 343 U.S. 395, 401-02 (1952). "The overriding policy of the NLRA is 'industrial peace.'" *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987) (internal citation omitted). "The central purpose of the Act was to protect and facilitate employees' opportunity to organize unions to represent them in collective-bargaining negotiations." *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609 (1991). *See also* Labor Management Cooperation Act, 29 U.S.C. § 175a. Neutrality agreements are a prominent way of accomplishing this. *Dana Corporation*, 356 N.L.R.B. No. 49 (2010), slip op. at 7-8.

The notion that unions and employers commit criminal offenses by helping each other is antithetical to the NLRA's basic premise. The employer always receives consideration for a neutrality agreement. The one here, like those in all the court and NLRB cases on the subject, has a prohibition against picketing and other disruptive labor actions – valuable

consideration for a fledgling business. The existence of such consideration does not make a neutrality agreement illegal. This makes it enforceable under the common law of contracts and under § 301(a). *Lion Dry Goods*, 368 U.S. at 28.

The Union did not make any promise in the agreement that it would do anything to support legislation allowing the employer to have slot machines.[4] The neutrality agreement makes the employer's ability to have slot machines a condition precedent to the agreement becoming effective. App. 85, ¶ 15. It was thus in the union's *self-interest* to lobby for legalization of slot machines, which it did. *See Mulhall I*, App. 38. If it were successful, which it was, the agreement would become effective and the employer would let the union *try* to organize its employees without hindrance. This condition was explicit, not hidden, and was entirely logical and benign.

If it is sound logic that a union's help for the employer's business can make a labor-management agreement criminal, then a new era of labor relations is ushered in. Unions try to help their employers all

[4] The allegation in Paragraph 11 of the complaint that the union "agreed to expend monetary and other resources to support a ballot proposition favored by Mardi Gras" does not meet *Twombly/Iqbal* standards. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *see Mulhall II*, App. 11-12 (Restani, J., dissenting). No facts were alleged to support this conclusion. It is belied by the text of the neutrality agreement itself.

the time, and, of course, they expect benefits in return, both in the form of more and better jobs for their members (or at least not losing them) and in a cooperative attitude in collective bargaining. When they do so by lobbying for mutually beneficial legislation, their conduct is not unlawful; it is protected by the Petition Clause. *United Mine Workers v. Pennington*, 381 U.S. 657, 670-71 (1965) (joint union-employer lobbying for minimum wage that would favor large employers signed to union's agreement could not violate antitrust law); *Brown & Root, Inc. v. Louisiana State AFL-CIO*, 10 F.3d 316, 325-26 (5th Cir. 1994) (First Amendment barred NLRA § 303 challenge to unions' lobbying for legislation sought by company in return for dismissal of nonunion subcontractor); *Franchise Realty Interstate Corp. v. San Francisco Local Jt. Exec. Bd. of Culinary Workers*, 542 F.2d 1076, 1080 (9th Cir. 1976) (joint lobbying by restaurant association and labor union protected under *Noerr-Pennington* doctrine); *see, e.g.*, Juliet Eilperin & Steven Mufson, "Obama's Allies' Interests Collide Over Keystone Pipeline," *The Washington Post*, October 16, 2011 (noting lobbying for Keystone Pipeline project by unions who had entered into labor agreement with project's developer).[5] Once again, the Eleventh Circuit's approach proves too much. If a labor-management agreement can be tainted by a

[5] http://www.washingtonpost.com/national/health-science/obama-allies-interests-collide-over-keystonepipeline/2011/10/11/gIQAr09cpL_story.html.

union's lobbying for mutually beneficial legislation, why not a collective bargaining agreement or any other form of labor-management cooperation?

Because the whole purpose of the neutrality agreement here is to foster the twin aims of the NLRA – the avoidance of labor disputes and the promotion of collective bargaining – the agreement cannot be condemned by § 302.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD G. MCCRACKEN*
ANDREW J. KAHN
PAUL L. MORE
DAVIS, COWELL & BOWE LLP
595 Market Street, Suite 1400
San Francisco, CA 94105
(415) 597-7200
rmccracken@dcbsf.com

Counsel for Petitioner

**Counsel of Record*

July 20, 2012

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 11-10594

D.C. Docket No. 0:08-cv-61766-PAS

MARTIN MULHALL,

Plaintiff-Appellant,

versus

UNITE HERE LOCAL 355,
HOLLYWOOD GREYHOUND TRACK, INC.,
doing business as Mardi Gras Gaming,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(January 18, 2012)

Before WILSON and FAY, Circuit Judges, and RESTANI,* Judge.

---

* Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

WILSON, Circuit Judge:

On this appeal, we decide whether organizing assistance offered by an employer to a labor union can be a "thing of value" contemplated under § 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186. Section 302 makes it unlawful for an employer to give or for a union to receive any "thing of value," subject to limited exceptions. We hold that organizing assistance can be a thing of value that, if demanded or given as payment, could constitute a violation of § 302. Because the dismissal of Martin Mulhall's complaint was based on a contrary conclusion, we reverse.

I. BACKGROUND[1]

Hollywood Greyhound Track, Inc., d/b/a Mardi Gras Gaming ("Mardi Gras"), and UNITE HERE Local 355 ("Unite"), a labor union, entered into a memorandum of agreement ("Agreement") on August 23, 2004. In the Agreement, Mardi Gras promised to (1) provide union representatives access to non-public work premises to organize employees during non-work hours; (2) provide the union a list of employees, their job classifications, departments, and addresses; and (3) remain neutral to the unionization of employees. In return,

[1] We present the facts in the light most favorable to the plaintiff and accept all factual allegations as true in reviewing Federal Rule of Civil Procedure 12(b)(6) dismissals. *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003) (per curiam).

Unite promised to lend financial support to a ballot initiative regarding casino gaming. Ultimately, Unite spent more than $100,000 campaigning for the ballot initiative. Additionally, if recognized as the exclusive bargaining agent for Mardi Gras's employees, Unite promised to refrain from picketing, boycotting, striking, or undertaking other economic activity against Mardi Gras.

Mulhall is a Mardi Gras employee opposed to being unionized. His complaint seeks to enjoin enforcement of the Agreement, contending that it violated § 302. The district court dismissed the complaint for failure to state a claim because it found that the assistance promised in the Agreement cannot constitute a "thing of value" under § 302.

This is not the first time this case has been before us on appeal. In a previous appeal addressing Mulhall's standing to bring the case, we stated that Mulhall "adequately alleged that the organizing assistance promised by Mardi Gras in the [Agreement] is valuable, and indeed essential, to Unite's effort to gain recognition." *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1288 (11th Cir. 2010).

II. STANDARD OF REVIEW

An order granting a motion to dismiss for failure to state a claim is subject to de novo review. *See Redland Co. v. Bank of Am. Corp.*, 568 F.3d 1232, 1234 (11th Cir. 2009) (per curiam).

III. DISCUSSION

Congress enacted the LMRA, commonly known as the Taft-Hartley Act, to curb abuses "inimical to the integrity of the collective bargaining process." *Arroyo v. United States*, 359 U.S. 419, 425, 79 S. Ct. 864, 868 (1959). With certain exceptions, § 302 makes it unlawful for

> any employer . . . to pay, lend, or deliver, any money or other thing of value . . . 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. . . .

29 U.S.C. § 186(a)(2). Additionally, a person cannot request or demand a payment, loan, or delivery of money or other thing of value. *Id.* at § 186(b)(1). As the Ninth Circuit explained, "The dominant purpose of § 302 is to prevent employers from tampering with the loyalty of union officials and to prevent union officials from extorting tribute from employers." *Turner v. Local Union No. 302, Int'l Bhd. of Teamsters*, 604 F.2d 1219, 1227 (9th Cir. 1979).

In the context of § 302, the Eleventh Circuit has not addressed the meaning of the phrase "thing of value," but it has commented on the phrase as it is used in various other criminal statutes. In *United States v. Nilsen*, the Court stated, "Congress' frequent use of 'thing of value' in various criminal statutes has evolved the phrase into a term of art which the courts generally construe to envelop[ ] both tangibles and

intangibles." 967 F.2d 539, 542 (11th Cir. 1992) (per curiam) (discussing 18 U.S.C. § 876, a statute criminalizing the making of a threatening letter with the intent to extort a thing of value). Reasoning that "monetary worth is not the sole measure of value," we held the expected testimony of a key government witness is a thing of value. *Id.* at 543.

The Fourth and Third Circuits have addressed challenges to neutrality and cooperation agreements under § 302, and both courts found the assistance was not a thing of value. *Adcock v. Freightliner LLC*, 550 F.3d 369, 374 (4th Cir. 2008); *Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hospitality Res., LLC*, 390 F.3d 206, 219 (3d Cir. 2004). In *Adcock*, the plaintiff challenged an agreement in which the employer (1) granted the union access to private property, (2) promised neutrality during organizing campaigns, and (3) required some employees to attend union presentations on paid company time. 550 F.3d at 371. The Fourth Circuit concluded the organizing assistance had no ascertainable value, and therefore the plaintiff had failed to state a § 302 claim. *Id.* at 374. The court explained that the reading of § 302 was consistent with the purpose of the statute because the agreement could not be construed as a bribe or corrupt practice. *Id.* at 375.

The Third Circuit reviewed a neutrality agreement and held that, regardless of whether the agreement benefitted an employer and a union, there was no § 302 violation because the organizing assistance does not qualify as a payment, loan, or delivery. *Sage*

Hospitality Res., LLC, 390 F.3d at 219. The court also reasoned that any benefit "inherent in a more efficient resolution of recognition disputes does not constitute a 'thing of value' within the meaning of the statute." *Id.* Moreover, the court expressed concern that invalidating the suspect agreement for a § 302 violation would upset the balance of laws governing the recognition of unions. *Id.*

No other circuit has published an opinion involving the precise facts presented on this appeal, but several have addressed what the term "thing of value" means in the § 302 context. The Sixth Circuit rejected the argument that under § 302 "a thing of value" is restricted to things of monetary value. *United States v. Douglas*, 634 F.3d 852, 858 (6th Cir.), *cert. denied*, 131 S. Ct. 3039 (2011). In that case, General Motors gave high paying jobs to non-qualified relatives of union officials. The court found a violation of the statute occurred even though the thing of value was not money or some other tangible thing. *Id.*

The Second Circuit commented on the scope of the phrase "thing of value" when it explained that "[v]alue is usually set by the desire to have the 'thing' and depends upon the individual and the circumstances." *United States v. Roth*, 333 F.2d 450, 453 (2d Cir. 1964) (holding that a loan is a thing of value under § 302). It recommended that common sense should inform determinations of whether an improper benefit has been conferred.

> [I]t may be argued that a five-dollar Christmas tie is a "thing of value" and a Christmas present hopefully is to create good will in the recipient towards the donor. Countless hypothetical cases can be put, each on its facts approaching that evanescent borderline between the proper and the improper. No calculating machine has yet been invented to make these determinations with certainty. In the meantime the courts must rely upon the less mechanical judgment and common sense which under the present system is, and of necessity must be, lodged in judges and juries.

Id. at 454. We are inclined to agree that, in circumstances like these where we search for the line between the proper and the improper, we must rely upon our common sense.

It seems apparent that organizing assistance can be a thing of value, but an employer does not risk criminal sanctions simply because benefits extended to a labor union can be considered valuable. Violations of § 302 only involve payments, loans, or deliveries, 29 U.S.C. § 186(a)-(b), and every benefit is not necessarily a payment, loan, or delivery. For example, intangible organizing assistance cannot be loaned or delivered because the actions "lend" and "deliver" contemplate the transfer of tangible items.

Yet, a violation of § 302 cannot be ruled out merely because intangible assistance cannot be loaned or delivered. Section 302 also prohibits payment of a

thing of value, and intangible services, privileges, or concessions can be paid or operate as payment. Whether something qualifies as a payment depends not on whether it is tangible or has monetary value, but on whether its performance fulfills an obligation. If employers offer organizing assistance with the intention of improperly influencing a union, then the policy concerns in § 302 – curbing bribery and extortion – are implicated.

It is too broad to hold that all neutrality and cooperation agreements are exempt from the prohibitions in § 302. Employers and unions may set ground rules for an organizing campaign, even if the employer and union benefit from the agreement. But innocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer.

We need not address whether we require a "thing of value" to have monetary value. Here, Mulhall alleged and a jury could find that Mardi Gras's assistance had monetary value. As evidence of the value, Mulhall points to the $100,000 Unite spent on the ballot initiative that was consideration for the organizing assistance. Mulhall's allegations are sufficient to support a § 302 claim.

We also are unpersuaded by arguments that either the rule of lenity or concerns about constitutionally protected speech counsel against allowing neutrality agreements to be covered by § 302. The rule of lenity applies only when a statute is ambiguous,

Salinas v. United States, 522 U.S. 52, 66, 118 S. Ct. 469, 478 (1997), and here, the plain language of the statute is clear. The protected speech concerns arise out of a mistaken understanding that employers will be required to actively oppose unionization in order to avoid criminal sanctions under § 302. As we see it, an employer's decision to remain neutral or cooperate during an organizing campaign does not constitute a § 302 violation unless the assistance is an improper payment. If the assistance is not an improper payment, an employer's speech is not limited, and it may choose to oppose unionization.

Consequently, we find that Mulhall has stated a claim for relief, and we remand so that the district court can consider the § 302 claim and determine the reason why Unite and Mardi Gras agreed to cooperate with one another.

REVERSED AND REMANDED.

RESTANI, Judge, dissenting:

I respectfully dissent. I conclude that the reasoning of our sister circuits is correct. *See Adcock v. Freightliner LLC*, 550 F.3d 369 (4th Cir. 2008); *Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hospitality Res. LLC*, 390 F.3d 206, 218-19 (3d Cir. 2004). Therefore, I would affirm the dismissal granted by the District Court.

I also write because I do not agree that an improper intent on behalf of the union or employer in

demanding or offering the types of concessions at issue here transforms an otherwise "innocuous" concession into a bribe or constitutes extortion in violation of § 302 of the Labor Management Relations Act ("LMRA"). Mulhall has not alleged that Mardi Gras offered these concessions as a bribe.[1] Thus, I put this issue aside and focus on whether a union that demands these types of concessions with an improper intent commits extortion and thereby runs afoul of § 302.

Adding the element of intent is a non-starter because to do so conflicts with the purpose of the LMRA regardless of whether the focus is the concessions or the intent behind them. Unions demand these types of concessions, and may threaten to cause disruptions if the concessions are not given. The purpose is to make it easier to achieve collective bargaining rights on behalf of the target employees. The LMRA is designed to promote both labor peace and collective bargaining. *See Adcock*, 550 F.3d at 375 (citing *Arroyo v. United States*, 359 U.S. 419, 425

[1] Mulhall's complaint states that "it is not alleged that Mardi Gras has violated § 302(a)(2) because it has not delivered the Information, Access, or Gag Clause demanded by Local 355." Rec. Ex. at 14, ¶ 38, ECF No. 12. According to the complaint, it is not the formation of the Agreement that violated § 302 but Unite's demand and request that the Agreement be enforced. *Id.* at ¶ 37. To the extent bribery is at issue, I agree with *Adcock* that "[b]y no stretch of the imagination are the concessions a means of bribing representatives of the Union[.]" 550 F.3d at 375.

(1959)) (noting the purpose behind § 302 is to promote "the integrity of the collective bargaining process"). The LMRA cannot promote collective bargaining and, at the same time, penalize unions that are attempting to achieve greater collective bargaining rights.

Even if the union has some other aim besides achieving collective bargaining rights (such as obtaining more members and dues without ever promoting the interest of the employees), such conduct implicates the union's duty to its members, not the collective bargaining process between the employer and the union. In such a situation, employees can decline to join the union and union members can leave the union or seek their own judicial remedies. We should not, however, turn § 302 upside down to protect against possible disadvantages resulting from some union actions.

Moreover, under the majority's holding, § 302 is not implicated unless the concessions at issue are "used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer." Maj. Op. at 9. Thus, at the pleading stage, the complaint must contain sufficient factual allegations showing the union demanded these concessions as extortion or were offered by the employer as a bribe, and not just as regular ground rules of organizing.

Here, Mulhall's complaint makes no allegations of wrongdoing relating to the formation of the Agreement or Unite's motives at the time of contracting. *See* Rec. Ex. at 7-8, ¶ 7-11, ECF No. 12. Mulhall

merely alleges that unions, in general, have or may have improper motives when negotiating for these concessions. Rec. Ex. at 12, ¶ 28 ("Unions have made, and are liable to make, wage, benefit, and other concessions at the expense of employees they exclusively represent in collective bargaining in exchange, *quid pro quo*, for things of value from employers. . . ."). Such general allegations are insufficient under our pleading standards. Thus, even under the majority's theory, Mulhall's complaint fails to state a cause of action and should be dismissed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 08-61766-CIV-SEITZ/O'SULLIVAN

MARTIN MULHALL,

Plaintiff,

v.

UNITE HERE LOCAL 355,
HOLLYWOOD GREYHOUND TRACK,
INC., d/b/a MARDI GRAS GAMING,

Defendants. /

ORDER GRANTING MOTION TO DISMISS

(Filed Jan. 24, 2011)

THIS MATTER came before the Court upon Defendant Unite Here Local 355's Motion to Dismiss [DE-40]. This action arises from Defendants, Hollywood Greyhound Track (Mardi Gras) and Unite Here Local 355's (Unite Here) organizing concessions agreement (MOA) to which Plaintiff (Mulhall) is not a party. Mulhall seeks an injunction under § 302 of the Labor Management Relations Act (LMRA) prohibiting Unite Here from demanding or receiving from Mardi Gras "things of value" in the form of organizing assistance, namely his employee information, access to non-public areas such as employee break rooms during non-work hours, and employer neutrality to unionization. Because the assistance promised in the MOA does not constitute a thing of value, Unite Here's Motion to Dismiss is granted.

I. Background

Mardi Gras maintains a dog track at which Mulhall has worked as a paramutual clerk and groundskeeper for forty years. In an effort to establish a gaming facility, Mardi Gras executed the MOA in 2004 with Unite Here, the local hospitality services union. The MOA exchanged Unite Here's support for Mardi Gras's gaming license campaign and labor peace for three labor organizing concessions: (1) Mardi Gras must provide union representatives access to "non-public" work premises to organize employees during non-work hours; (2) Mardi Gras must provide the union a list of employees, their job classifications, departments, and addresses; and (3) Mardi Gras must remain neutral to the unionization of employees. (*See* MOA at DE-1 at 14-18, ¶¶ 4, 7, 8, 11.) With these concessions, Unite Here may more successfully campaign Mardi Gras's employees to organize. If a majority of employees elect Unite Here pursuant to the MOA's "card check" election procedure, Mardi Gras must recognize Unite Here as the employees' exclusive bargaining representative. (*See* MOA ¶ 9.)

In 2006, Mardi Gras began operating its gaming facility, and, pursuant to the MOA, provided Unite Here employee information lists in 2006 and 2007, neither of which contained Mulhall's information. In 2008, Mardi Gras refused to provide Unite Here any employee information and, after Mardi Gras ignored requests to arbitrate the issue, Unite Here brought suit to compel arbitration. In response, Mardi Gras argued that the MOA was *void ab initio* because it

promised things of value to Unite Here. The Court ordered arbitration and the arbitrator entered an award finding that the MOA was enforceable. On August 6, 2010, the arbitration award was confirmed in relevant part.

On November 4, 2008, Mulhall sued both Mardi Gras and Unite Here to enjoin enforcement of the MOA, and on November 21, 2008, Unite Here moved to dismiss or stay his action. On April 22, 2009, the Court granted Unite Here's Motion to Dismiss based on Plaintiff's lack of standing. Subsequently, Mulhall appealed and the Eleventh Circuit, finding that Mulhall has standing, remanded the case to this Court for further proceedings. The Eleventh Circuit explicitly noted that it was not addressing whether an individual, like Mulhall, had a private right of action under § 302 of the LMRA or whether the organizing assistance provided by Mardi Gras under the MOA constitutes a "thing of value" under the statute. Thereafter, Unite Here filed the instant Motion to Dismiss.

II. Analysis

Unite Here moves to dismiss Mulhall's complaint because his sole basis for relief is his claim that the concessions provided to Unite Here in the MOA are a "thing of value" and thus prohibited by § 302. Unite Here asserts that the concessions Mardi Gras provided to Unite Here under the MOA do not constitute a "thing of value," as that term is used in the LMRA,

29 U.S.C. § 186, also known as § 302.[1] Section 302 of the LMRA states, in relevant part:

> (a) . . . It shall be unlawful for any employer . . . pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value –
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (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
>
> (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

[1] Unite Here also moves to dismiss because § 302 does not provide Mulhall with a private right of action. The Court finds that it need not address whether a private right of action exists under the statute because the MOA did not provide Unite Here with a "thing of value."

> (b) . . . (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

29 U.S.C. § 186. Unite Here submits that Mardi Gras did not "pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value" to Unite Here. Thus, Unite Here asserts that the complaint should be dismissed.

While the Eleventh Circuit has not directly addressed what constitutes a "thing of value" under § 302 of the LMRA, two other Circuit Courts have. In *Adcock v. Freightliner, LLC*, 550 F.3d 369 (4th Cir. 2008), the Fourth Circuit considered whether a card check agreement, wherein the employer agreed to: (1) require some of its employees to attend, on paid company time, union presentations explaining the card check agreement; (2) provide the union reasonable access to non-work areas in company plants to allow union representatives to meet with employees; and (3) refrain from making negative comments about the Union during organizing campaigns, violated § 302. The Fourth Circuit held that none of these things constituted a "thing of value" under the plain language of the statute. *Id.* at 374. The Fourth Circuit reasoned that all of these things involved giving the union access to employees during an organizing campaign and did not involve the delivery of either tangible or intangible items to the union. *Id.*

The Fourth Circuit further noted that such a reading of the statute was buttressed by the statute's penalty provision, in which the severity of the penalty is dictated by the monetary value of the thing delivered by the employer or received by the union. *Id.* at 375. Therefore, the Fourth Circuit concluded that "Congress clearly intended § 302's 'thing of value' to have at least some ascertainable value" and that access to employees clearly has no such ascertainable value. *Id.*

The Third Circuit came to a similar conclusion in *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206 (3d Cir. 2004), where it upheld the district court's decision that an employer's promises of neutrality, granting the union access to the employer's facility, and provision of employee list in return for a union's no-strike commitment did not constitute a "thing of value" under § 302. *See Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 299 F. Supp. 2d 461, 465 (W.D. Pa. 2003) for details regarding content of agreement. In reaching their conclusions, both the Fourth Circuit and the Third Circuit also considered the purpose behind Congress's enactment of § 302. The Third Circuit, quoting *Arroyo v. U.S.*, 359 U.S. 419, 425-26 (1959), noted that "[w]hen Congress enacted section 302, it was '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.'" *Sage*, 390 F.3d at 218; *see also Adcock*, 550 F.3d at 375 (noting that § 302 is aimed at preventing bribery, extortion, and other corrupt practices conducted in secret) (quotation and citation omitted). The Fourth Circuit found that concessions that permitted union access to employees were "by no stretch of the imagination" a means of bribing union representatives and clearly no union representative would personally benefit from such concessions. *Adcock*, 550 F.3d at 375.

Both *Adcock* and *Sage* involved very similar concessions to the ones at issue in the instant case – access to employees and employee lists and neutrality – and the Circuit Courts found such concessions did not violate § 302. Further, the purpose behind § 302, as discussed in *Adcock* and *Sage* are met here. There is no indication of corruption or bribery of Unite Here officials. In fact, none of the concessions directly benefitted any individual union official or union employee. Consequently, based on *Adcock* and *Sage*, Mulhall has failed to allege a violation of § 302.

Notwithstanding *Adcock* and *Sage*, Mulhall makes several arguments that he has adequately pled that Unite Here's access to non-public work areas, employee lists, and neutrality to unionization constitute "things of value" in violation of § 302. Mulhall's first argument is that the complaint alleges that the things provided to Unite Here under the MOA have "monetary and market value" and, therefore, he has sufficiently pled his claim for purposes of a motion to

dismiss. However, this allegation is conclusory. In considering a motion to dismiss, a court need not consider as true an unsupported, conclusory allegation. *Oxford Asset Mgmt, Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002) (stating "conclusory allegations, unwarranted deductions of facts[,] or legal conclusions masquerading as facts will not prevent dismissal."); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009) (holding that pleadings that "are no more than conclusions, are not entitled to the assumption of truth[;] they must be supported by factual allegations").

Mulhall also argues that while the Eleventh Circuit has not defined the term "thing of value" under § 302, it has determined that generally the term is a term of art and thus the term should be interpreted the same way in all circumstances and under all statutes. However, Mulhall has not offered any authority to support this sweeping proposition and the authorities he does rely on are inapplicable to this matter. *See U.S. v. Nilsen*, 967 F.2d 539, 542-43 (11th Cir. 1992) (holding that the use of the term "thing of value" is a term of art as used in various *criminal* statutes).

Turning to the specific concessions provided by Mardi Gras, Mulhall argues that, under Eleventh Circuit law, each of the three things provided to Unite Here under the MOA – access to non-public portions of the facility, lists of employees, and neutrality as to unionization – individually constitute a "thing of value." In asserting that providing Unite Here with a

list of current employees and their addresses constitutes a "thing of value," Mulhall cites to *U.S. v. Jordan*, 582 F.3d 1239, 1247 (11th Cir. 2009), as support for this proposition. However, the information obtained in *Jordan* was the criminal records of absentee voters, which was obtained from a government database without proper authorization. *Id.* Thus, Mulhall's claim that the employee information Unite Here seeks from Mardi Gras is "indistinguishable" from the information at issue in *Jordan* rings hollow at best. Mulhall further argues that confidential business information has long been recognized as property. While this may be true, Mulhall fails to cite a single case from any circuit that establishes that a list of employees and their addresses constitutes confidential business information. Consequently, Mulhall's arguments that the case law clearly recognizes such a list as a thing of value fails.

Next, Mulhall argues that Mardi Gras's permitting Unite Here to have access to nonpublic parts of the facility amounts to a thing of value. In support of this argument, Mulhall cites to *U.S. v. Schiffman*, 552 F.2d 1124, 1126 (5th Cir. 1977), which found that a union official who asked for and received a highly reduced hotel room rate could have received a thing of value in violation of § 302, and *N.L.R.B. v. BASF Wyandotte Corp.*, 798 F.2d 849, 856 (5th Cir. 1986), which found that allowing the union chairman to use a company office, telephone and copier may constitute a thing of value under § 302. However, neither of these cases are dispositive of the issue. First, both involved

things that had objective monetary value. The hotel room in *Schiffman* and the office space and use of a phone and copier in *BASF* both had ascertainable market values. Furthermore, in both cases, the thing of value was given to a specific, individual union official for his exclusive use. That is not the case here. The MOA simply grants Unite Here access to the employee break room. Thus, it does not give a specific union official exclusive use of something with a clear market value. Consequently, Mulhall has not cited to any binding authority that holds that giving Unite Here access to the employee break room constitutes a thing of value under § 302.

Last, Mulhall argues that Mardi Gras's agreement to remain neutral regarding the union also constitutes a thing of value under § 302. Again, the only Eleventh Circuit case cited by Mulhall does not support his proposition. The Eleventh Circuit case on which Mulhall relies involved a criminal statute and found that a defendant's attempt to silence a government witness could be a thing of value under the criminal statute. *Nilsen*, 967 F.2d at 542-43. Clearly, that is not the same thing as Mardi Gras *agreeing* to remain neutral regarding the union. Consequently, Mulhall has failed to cite to a single binding case that demonstrates that the concessions Mardi Gras gave Unite Here amount to things of value under § 302. Thus, Mulhall has failed to provide binding, on point authority to support his argument that the concessions Unite Here received from Mardi Gras violate § 302.

Given the decisions in *Adcock* and *Sage* and Mulhall's failure to cite any applicable binding authority or any on point decisions from other Circuit Courts, it is

ORDERED that Defendant Unite Here Local 355's Motion to Dismiss [DE-40] is GRANTED.

1. Plaintiff's complaint is DISMISSED with prejudice.

2. All pending motions not otherwise ruled upon are DENIED as moot.

3. This case is CLOSED.

DONE AND ORDERED in Miami, Florida, this 24th day of January, 2011.

/s/ Patricia A. Seitz
PATRICIA A. SEITZ
UNITED STATES
DISTRICT JUDGE

cc: All counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 08-61766-CIV-SEITZ/O'SULLIVAN

MARTIN MULHALL,

Plaintiff,

v.

UNITE HERE LOCAL 355,
HOLLYWOOD GREYHOUND
TRACK, INC.,

Defendants. /

ORDER GRANTING MOTION TO DISMISS

(Filed Apr. 22, 2009)

THIS action arises from Defendants Hollywood Greyhound Track ("Hollywood") and Unite Here Local 355's ("Unite Here") organizing concessions agreement ("MOA") to which Plaintiff ("Mulhall") is not a party. Mulhall protests that he is under imminent threat of injury because, according to the MOA, Hollywood will provide Unite Here with "thing[s] of value," namely his employee information, access to non-public areas such as employee break rooms during non-work hours, and employer neutrality to unionization, which violates section 302 of the Labor Management Relations Act ("LMRA"). At the April 13, 2009 hearing on Unite Here's Motion to Dismiss or Stay [DE 7, 9], Unite Here maintained that agreements like the MOA have never been deemed to trade a thing of value under the LMRA, but nonetheless

stipulated that, should the MOA be held enforceable against Hollywood in a related case,[1] it would not seek Mulhall's employee information. Mulhall responded that he was nevertheless subject to an imminent threat of injury because he may be unionized by Unite Here with the support of Hollywood's allegedly illegal concessions. Because Mulhall has not shown that his legally protected interests have been invaded and that his purported injury is actual or imminent rather than speculative and hypothetical, he lacks standing to contest the MOA's illegality, and therefore the Court will grant Unite Here's motion to dismiss.

I. Background[2]

Hollywood maintains a dog track at which Mulhall has worked first as a paramutual clerk and then as a groundskeeper for forty years. In an effort to establish a gaming facility, Hollywood executed the MOA in 2004 with Unite Here, the local hospitality services union. The MOA exchanged Unite Here's support for Hollywood's gaming license campaign and labor peace for three labor organizing concessions: (1) Hollywood must provide union representatives access

---

[1] Unite Here sued to compel Hollywood to arbitration in *Unite Here Local 355 v. Hollywood Greyhound Track, Inc.,* No. 61655-CIV-SEITZ.

[2] The Court takes the relevant background from the parties' statements at the hearing in addition to the facts in the pleadings.

to "non-public" work premises to organize employees during non-work hours; (2) Hollywood must provide the union a list of employees, their job classifications, departments, and addresses; and (3) Hollywood must remain neutral to the unionization of employees. (*See* DE 1 at 14-18 MOA ¶¶ 4, 7, 8, 11.) With these concessions, Unite Here may be more successful in its efforts to organize Hollywood's employees. If a majority of employees elect Unite Here pursuant to the MOA's "card check" election procedure, Hollywood must recognize Unite Here as the employees' exclusive bargaining representative. (*See* MOA ¶ 9.) At this time, Unite Here has not been elected as the employees' exclusive bargaining representative.

In 2006, Hollywood began operating its gaming facility, and, pursuant to the MOA, provided Unite Here employee information lists in 2006 and 2007. In 2008, Hollywood refused to provide Unite Here any employee information and, after they ignored requests to arbitrate the issue, Unite Here brought suit to compel arbitration. (*See* DE 1 "Complaint" ¶ 13.) On November 4, 2008, Mulhall sued both Hollywood and Unite Here, arguing that Unite Here's attempt to enforce the MOA violates section 302 of the LMRA. (*See* Complaint ¶ 14.) Mulhall seeks: (1) to enjoin Hollywood's performance under the MOA; and (2) a declaration that the MOA's concessions and Unite Here's attempt to enforce the MOA violates section 302. (*See* Complaint at 11.) On November 21, 2008, Unite Here moved to dismiss or stay his action. (*See* DE 7, 9.) In an effort to resolve the matter at the

April 13 hearing, Unite Here stipulated that it would not seek Mulhall's employee information. Mulhall insisted that his case concerned more than his own information, but the question remained whether he had standing to assert a section 302 claim regarding the MOA's other concessions.

II. Standards

Section 302 of the LMRA permits private litigants, such as Mulhall, to bring suits "to obtain injunctions in order to protect the integrity of employees' collective bargaining representatives in carrying out their responsibilities." *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195, 204-05 n. 19 (1962), *overruled on other grounds,* 398 U.S. 235 (1970). To that end, section 302 proscribes the "pay[ing], lend[ing], or deliver[ing] . . . [of] any money or other thing of value" between unions and employers. 29 U.S.C. § 186(a), (b). Significantly, section 302 also charges the Attorney General to enforce its prohibitions. 29 U.S.C. § 186(d); *Sinclair Refining,* 370 U.S. at 205 n. 19.

While section 302 provides a cause of action to private litigants, Article III of the Constitution requires Mulhall to submit an actual case or controversy. *Region 8 Forest Service Timber Purchasers Council v. Alcock,* 993 F.2d 800, 804 (11th Cir. 1993) (citing *Allen v. Wright,* 468 U.S. 737, 750 (1984)) Thus, to avail himself of section 302's private right of action,

Mulhall must satisfy three basic tenets of constitutional standing. First, he must have suffered or be under imminent threat of suffering a concrete and particularized injury in fact. *Region 8 Forest Service Timber Purchasers Council,* 993 F.2d at 804-05 (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)). Imminence requires that the injury is likely to occur immediately:

> Although "imminence" is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes-that the injury is *certainly* impending. It has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiffs own control. In such circumstances we have insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all.

Lujan, 504 U.S. at 564 (citations omitted) (emphasis in original).

Second, Mulhall's injury must be traceable to Hollywood's performance of the organizing concessions to Unite Here. *Region 8 Forest Service Timber Purchasers Council*, 993 F.2d at 804-05 (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)).

Finally, it must be likely, as opposed to merely speculative, that his injury will be redressed by a favorable decision from this Court. *Id.* In addition, as a prudential limit on his standing, Mulhall must advance his own rights and interests rather than rely on the rights and interests of others. *Region 8 Forest Service Timber Purchasers Council,* 993 F.2d at 804-05 (citing *Valley Forge College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 469 (1982)).

III. Discussion

Although Unite Here stipulated that it will not seek Mulhall's employee information, Mulhall asserts that he is subject to an imminent risk of injury because Unite Here seeks: (1) information on other employees; (2) access to his workplace during non-work hours; and (3) Hollywood's neutrality in an effort to become his exclusive bargaining representative.[3] Further, Mulhall contends that, should Unite

[3] Mulhall claims that these concessions are "thing[s] of value" under section 302 because *United States v. Nilsen,* 967 F.2d 539, 542-43 (11th Cir. 1992) and *United States v. Moore,* 525 F.3d 1033, 1048 (11th Cir. 2008), which concerned mail extortion and public corruption statutes, both read intangible items such as refraining from testifying and sexual services to be things of value. Mulhall also maintains that *Hotel Employees and Restaurant Employees Union v. Sage Hospitality Resources, LLC,* 390 F.3d 206 (3d Cir. 2004) and *Adcock v. Freightliner LLC,* 550 F.3d 369 (4th Cir. 2008), which hold that organizing concessions do not violate section 302, are erroneous and contrary to the law of this circuit as articulated in *Nilsen* and *Moore.*

Here be elected as his exclusive bargaining agent with the support of Hollywood's concessions, it would be in breach of its fiduciary obligations because it would be indebted to Hollywood. Mulhall's alleged injuries, however, are not supported by legally cognizable interests and are too speculative to be considered by this Court.

The particular concessions at issue, Mulhall's colleagues' information, access to Hollywood's premises, and Hollywood's neutrality, do not by themselves demonstrate an injury in fact because Mulhall does not have an enforceable interest in these concessions. *See Cox Cable Communications, Inc. v. United States,* 992 F.2d 1178, 1182 (11th Cir. 1993) ("No legally cognizable injury arises unless an interest is protected by statute or otherwise"). First, Mulhall cannot rely on Hollywood's use of other employees' information to establish his own injury. *See Region 8 Forest Service Timber Purchasers Council,* 993 F.2d at 804-05 (citation omitted). Second, Mulhall does not show that he has a cognizable property interest in Hollywood's premises. *Cf Lechmere, Inc. v. N.L.R.B.,* 502 U.S. 527, 529-31, 540-41 (1992) (employer "barged] [ ] nonemployee organizers from its property"). Third, Mulhall does not demonstrate a legally protected interest in Hollywood's speech. Hollywood's First Amendment free speech rights are not implicated here because there is no state action prohibiting Hollywood from speaking. Indeed, Hollywood privately and voluntarily contracted away its right to speak on Unite Here's unionization efforts, and Mulhall

cannot now stake claim to the rights Hollywood relinquished.

Furthermore, because Unite Here has not been elected as Mulhall's exclusive representative, and indeed may not ever be elected,[4] Unite Here's purported conflict of interest is at best speculative, and if Hollywood's employees do not elect Unite Here, its fiduciary obligations to Mulhall will never exist. By contrast, the union in *Adcock* had fiduciary obligations, which the plaintiff employees could raise in their section 302 challenge to the concessions agreement in that case, because the union had been elected by a majority of employees and recognized as their exclusive bargaining agent. *Adcock,* 550 at 372-73.[5] In this case, however, Mulhall cannot assert a similar injury because Unite Here has not been elected as his exclusive bargaining representative. Indeed, since Unite Here may lose a future card check election, any ruling on Mulhall's section 302 claim would be advisory and not connected to an imminent, actual injury.

---

[4] To be sure, because the question of the MOA's enforceability is yet to be decided by an arbitrator in Unite Here's companion case, Unite Here may never have the opportunity to request a card check election. *See Unite Here v. Hollywood Greyhound Track, Inc.,* No. 08-61655-CIV-SEITZ.

[5] While the Court intimates no view on the merits of Mulhall's case because he lacks standing, he fails to show how the holdings in *Nilsen* and *Moore* are controlling and why the *Adcock* and *Sage* holdings are unpersuasive.

Mulhall argues that section 302 provides standing because it extends its prohibitions to unions, like Unite Here, who "seek[ ] to represent" him. 29 U.S.C. 186(a)(2). However, assuming *arguendo* that Unite Here and Hollywood traded a thing of value in violation of section 302, it does not follow that Mulhall was injured merely because Unite Here sought to represent him. Without demonstrating that Unite Here and Hollywood "invaded some legally protected interest of his," Mulhall raises only a generalized grievance and cannot remedy their alleged section 302 violations as a private litigant. *Bochese v. Town of Ponce Inlet,* 405 F.3d 964, 980 (11th Cir. 2005) (citation omitted). To be sure, if Unite Here and Hollywood transgressed section 302 without particularized injury to any private litigant, criminal prosecution would be the appropriate manner of redress. *See, e.g., United States v. Phillips,* 19 F.3d 1565, 1575-76, 84 (11th Cir. 1994) (affirming section 302 conviction for undue pension benefits). Because the Court concludes that Mulhall fails to establish an injury in fact, it need not consider whether Mulhall demonstrates the remaining elements of standing. *See Bochese,* 405 F.3d at 980.

IV. Conclusion

For the reasons discussed above, because Mulhall: (1) failed to establish his legal interest in the MOA's concessions, and (2) has referred to injuries which would require the Court to speculate whether Unite Here will be elected and recognized, he lacks

standing to assert a section 302 claim. Thus, the Court will grant Unite Here's motion to dismiss. Accordingly, it is hereby

ORDERED that

(1) Unite Here's Motion to Dismiss [DE 7] is GRANTED. Mulhall's Complaint [DE 1] is DISMISSED.

(2) Unite Here's Motion to Stay [DE 9] is DENIED AS MOOT.

DONE AND ORDERED in Miami, Florida, this 22nd day of April, 2009.

/s/ Patricia A. Seitz
PATRICIA A. SEITZ
UNITED STATES
DISTRICT JUDGE

cc: Magistrate Judge John O'Sullivan
Counsel of Record

618 F.3d 1279

Martin MULHALL, Plaintiff-Appellant,

v.

UNITE HERE LOCAL 355, Hollywood Greyhound Track, Inc., d.b.a. Mardi Gras Gaming, Defendants-Appellees.

No. 09-12683

United States Court of Appeals,
Eleventh Circuit

Sept. 10, 2010

William L. Messenger, Nat. Right to Work Legal Defense Foundation, Springfield, VA, for Plaintiff-Appellant.

Noah Scott Warman, Sugarman & Susskind, P.A., Miami, FL, Robert L. Norton, Allen, Norton & Blue, P.A., Miami, FL, Brianne Marie Strohsahl, Michael Anthony Pancier, Rothstein Rosenfeldt Adler, Ft. Lauderdale, FL, Peter L. Sampo, Allen, Norton & Blue, P.A., Coral Gables, FL, for Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before BARKETT and MARCUS, Circuit Judges, and HOOD,* District Judge.

---

* Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

MARCUS, Circuit Judge:

Martin Mulhall ("Mulhall"), an employee at the Hollywood Greyhound Track, Inc., d/b/a Mardi Gras Gaming ("Mardi Gras"), appeals from the district court's dismissal of his complaint against Mardi Gras and UNITE HERE Local 355 ("Unite"), a labor union, for violations of § 302 of the Labor Management Relations Act ("LMRA"). Mulhall sued Unite and Mardi Gras to enjoin enforcement of a Memorandum of Agreement ("MOA"), whereby Unite agreed to spend money in support of Mardi Gras' public campaign to obtain a gaming license, in exchange for Mardi Gras' assistance in making Unite the exclusive bargaining agent for Mardi Gras' currently non-unionized workforce. Appellant Mulhall, who vigorously opposes being unionized, claims that the organizing assistance promised by Mardi Gras violates § 302 of the LMRA, which makes it illegal for an employer to deliver, or for a union to receive, any "thing of value," subject to limited exceptions. 29 U.S.C. § 186(a)-(b). The district court dismissed Mulhall's complaint for lack of standing, holding that he lacked a cognizable injury. After thorough review, we conclude, however, that Mulhall has standing to prosecute this claim in federal court, and therefore that the case is justiciable. Accordingly, we reverse and remand for further proceedings.

I.

Mulhall's grievance stems from a Memorandum of Agreement concluded between Mardi Gras and Unite on August 23, 2004. The substance of the agreement was as follows. The local union, Unite, promised to lend financial support to a ballot initiative regarding casino gaming that would benefit Mardi Gras, and, if recognized as the exclusive bargaining agent for Mardi Gras' employees, to refrain from picketing, boycotting, striking, or undertaking "other economic activity" against Mardi Gras.[1] In exchange, Mardi Gras promised to help Unite organize the company's non-unionized workforce. This assistance notably included providing complete lists of Mardi Gras' employees, including their job classifications, departments, and home addresses;[2] the use of Mardi Gras' property, including non-public areas, for organizing;[3] a "neutrality agreement" (which Mulhall

---

[1] "During the life of this Agreement, the Union will not engage in a strike, picketing[,] or other economic activity at any gaming facility covered by this Agreement. . . ." MOA ¶ 11. *See also* Complaint, ¶ 11 (describing promises of monetary and other support for ballot proposition concerning gaming).

[2] "Within ten (10) days following receipt of written notice of intent to organize Employees, the Employer will furnish the Union with a complete list of Employees, including both full and regular part-time Employees, showing their job classifications, departments[,] and addresses. Thereafter, the Employer will provide updated complete lists monthly, or at a longer period of time if the Union does not request the lists monthly." MOA ¶ 8.

[3] "If the Union provides written notice to the Employer of its intent to organize Employees covered by this Agreement, the

(Continued on following page)

calls a "gag clause") that prohibits any speech or actions by Mardi Gras or its agents that state or imply opposition to the union;[4] a waiver of Mardi Gras' right to seek NLRB-supervised *secret* elections to verify the union's majority status, and an agreement to abide by a less formal "card-check" procedure instead;[5] and a promise not to file unfair labor practice

---

Employer shall provide access to its premises and to such Employees by the Union. The Union may engage in organizing efforts in non-public areas of the gaming facility during Employees' non-working times (before work, after work, and during meals and breaks) and/or during such other periods as the parties may mutually agree upon." MOA ¶ 7.

[4] "The Employer will take a neutral approach to unionization of Employees. The Employer will not do any action nor make any statement that will directly or indirectly state or imply any opposition by the Employer to the selection by such Employees of a collective bargaining agent, or preference for or opposition to any particular union as a bargaining agent." MOA ¶ 4.

[5] "The Union may request recognition as the exclusive collective bargaining agent for Employees. The Arbitrator selected through the procedures set out [herein], or another person mutually agreed to by Employer and Union, will conduct a review of Employees' authorization cards and membership information submitted by the Union in support of its claim to represent a majority of such Employees. If that review establishes that a majority of such Employees has designated the Union as their exclusive collective bargaining representative or joined the Union, the Employer will recognize the union as such representative of such Employees. The Employer will not file a petition with the National Labor Relations Board for any election in connection with any demand for recognition provided for in this agreement." MOA ¶ 9.

charges against Unite for violations of employee rights during the union's organizing campaign.[6]

Pursuant to the MOA, Unite spent over $100,000 campaigning for the gaming-related ballot initiative favored by Mardi Gras. Thereafter, in May and July 2008, Unite sent Mardi Gras written notices of its intent to organize Mardi Gras' employees, and demanded that Mardi Gras provide the organizing assistance promised in the MOA. Mardi Gras, however, refused to provide the assistance, claiming, with the advice of new legal counsel, that the MOA was illegal and unenforceable.

Unite responded in late September 2008 by filing a petition to compel arbitration, pursuant to the MOA's arbitration clause, in the United States District Court for the Southern District of Florida. *See Unite HERE Local 355 v. Hollywood Greyhound Track, Inc.,* Case No. 08-61655-PAS (S.D.Fla.2008).[7] Unite requested enforcement of the MOA, but also made clear that if the MOA were found unlawful, it would "request restitutionary damages from the arbitrator or court based on quantum meruit for the time and money the Union and its members spent on

---

[6] "The Union and the Employer will not file any charges with the National Labor Relations Board in connection with any act or omission occurring within the context of this agreement; arbitration . . . shall be the exclusive remedy." MOA ¶ 9.

[7] Unite named Mardi Gras as the sole respondent, and Mulhall has never been a party to Unite's separate lawsuit against Mardi Gras.

the political campaign to obtain a gaming license for Mardi Gras (estimated at over $100,000) and over $100,000 in business which Mardi Gras would have lost from a boycott." Joint Scheduling Rpt., February 23, 2009, at *2. Mardi Gras filed an answer and counterclaimed for a declaration that the MOA was invalid.

On April 15, 2009, the district court entered an order compelling arbitration of the parties' dispute, including Mardi Gras' claim that the MOA was unenforceable. The matter was arbitrated, and on August 6, 2009, an arbitrator returned a ruling in favor of Unite, finding the MOA enforceable and requiring Mardi Gras to provide the requested organizing assistance. Mardi Gras then moved the district court to vacate the award, and Unite moved to confirm it. *See Hollywood Greyhound Race Track, Inc. v. Unite HERE Local 355*, Case No. 09-61760-WJZ (S.D.Fla.2009). The district court denied Mardi Gras' motion and confirmed the award in most material respects. The court granted Mardi Gras' motion to vacate the award only insofar as the arbitrator had unilaterally extended the terms of the MOA by one year, apparently as an equitable remedy for Mardi Gras' breach in failing to provide the contractually promised organizing assistance. *See Hollywood Greyhound Race Track, Inc. v. Unite HERE Local 355,* Case No. 09-61760-Zloch (S.D.Fla.2009) (Order granting in part and denying in part motions to vacate and to confirm arbitration award, at 6).

All the while, Mulhall was pursuing his own effort to block enforcement of what he characterized as an illegal and collusive arrangement between a union and an employer. Not long after Mardi Gras filed its counterclaim for declaratory relief, Mulhall filed his own action (the instant case) seeking an injunction pursuant to § 302(e) of the LMRA, 29 U.S.C. § 186(e), claiming that the MOA violated § 302(a)-(b) of the statute. On April 22, 2009, one week after ordering Mardi Gras and Unite to arbitrate the validity of the MOA, the district court dismissed Mulhall's complaint for lack of standing, holding that he had failed to show an injury-in-fact that was "actual or imminent," since it was possible that he would never be unionized even if Unite received all of the specified organizing assistance from the Hollywood Greyhound Track.

Mulhall timely filed this appeal, claiming to have both Article III and prudential standing to seek to enjoin the MOA pursuant to § 302. Unite disagrees, and also says that Mulhall's claim is not ripe for review because Mardi Gras has refused to provide organizing assistance, and may never do so.

II.

A.

We consider first whether Mulhall has Article III standing. As the party invoking federal jurisdiction, Mulhall bears the burden of demonstrating his standing to sue. *Pittman v. Cole,* 267 F.3d 1269, 1282 (11th

Cir.2001). To do so, he must show that: (1) he has suffered, or imminently will suffer, an injury-in-fact; (2) the injury is fairly traceable to the defendants' conduct; and (3) a favorable judgment is likely to redress the injury. *Harrell v. The Florida Bar,* 608 F.3d 1241, 1253 (11th Cir.2010). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (quoting *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 889, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990)).[8] Whether Mulhall has standing to seek an injunction of the MOA pursuant to § 302 is a legal issue subject to *de novo* review. *Region 8 Forest Serv. Timber Purchasers Council v. Alcock,* 993 F.2d 800, 806 (11th Cir.1993).

---

[8] Although a court may consider materials beyond the pleadings if the defendant has mounted a factual attack on subject-matter jurisdiction, there is no suggestion in this record that the defendant has done so, and we consider this to be a facial attack. A plaintiff defending against a facial attack on jurisdiction enjoys "safeguards similar to those retained when a Rule 12(b)(6) motion to dismiss for failure to state a claim is raised," and both the district court and a reviewing court "*must* consider the [well-pleaded] allegations in the plaintiff's complaint as true." *McElmurray v. Consol. Gov't of Augusta-Richmond County,* 501 F.3d 1244, 1251 (11th Cir.2007) (emphasis added) (citations omitted).

To demonstrate an injury-in-fact, Mulhall is required to show that he has a legally cognizable interest that has been or is imminently at risk of being invaded. *Lujan,* 504 U.S. at 560, 112 S.Ct. 2130. This requirement merely ensures that Mulhall, like any plaintiff, "has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues.'" *Flast v. Cohen,* 392 U.S. 83, 99, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968) (quoting *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). Importantly, therefore, the relevant question is not whether Mulhall has a legal right to be free from involuntary unionization, or is legally entitled to enjoin the MOA. "[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal," *Warth v. Seldin,* 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); it "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated," *Flast,* 392 U.S. at 99, 88 S.Ct. 1942. At issue today is only whether Mulhall has a stake in this controversy that is real enough and concrete enough to entitle him to be heard in a federal district court concerning his § 302 claim, nothing more.

Mulhall has a cognizable associational interest under the First Amendment to challenge the alleged collusive arrangement between the employer and the union under § 302. If Unite is certified as the majority representative of Mardi Gras' employees, Mulhall will have been thrust unwillingly into an agency

relationship, where the union is his "exclusive representative[ ] . . . for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment" under § 9(a) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 159(a). This arrangement creates a fiduciary relationship, akin to that between a trustee and beneficiary. *See Chauffeurs, Teamsters, and Helpers, Local 391 v. Terry,* 494 U.S. 558, 567, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990). Moreover, regardless of whether Mulhall can avoid contributing financial support to or becoming a member of the union, *cf.* Fla. Const. art. I, § 6 ("The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization."), its status as his exclusive representative plainly affects his associational rights. His views, for example, like those of any employee, may be at variance with

> a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines designed to limit inflation,

> or might object to the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination. The examples could be multiplied.

Abood v. Detroit Bd. of Ed., 431 U.S. 209, 222, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). Thus, it has long been recognized that such "association for the purpose of advancing economic, as well as political or religious, interests falls within the protection of the First Amendment." *Scott v. Moore,* 680 F.2d 979, 990 (5th Cir.1982) (en banc), *rev'd on other grounds sub nom. United Bhd. of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott,* 463 U.S. 825, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983) (citing *Bhd. of R.R. Trainmen v. Virginia,* 377 U.S. 1, 8, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964), *Thomas v. Collins,* 323 U.S. 516, 531, 65 S.Ct. 315, 89 L.Ed. 430 (1945), and *Abood,* 431 U.S. at 222, 97 S.Ct. 1782).

Just as "[t]he First Amendment clearly guarantees the right to join a union," *Hobbs v. Hawkins,* 968 F.2d 471, 482 (5th Cir.1992) (citing *Thomas,* 323 U.S. at 532, 65 S.Ct. 315), it "presupposes a freedom not to associate" with a union, *Roberts v. U.S. Jaycees,* 468 U.S. 609, 623, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) (citing *Abood,* 431 U.S. at 234-235, 97 S.Ct. 1782). This freedom of course may be outweighed by other important governmental interests, such as the promotion of productive labor-management relations. In this instance, for example, although the federally-created right of a majority-favored union to supersede an employee's direct bargaining relationship with his

employer amounts to "compulsory association," *Acevedo-Delgado v. Rivera,* 292 F.3d 37, 42 (1st Cir.2002), that compulsion "has been sanctioned as a permissible burden on employees' free association rights," *id.,* based on a legislative judgment that collective bargaining is crucial to labor peace, *Abood,* 431 U.S. at 224, 97 S.Ct. 1782.

The relevant point here, however, is that employees like Mulhall *have* such an associational interest. *See Scott,* 680 F.2d at 990 (holding that First Amendment interests of nonunion employees to work in nonunion environment were invaded by pro-union conspiracy); *see also Rivera,* 292 F.3d at 42. In other words, while "compulsory affiliation with . . . [a] union does not, without more, violate the First Amendment rights" of employees, *Lehnert v. Ferris Faculty Ass'n,* 500 U.S. 507, 517, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991) (addressing both private- and public-employer contexts), it is no less true that "compelling an employee . . . to belong to . . . a union . . . *implicates* that person's First Amendment right not to associate," *Romero v. Colegio De Abogados De P.R.,* 204 F.3d 291, 301 (1st Cir.2000) (emphasis added).[9] We conclude that Mulhall has a legally

[9] Indeed, even if Mulhall's associational interest were characterized as being primarily commercial in nature, his interest would still be entitled to protection under the First Amendment, albeit to a lesser extent. *See Roberts v. U.S. Jaycees,* 468 U.S. 609, 634, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) (O'Connor, J., concurring).

cognizable associational interest. We do not purport to assess the strength of Mulhall's interest; we say only that it is enough to allow him to get his ticket stamped for admission to the federal court in order to be able to argue that the arrangement between Mardi Gras and Unite is illegal under § 302.

Mulhall has also adequately alleged that this associational interest is at imminent risk of invasion, because Mardi Gras' provision of considerable and varied organizing assistance pursuant to the MOA will substantially increase the likelihood that Mulhall will be unionized against his will. Under controlling law, a plaintiff faces an "imminent" harm when there is "a realistic danger of sustaining a direct injury as a result" of the challenged action. *Fla. State Conf. of NAACP v. Browning,* 522 F.3d 1153, 1161 (11th Cir.2008) (quoting *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)). "How likely is enough is necessarily a qualitative judgment," *id.,* but, under our law, "probabilistic harm is enough injury in fact to confer standing in the undemanding Article III sense," *id.* at 1163 (citation and alteration omitted).

Mulhall has adequately alleged that the organizing assistance promised by Mardi Gras in the MOA is valuable, and indeed essential, to Unite's effort to gain recognition. As an initial matter, the complaint says that the provision of lists showing the classifications, departments, and home addresses of Mardi Gras' employees "permits Local 355 to target employees during organizing campaigns and send union

organizers to employees' homes," Complaint ¶ 17(b); that access to Mardi Gras' facilities, including "non-public areas of the gaming facility" during non-working hours, "is objectively useful to Local 355 for organizing nonunion employees," *id.* ¶ 20(b); that the neutrality agreement is also useful to Local 355 because, among other things, it silences potentially persuasive opponents of unionization within the company, including all managers and supervisors who otherwise might discuss the disadvantages of unionization, *id.* ¶ 25(b); and that Mardi Gras' waiver of its right to demand a secret, NLRB-conducted election, Complaint, ¶ 10(a)-a method which has "acknowledged superiority in ascertaining whether a union has majority support," *Linden Lumber Division, Summer & Co. v. NLRB,* 419 U.S. 301, 304, 95 S.Ct. 429, 42 L.Ed.2d 465 (1974)-similarly figured into the *quid pro quo* exchange with Unite, *id.* ¶ 11.

The complaint in this case, moreover, highlights Unite's own belief that the employer's organizing assistance is essential to its effort to gain majority status. The complaint contains the following quotation from Unite's own allegations in parallel litigation:

> [T]he Employer's failure to abide by the Agreement's provisions has caused and will cause serious irreparable injuries to the Union and its members. Without a list the Union is unable to provide information to many of the Employer's workers, and hence unable to obtain recognition as the employees'

> representative as contemplated by Section 9 of the Agreement, and unable to find out from workers whether the Employer is complying with other provisions of the Agreement. . . . The resulting delay in recognition means a delay in obtaining the financial benefits of union representation for employees, and increased organizing expenses and lost revenues for the Union, but the amount of such damages is extraordinarily burdensome to calculate, and also there are non-financial advantages to recognition which cannot be put into monetary terms. The Union is also suffering irreparable injuries in loss of standing with employees and loss of bargaining power.

Complaint ¶ 27 (quoting *Unite HERE Local 355 v. Hollywood Greyhound Track, Inc.,* Case No. 08-61655-PAS (S.D.Fla.) (Complaint ¶ 11)). Also noteworthy, of course, is the consideration Unite offered for the organizing assistance: it promised not to "picket, boycott, strike, or take other economic action against Mardi Gras," and that it would "expend monetary and other resources" to support a ballot proposition favored by Mardi Gras. *Id.* ¶ 11. Unite ultimately spent $100,000 on the initiative campaign, suggesting that the organizing assistance it bargained for was significant in a monetary sense.

Taken together, the allegations in Mulhall's complaint yield a strong inference that the organizing assistance is a critical ingredient for Unite's success, and that, if provided, it will substantially increase the

likelihood that Mulhall will be unionized against his will. That "probabilistic harm" is a cognizable injury for purposes of standing. *Browning,* 522 F.3d at 1163.[10]

---

[10] On appeal, Mulhall cites a number of academic authorities in support of his contention that the organizing assistance and other concessions by Mardi Gras in the MOA substantially increase the likelihood that Unite will achieve majority recognition. *See, e.g.,* Laura J. Cooper, *Privatizing Labor Law: Neutrality/Card Check Agreements and the Role of the Arbitrator,* 83 Ind. L.J. 1589, 1591-93 (2008) (noting that "all indications" in empirical research are that "neutrality/card check agreements [are] . . . a remarkably successful mechanism" in achieving recognition; explaining that neutrality agreements ban many lawful employer tactics thought to contribute to union representation election losses, including captive audience speeches, "aggressive and hierarchical" employer communications, and "intense personal campaigning by supervisors" (citation omitted); and observing that it is unclear "why a non-union employer might be willing to contract with a stranger union to forego lawful campaign tactics and a government-conducted secret-ballot election, both of which would enhance its chances of remaining union-free," except as a result of "rational business judgment"); Charles I. Cohen, Joseph E. Santucci, Jr. & Jonathan C. Fritts, *Resisting its Own Obsolescence-How the National Labor Relations Board is Questioning the Existing Law of Neutrality Agreements,* 20 Notre Dame J.L. Ethics & Pub. Pol'y 521, 523 (2006) (noting that neutrality agreements, employee lists, and access to employer facilities "significantly increase the chances that an organizing drive will be successful"); Adrienne E. Eaton & Jill Kriesky, *Union Organizing under Neutrality and Card Check Agreements,* 55 Indus. & Lab. Rel. Rev. 42, 57 (2001) (finding strong evidence that "[c]ard check agreements . . . substantially increased the rate of union recognition" as compared with NLRB-conducted secret elections, and that "[r]equirements that employers provide unions with employee lists and time limits to campaigns were both associated with

(Continued on following page)

For obvious reasons, Mulhall's claim also satisfies the causation element of the standing inquiry. Mulhall's claimed injury flows from Mardi Gras' imminent provision of organizing assistance under the MOA, in response to Unite's demands. This injury is "fairly traceable" to the defendants' conduct. *Lujan,* 504 U.S. at 560, 112 S.Ct. 2130 (alteration omitted).

Finally, Mulhall's allegations satisfy the redressability requirement. "Redressability is established . . . when a favorable decision 'would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered.'" *Harrell,* 608 F.3d at 1260 n. 7 (citation omitted). If Mulhall obtains a judgment enjoining enforcement of the MOA, the substantial increase in the risk of unionization attributable to the MOA will have been eliminated.

B.

Unite Local 355 also appears to suggest that Mulhall's claim is barred by the prudential standing doctrine, which comprises three non-constitutional, non-jurisdictional, policy-based limitations on the availability of judicial review. *Am. Iron and Steel Inst.*

---

greater union success"). This material, however, is neither part of the pleadings, nor subject to judicial notice, nor included in any affidavits or attachments to the pleadings, so we do not consider it in resolving this facial attack on subject-matter jurisdiction.

v. OSHA, 182 F.3d 1261, 1274 n. 10 (11th Cir.1999). The doctrine requires (1) that the plaintiff's complaint fall within the "zone of interests" protected by the statute or constitutional provision at issue; (2) that the complaint not require the court to pass on abstract questions or generalized grievances better addressed by the legislative branches; and (3) that the plaintiff assert his or her own legal rights and interests rather than the legal rights and interests of third parties. *Harris v. Evans,* 20 F.3d 1118, 1121 (11th Cir.1994) (en banc). Mulhall easily satisfies the second and third requirements. The only real dispute here is whether Mulhall meets the "zone-of-interests" test, which limits judicial review to claims of injury that are sufficiently related to the core concerns of a given statute.

The zone-of-interests test "does not require the plaintiff to show an identifiable 'legal interest' that may entitle him to relief." *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater,* 2 F.3d 1514, 1526 (11th Cir.1993) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp* ("*ADAPSO*"), 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970)). Rather, the plaintiff need only show "that the relationship between [his] alleged interest and the purposes implicit in the substantive provision [is] more than 'marginal[ ],'" *City of Clearwater,* 2 F.3d at 1526 (quoting *Clarke v. Sec. Indus. Ass'n,* 479 U.S. 388, 399, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987)). *See also ADAPSO,* 397 U.S. at 153, 90 S.Ct. 827.

The relationship between Mulhall's alleged interest and the purposes of § 302 is more than "marginal." Section 302 is "a conflict-of-interest statute," *United States v. Browne,* 505 F.3d 1229, 1248 (11th Cir.2007); it bans the exchange of anything of value between a union and an employer, subject to a strictly limited set of exceptions, *see* 29 U.S.C. § 186(a)-(c). Its purpose is to "protect employees in dealings between the union and employer," *Jackson Purchase Rural Elec. Coop. Ass'n v. Local Union 816, Int'l Bhd. of Elec. Workers,* 646 F.2d 264, 267 (6th Cir.1981), and specifically to protect them "from the collusion of union officials and management," *Mosley v. Nat'l Maritime Union Pension and Welfare Plan,* 438 F.Supp. 413, 421 (E.D.N.Y.1977). Indeed, the legislative history of § 302 demonstrates that the provision was intended to "prohibit[ ], among other things, the buying and selling of labor peace," *see* S.Rep. No. 98-225 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3477, something that the MOA at issue here at least arguably does, *see* Complaint ¶ 11; MOA ¶ 11. Mulhall's complaint thus falls within the zone of interests that § 302 was designed to protect.

In sum, Mulhall has adequately pleaded facts supporting Article III standing, and his claim raises no prudential standing concerns.

III.

Unite next argues that Mulhall's claim is not ripe, because his alleged injury is contingent on the

outcome of Mardi Gras' own lawsuit against Unite to void the MOA. Specifically, Unite suggests that Mardi Gras' lawsuit, if successful, would shield Mulhall from the agreement's allegedly illegal effects, and from the concomitant increase in the likelihood of unionization. We remain unpersuaded.

The ripeness doctrine is one of the several "strands of justiciability doctrine . . . that go to the heart of the Article III case or controversy requirement." *Harrell,* 608 F.3d at 1246 (quotation marks and citation omitted). While standing concerns the identity of the plaintiff and asks whether he may appropriately bring suit, ripeness concerns the timing of the suit. *Id.* at 1261. The function of the ripeness doctrine is to "protect[ ] federal courts from engaging in speculation or wasting their resources through the review of potential or abstract disputes." *Id.* at 1257-58 (citation and quotation marks omitted). "To determine whether a claim is ripe, we assess both the fitness of the issues for judicial decision and the hardship to the parties of withholding judicial review." *Id.* at 1258 (emphasis omitted). "The fitness prong is typically concerned with questions of 'finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed.'" *Id.* (citation and quotation marks omitted). "The hardship prong asks about the costs to the complaining party of delaying review until conditions for deciding the controversy are ideal." *Id.*

Unite's argument, which goes to the "fitness" prong of the ripeness inquiry, has some appeal, for it is generally true that the existence of contingencies raises fitness concerns that "militat[e] in favor of postpon[ing]" review. *Id.* at 1263 (quoting *AT&T Corp. v. FCC,* 349 F.3d 692, 700 (D.C.Cir.2003)). Specifically, if a plaintiff's claimed injury depends on the resolution of other judicial proceedings, there may well be fitness concerns that render the plaintiff's claim presumptively unripe. *See, e.g., In re Lowenschuss,* 170 F.3d 923, 932 (9th Cir.1999) (holding that claim in bankruptcy dependent on judgment in parallel proceedings in New Jersey was unripe, where Third Circuit had not yet ruled on an appeal); *Lincoln House, Inc. v. Dupre,* 903 F.2d 845 (1st Cir.1990).[11]

Yet, to determine whether a future contingency creates fitness (and ultimately ripeness) concerns, a court must assess the *likelihood* that a contingent event will deprive the plaintiff of an injury. *See*

---

[11] The "fitness" issue raised by the existence of future contingencies, which goes to ripeness, is related to but distinct from the "imminence" requirement of a cognizable injury-in-fact, which goes to standing. The question, for purposes of standing, is how likely the challenged conduct is to cause the plaintiff an injury. The question for ripeness purposes is whether the defendant's *engagement* in the challenged conduct is contingent on future events whose non-occurrence might deprive the plaintiff of an injury-in-fact. *See Bova v. City of Medford,* 564 F.3d 1093, 1096 (9th Cir.2009) (noting that ripeness and standing are interrelated, insofar as non-occurring future events will deprive the plaintiff of an injury-in-fact).

Pittman, 267 F.3d at 1278. In other words, it is not merely the existence, but the "*degree* of contingency [that] is an important barometer of ripeness." *Riva v. Massachusetts,* 61 F.3d 1003, 1011 (1st Cir.1995) (emphasis added). *See also United Steelworkers of Am., Local 2116 v. Cyclops Corp.,* 860 F.2d 189, 194 (6th Cir.1988) ("In undertaking a ripeness analysis, we. . . . pay particular attention to the likelihood that the harm alleged by plaintiffs will ever come to pass.").

In this case, it is extremely unlikely that Mardi Gras' parallel litigation, in its present posture, will deprive Mulhall of an injury. As recounted above, the district court granted Unite's motion to compel arbitration of the dispute over the validity of the MOA, and the arbitrator rendered a judgment in favor of Unite. Mardi Gras moved to vacate the award, but the district court confirmed the award in all respects but one. Thus, despite its long-standing unwillingness to comply with the disputed provisions of the MOA, Mardi Gras is *now* under compulsion of the law to do just that.

We can divine only one theoretical scenario in which Mulhall could be deprived of an injury at this point, namely, if Mardi Gras appealed the district court's order confirming the arbitration award, obtained a stay of the district court's judgment pending appeal, *and* prevailed on appeal. But that scenario is a decidedly remote possibility under the circumstances, because Mardi Gras is very unlikely to succeed in an appeal of the judgment confirming the arbitration

award. The Federal Arbitration Act authorizes a federal court to vacate an arbitral award in only four instances:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a); *Frazier v. CitiFinancial Corp., LLC,* 604 F.3d 1313, 1321, 1324 (11th Cir.2010) (holding that statutory grounds for vacatur are exclusive). Aside from its claim that the arbitrator exceeded his authority by extending the term of the MOA for one year – a claim upon which the district court granted relief – Mardi Gras never argued that the arbitral award was subject to vacatur on any of the enumerated statutory grounds.

Furthermore, although Mardi Gras might argue on appeal that the validity of the MOA should not

have been arbitrated in the first instance, Mardi Gras is very unlikely to prevail on that claim, either. As the district court observed in granting Unite's motion to compel arbitration, federal law required arbitration of the subject dispute, pursuant to the MOA's arbitration clause, "unless it [could] be said with positive assurance that the arbitration clause [was] not susceptible of an interpretation that cover[ed] the asserted dispute," with any doubts about arbitrability resolved "in favor of coverage." *AT & T Techs. v. Commc'ns Workers of Am.,* 475 U.S. 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (citations omitted). The clause at issue here broadly covered "any disputes over the interpretation or application of" the MOA, a phrase that seems at least arguably expansive enough to cover a dispute over whether certain parts of the agreement were legal and could be applied at all.

It is also exceedingly unlikely that Mardi Gras could successfully obtain a stay of the district court's judgment confirming the arbitral award pending appeal. To be sure, a stay is theoretically (and procedurally) possible: "[a]rbitration awards are not self-enforcing, [but] . . . must be given force and effect by being converted to judicial orders" on an appropriate motion to confirm or vacate, *D.H. Blair & Co. v. Gottdiener,* 462 F.3d 95, 104 (2d Cir.2006) (internal quotation marks omitted), and a district court may enter a stay of any judgment pending an appeal, *see* Fed.R.Civ.P. 62, including a judgment upon an order confirming or vacating an arbitral award. Yet, in

ruling on a requested stay, the district court first would have to assess the appellant's likelihood of success on appeal. *See Venus Lines Agency v. CVG Industria Venezolana De Aluminio, C.A.,* 210 F.3d 1309, 1313-14 (11th Cir.2000).[12] As we see it, the likelihood that Mardi Gras will succeed in any appeal is minimal due to the constraints of the arbitration system, and the additional likelihood of a stay is correspondingly low.

In short, the contingency, if any, occasioned by Mardi Gras' parallel litigation to void the MOA is very remote. Thus, Mulhall's claim raises no substantial fitness concerns. And, "'[w]here . . . there are no significant agency or judicial interests militating in favor of delay, [lack of] "hardship" cannot tip the balance against judicial review.'" *Harrell,* 608 F.3d at 1259 (quoting *Consol. Rail Corp. v. United States,* 896 F.2d 574, 577 (D.C.Cir.1990)). Accordingly, Mulhall's claim is ripe for review, too.

---

[12] The likelihood of success is one factor a district court must consider when ruling on a requested stay. The other factors are: whether, absent a stay, the movant will suffer irreparable damage; whether the adverse party will suffer no substantial harm from issuance of a stay; and whether the public interest will be served by issuing a stay. *Venus Lines Agency v. CVG Industria Venezolana De Aluminio, C.A.,* 210 F.3d 1309, 1313-14 (11th Cir.2000).

IV.

Beyond the issues of standing and ripeness, the parties have extensively briefed the merits question of whether § 302 provides a claimant like Mulhall with a private right of action, as well as the question of whether the organizing assistance specified in the MOA actually violates § 302 of the LMRA. Neither question, however, is properly before us on review of the district court's order dismissing this action for lack of subject-matter jurisdiction.

The existence of a private right of action is an issue "separate and distinct" from the issue of standing, *The Wilderness Society v. Kane County, Utah,* 581 F.3d 1198, 1215 (10th Cir.2009), and "is not jurisdictional," *Northwest Airlines, Inc. v. County of Kent, Mich.,* 510 U.S. 355, 365, 114 S.Ct. 855, 127 L.Ed.2d 183 (1994). *See also Air Courier Conference of Am. v. Am. Postal Workers Union, AFL-CIO,* 498 U.S. 517, 523, n. 3, 111 S.Ct. 913, 112 L.Ed.2d 1125 (1991). Although the district court mentioned in passing that § 302 provides a private right of action, *Mulhall v. Unite HERE Local 355, et al.,* No. 08-61766-PAS (S.D. Fla. April 22, 2009) (Order granting motion to dismiss, at 3), and although the Supreme Court has observed in dicta that § 302(e) "expressly permit[s] suits for injunctions . . . to be brought in the federal courts by private litigants," *Sinclair Ref. Co. v. Atkinson,* 370 U.S. 195, 205 n. 19, 82 S.Ct. 1328, 8 L.Ed.2d 440 (1962), the issue is simply not for us to decide in this appeal.

Similarly, the question of whether the disputed organizing assistance is a "thing of value," whose provision by Mardi Gras or acceptance by Unite would violate § 302, is beyond the scope of this appeal. "[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth,* 422 U.S. at 500, 95 S.Ct. 2197. The merits will be for the district court to decide on remand.

V.

In sum, we conclude that Mulhall has constitutional and prudential standing to maintain his claim for injunctive relief under § 302 of the Labor Relations Management Act, and that his claim is ripe for review. Accordingly, we reverse the district court's order and judgment of dismissal and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 11-10594-FF

MARTIN MULHALL,

Plaintiff-Appellant,

versus

UNITE HERE LOCAL 355,
HOLLYWOOD GREYHOUND TRACK, INC.,
doing business as Mardi Gras Gaming,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Filed Apr. 25, 2012)

BEFORE: WILSON and FAY, Circuit Judges, and RESTANI,* Judge.

---

* Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Charles R. Wilson
UNITED STATES
CIRCUIT JUDGE

ORD-42

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. **08-CV-61766-Zloch-Snow**

MARTIN MULHALL

Plaintiff,

v.

UNITE HERE LOCAL 355,
HOLLYWOOD GREYHOUND
TRACK, INC., d/b/a
MARDI GRAS GAMING

Defendants

COMPLAINT

(Filed Nov. 3, 2008)

Preliminary Statement

This is a suit for injunctive and declaratory relief under § 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186. Section 302(a)(2) makes it unlawful for an employer to deliver "any money or other thing of value . . . to any labor organization," except for that permitted by § 302(c). Section 302(b)(1) makes it unlawful for a union to demand or receive anything prohibited by § 302(a).

UNITE HERE Local 355 ("Local 355") is demanding that Hollywood Greyhound Track, d/b/a Mardi Gras Gaming ("Mardi Gras") deliver several "thing[s] of value" to the union not permitted by § 302(c): (1) information about nonunion employees; (2) access

and use of the employer's property for organizing; and (3) control over the employer's communications with nonunion employees. In so doing, Local 355 is violating the plain language of § 302(b)(1) of the LMRA.

Plaintiff Martin Mulhall is an employee of Mardi Gras who does not want Local 355 to obtain information about himself and his co-workers, to have access to his workplace, or to become his exclusive representative. In this suit, Plaintiff seeks an injunction under § 302(e) that prohibits Local 355 from demanding or receiving from his employer "things of value" in the form of organizing assistance and a declaration that Local 355's demands violate § 302(b)(1) of the LMRA.

Jurisdiction and Venue

1. This action arises under § 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186. This Court has subject matter jurisdiction over this action pursuant to § 302(e), 29 U.S.C. § 186(e), and under 28 U.S.C. § 1331.

2. This is also a case of actual controversy in which Plaintiff seeks a declaration of his rights under 28 U.S.C. §§ 2201 and 2202.

3. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b), 1391(c), and 1392(a). The events giving rise to this suit occurred in this judicial district, the Defendants transact business in this judicial district, and Plaintiff resides in this judicial district.

The Parties

4. UNITE HERE Local 355 ("Local 355") is a labor organization headquartered in Miami, Florida that transacts business and represents employees in this judicial district. Local 355 is under the trusteeship and control of UNITE HERE, a labor organization, which is responsible for all of Local 355's actions stated herein.

5. Hollywood Greyhound Track Inc., d/b/a Mardi Gras Gaming ("Mardi Gras") is a Florida corporation engaged in an industry affecting interstate commerce and is an employer that does business in this judicial district. Mardi Gras owns and operates the Mardi Gras Gaming facility in Hollywood, Florida, which sells gaming and entertainment services and hosts groups and group events.

6. Plaintiff Martin Mulhall resides in Davie, Florida and is employed by Mardi Gras at its Mardi Gras Gaming facility.

The Memorandum of Agreement

7. Local 355 does not exclusively represent Plaintiff or other employees employed by Mardi Gras at the Mardi Gras Gaming facility, but seeks to represent these employees and would admit them to membership.

8. On 23 August 2004, Local 355 and Mardi Gras entered into a Memorandum of Agreement ("MOA") attached hereto as Exhibit A.

9. The MOA requires that Mardi Gras assist Local 355 with organizing its nonunion employees by delivering several valuable things to Local 355, including information about Mardi Gras' nonunion employees, access and use of Mardi Gras' properties and facilities for organizing, and control over Mardi Gras' communications with its nonunion employees.

10. The MOA further requires that the representational procedures of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.,* not be invoked or utilized. Specifically, the MOA mandates that Mardi Gras:

a. not petition the National Labor Relations Board under § 9 of the NLRA, 29 U.S.C. § 159, for secret-ballot elections in which employees can vote on whether they want union representation, *see* MOA ¶ 9;

b. not file unfair labor practice charges with the National Labor Relations Board under § 8 of the NLRA, 29 U.S.C. § 158, regarding violations of employee rights during the union's organizing campaign, *see* MOA ¶ 9.

11. In exchange, *quid pro quo,* for Mardi Gras' agreement to deliver valuable organizing assistance to the union, Local 355 promised Mardi Gras labor peace, namely that Local 355 would not picket, boycott, strike, or take other economic action against Mardi Gras, and agreed to expend monetary and other resources to support a ballot proposition favored by Mardi Gras.

Local 355 Demands Three Things of Value From Mardi Gras

12. In May 2008, and again in July 2008, Local 355 demanded that Mardi Gras enforce the MOA at the Mardi Gras Gaming facility by providing written notices of its intent to organize the employees employed at the facility.

13. On 26 September 2008, Local 355 filed a Petition and Complaint to Compel Arbitration ("Petition") with the District Court for the Southern District of Florida to compel Mardi Gras to enforce the MOA at the Mardi Gras Gaming facility. *See UNITE HERE Local 355 v. Hollywood Greyhound Track, Inc.,* Case No. 08-61655CIV-Seitz/O'Sullivan (S.D. Fla. 2008).

14. By demanding that Mardi Gras enforce the MOA as stated above in ¶¶ 12-13, Local 355 has demanded that Mardi Gras deliver to it three things of value: information about nonunion employees under ¶ 8 of the MOA; access and use of the Mardi Gras Gaming facility under ¶ 7 of the MOA; and control over Mardi Gras' communications with its nonunion employees under ¶ 4 of the MOA.

15. *Information.* Local 355 demands that Mardi Gras provide it with information about nonunion employees pursuant to ¶ 8 of the MOA, which states:

> Within ten (10) days following receipt of written notice of intent to organize Employees, the Employer will furnish the Union with a complete list of Employees, including both full and regular part-time Employees, showing

> their job classifications, departments, and addresses. Thereafter, the Employer will provide updated complete lists monthly, or at a longer period of time if the Union does not request the lists monthly.

(hereinafter "Information").

16. The Information demanded by Local 355 is the property of Mardi Gras and is maintained by Mardi Gras as confidential business information.

17. The Information that Local 355 demands is a thing of value because, among other things:

a. Local 355 subjectively desires the Information and believes it to be valuable;

b. the Information is objectively useful to Local 355 because, among other things, it permits Local 355 to target employees during organizing campaigns and send union organizers to employees' homes; and

c. the Information has monetary and market value.

18. *Access*. Local 355 demands that Mardi Gras grant it access and use of the Mardi Gras Gaming facility pursuant to ¶ 7 of the MOA, which states:

> If the Union provides written notice to the Employer of their intent to organize Employees covered by this Agreement, the Employer shall provide access to its premises and to such Employees by the Union. The Union may engage in organizing efforts in non-public areas of the gaming facility during

> Employees' non-working times (before work, after work, and during meals and breaks) and/or during such other periods as the parties may mutually agree upon.

(hereinafter "Access").

19. The Mardi Gras Gaming facility is the private property of Mardi Gras.

20. The Access demanded by Local 355 is a thing of value because, among other things:

a. Local 355 subjectively desires the Access and believes it to be valuable;

b. it is objectively useful to Local 355 for organizing nonunion employees; and

c. the right to access and use the Mardi Gras Gaming facility has monetary and market value.

21. *Gag-Clause.* Local 355 demands that Mardi Gras provide it with control over Mardi Gras' communications with its nonunion employees pursuant to ¶ 4 of the MOA, which states:

> The Employer will take a neutral approach to unionization of Employees. The Employer will not do any action nor make any statement that will directly or indirectly state or imply any opposition by the Employer to the selection by such Employees of a collective bargaining agent, or preference for or opposition to any particular union as a bargaining agent. Upon request of the Union, the Employer shall issue a written statement to the

> employees acknowledging this agreement and its terms.

(hereinafter "Gag Clause").

22. Enforcement of ¶ 4 of the MOA will provide Local 355 with contractual control over Mardi Gras' communications and contractual control over the actions of Mardi Gras' managers, supervisors, and agents.

23. Mardi Gras has proprietary interests in its communications, relations with employees, and the actions of its managers, supervisors, and agents.

24. Mardi Gras would take actions and make statements that state or imply opposition to Local 355 but for ¶ 4 of the MOA.

25. The Gag Clause demanded by Local 355 is a thing of value because, among other things:

a. Local 355 subjectively desires the Gag Clause and believes it to be valuable;

b. the Gag Clause is objectively useful to Local 355 because, among things, it silences a persuasive party that would otherwise oppose Local 355 and, *inter alia,* prevents employees from learning about the disadvantages of Local 355; and

c. control over Mardi Gras' communications has monetary and market value.

26. Delivery of the Information, Access, and Gag Clause to Local 355 will result in a significant

monetary benefit to the union because, among other things, it will reduce the expense of conducting an organizing campaign against Mardi Gras employees and likely result in an increase in dues revenues for the union.

27. Local 355 had plead that it believes the Information, Access, and Gag Clause to be valuable in ¶ 11 of its Petition in *UNITE HERE Local 355 v. Hollywood Greyhound Track, Inc.,* Case No. 08-61655, which states:

> [T]he Employer failure to abide by the Agreement's provisions has caused and will cause serious irreparable injuries to the Union and its members. Without a list the Union is unable to provide information to many of the Employer's workers, and hence unable to obtain recognition as the employees' representative as contemplated by Section 9 of the Agreement, and unable to find out from workers whether the Employer is complying with other provisions of the Agreement. The deprivation of speech rights caused by the Employer's violation of Section 8 is inherently-irreparable injury. The resulting delay in recognition means a delay in obtaining the financial benefits of union representation for employees, and increased organizing expenses and lost revenues for the Union, but the amount of such damages is extraordinary [sic] burdensome to calculate, and also there are non-financial advantages to recognition which cannot be put into in [sic] monetary terms. The Union is also suffering

> irreparable injuries in loss of standing with employees and loss of bargaining power.

Paragraph 11 of the Petition is quoted solely as a statement of Local 355's subjective beliefs regarding the organizing assistance, not for its objective truth.

28. Unions have made, and are liable to make, wage, benefit, and other concessions at the expense of employees they exclusively represent in collective bargaining in exchange, *quid pro quo,* for things of value from employers that include lists of information about nonunion employees, the right to access and use nonunion properties and facilities, control over employer communications with nonunion employees, and other forms of valuable organizing assistance.

29. Mardi Gras has refused to deliver the Information, Access, and Control that the Local 355 demands from it.

Local 355's Demands for Organizing Assistance Create An Imminent Risk of Injury to Plaintiff

30. Local 355's demands for Information, Access, and a Gag Clause creates an actual and imminent risk of the following irreparable harms to Plaintiff's rights and interests:

a. Mardi Gras will deliver personnel information about Plaintiff and his co-workers to Local 355, including home addresses, job descriptions, and work shifts;

b. Local 355 will have access to Plaintiff and his co-workers in their workplace;

c. Plaintiff and his co-workers will be deprived of information from Mardi Gras about Local 355 and union representation;

d. Plaintiff will be exclusively represented by Local 355, and thus forced into an unwanted compulsory agency relationship that deprives him of his ability to deal with Mardi Gras with respect to his terms and conditions of employment, and;

e. Local 355 will partially control and change Plaintiffs terms and conditions of employment, including his wages, benefits, and terms of employment.

Local 355's Demands for Information, Access, and Control Violate § 302(b)(1) of the LMRA

31. Section 302(a)(2) of the LMRA states in pertinent part that "[i]t shall be unlawful for any employer . . . to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value . . . 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." 29 U.S.C. § 186(a)(2).

32. Section 302(b)(1) of the LMRA states that "[i]t shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other

thing of value prohibited by subsection (a) of this section." 29 U.S.C. § 186(b)(1).

33. Section 302(c) of the LMRA, 29 U.S.C. § 186(c), states nine exceptions to the general prohibitions of §§ 302(a) and (b), none of which apply here.

34. Mardi Gras is an "employer" under § 302(a)(2). Local 355 is a "labor organization . . . which represents, seeks to represent, or would admit to membership, any of the employees of" Mardi Gras under § 302(a)(2) of the LMRA and is a "person" under § 302(b)(1) of the LMRA.

35. The Information, Access, and Gag Clause demanded by Local 355 from Mardi Gras are each a "thing of value" under §§ 302(a) and (b), and are not covered by any of the exceptions listed in § 302(c).

36. Mardi Gras would violate § 302(a)(2) if it delivered or agreed to deliver to Local 355 the Information, Access, or Gag Clause demanded by the union.

37. Local 355 has violated § 302(b)(1) by requesting and demanding that Mardi Gras deliver "thing[s] of value" to Local 355 in the form of Information, Access, and a Gag Clause.

38. At this time, it is not alleged that Mardi Gras has violated § 302(a)(2) because it has not delivered the Information, Access, or Gag Clause demanded by Local 355. However, Mardi Gras is a necessary party to this suit.

Prayer for Relief

WHEREFORE, Plaintiff prays that this Court:

A. Issue a permanent injunction that enjoins the Local 355 from:

1. requesting, demanding, or receiving from Mardi Gras things of value in the form of information about Mardi Gras' nonunion employees, access and use of Mardi Gras' nonunion properties and facilities, and control over Mardi Gras' communications with its nonunion employees; and

2. invoking, enforcing, or attempting to enforce ¶¶ 4, 7, and 8 of the MOA.

B. Issue a declaratory judgment that:

1. Local 355's demands for things of value in the form of information about Mardi Gras' nonunion employees, access and use of Mardi Gras' nonunion properties and facilities, and control over Mardi Gras' communications with its nonunion employees, are unlawful under § 302(b)(1) of the LMRA; and

2. paragraphs 4, 7, and 8 of the MOA are unlawful, void, and facially invalid under § 302 of the LMRA.

C. Order any other legal or equitable relief deemed just and proper.

Respectfully submitted this 3 day of November 2008.

/s/ [Illegible]
Daniel R. Levine
(Fla. Bar No. 0057861)
Email:
drlevine@sbwlawfirm.com
Shapiro, Blasi, Wasserman,
& Gora, P.A.
Corporate Center at
Boca Raton
7777 Glades Road,
Suite 400
Boca Raton, Florida 33434
(561) 477-7800
(561) 477-7722 (fax)

William L. Messenger
(Va. Bar No. 47179)*
E-mail: wlm@nrtw.org
c/o National Right to Work
Legal Defense Foundation
8001 Braddock Road,
Suite 600
Springfield, Virginia 22160
(703) 321-8510
(703) 321-9319 (fax)

**Pro hac vice motion*
to be filed

EXHIBIT “A”

MEMORANDUM OF AGREEMENT

THIS AGREEMENT is made and entered into by and between Hollywood Greyhound Track, Inc., (hereinafter referred to as the "Employer"), and Local 355 of UNITE-HERE, AFL-CIO ("Union").

1. This Agreement shall cover all employees employed in classifications in the bargaining unit described in Exhibit A, or in classifications called by different names when performing similar duties, (referral to hereinafter as "Employees") at any and every casino, racing and/or other facility in Miami-Dade and/or Broward counties licensed by the State of Florida for any type of gaming, including associated operations such as hotels and restaurants, food stands, bars, conference centers, grandstands, storerooms and warehouse facilities (hereinafter referred as a "gaming facility" or collectively as "gaming facilities"), which during the term of this Agreement is owned by, operated by or substantially under the control of the Employer. The term "Employer" shall be deemed to include any person, firm, partnership, corporation, joint venture or other legal entity substantially under the control of: (a) the Employer covered by this Agreement; (b) one or more principal(s) of the Employer covered by this Agreement; (c) a subsidiary of the Employer covered by this Agreement; or (d) any person, firm, partnership, corporation, joint venture or other legal entity which substantially controls the Employer covered by this Agreement.

2. The parties hereby establish the following procedure for the purpose of ensuring an orderly environment for the exercise by the Employees of their rights under Section 7 of the National Labor Relations Act and to avoid picketing and/or other economic action directed at the Employer in the event the Union decides to conduct an organizing campaign among Employees.

3. The parties mutually recognize that national labor law guarantees employees the right to form or select any labor organization to act as their exclusive representative for the purpose of collective bargaining with their employer, or to refrain from such activity.

4. The Employer will take a neutral approach to unionization of Employees. The Employer will not do any action nor make any statement that will directly or indirectly state or imply any opposition by the Employer to the selection by such Employees of a collective bargaining agent, or preference for or opposition to any particular union as a bargaining agent. Upon request of the Union, the Employer shall issue a written statement to the employees acknowledging this agreement and its terms.

5. The Union and its representatives will not coerce or threaten any Employee in an effort to obtain authorization cards.

6. Whenever the Employer finds it necessary to hire new Employees for vacancies in job classifications covered by this Agreement at any gaming facility, the Employer shall notify the Union and the

Union may refer applicants for such vacancies. The Employer is free to solicit applicants from any other sources as well. The Employer shall state the qualifications applicants are expected to possess. The Union's selection of applicants for referral shall be on a non-discriminatory basis and shall not be based upon or in any way affected by membership in the Union or the Union's bylaws, rules, regulations, constitutional provisions, or any other aspects or obligation of Union membership policies or requirements, or upon personal characteristics of an applicant where discrimination based upon such characteristics is prohibited by law. The Employer agrees that any interest demonstrated by an applicant in joining the Union shall not constitute grounds for discriminatory or disparate treatment nor adversely impact the applicant's ability to be hired by the Employer. The Employer shall be the sole judge of an applicant's suitability, competence and qualifications to perform the work of any job to be filled.

7. If the Union provides written notice to the Employer of its intent to organize Employees covered by this Agreement, the Employer shall provide access to its premises and to such Employees by the Union. The Union may engage in organizing efforts in non-public areas of the gaming facility during Employees' non-working times (before work, after work, and during meals and breaks) and/or during such other periods as the parties may mutually agree upon. Union representatives will be required to sign in and wear identification while on the premises of the Employer.

The Union will not disrupt or interfere with the normal work, business and operations of the Employer or its Employees.

8. Within ten (10) days following receipt of written notice of intent to organize Employees, the Employer will furnish the Union with a complete list of Employees, including both full and regular part-time Employees, showing their job classifications, departments and addresses. Thereafter, the Employer will provide updated complete lists monthly, or at a longer period of time if the Union does not request the lists monthly.

9. The Union may request recognition as the exclusive collective bargaining agent for Employees. The Arbitrator selected through the procedures set out in Paragraph 14, or another person mutually agreed to by Employer and Union, will conduct a review of Employees' authorization cards and membership information submitted by the Union in support of its claim to represent a majority of such Employees. If that review establishes that a majority of such Employees has designated the Union as their exclusive collective bargaining representative or joined the Union, the Employer will recognize the Union as such representative of such Employees. The Employer will not file a petition with the National Labor Relations Board for any election in connection with any demand for recognition provided for in this agreement. The Union and the Employer will not file any charges with the National Labor Relations Board in connection with any act or omission occurring within

the context of this agreement; arbitration under Paragraph 14 shall be the exclusive remedy.

10. If the Union is recognized as the exclusive collective bargaining representative as provided in paragraph 9, negotiations for a collective bargaining agreement shall be commenced immediately. If the parties are unable to reach agreement on a collective bargaining agreement within 150 days after recognition pursuant to Paragraph 9, all unresolved issues except issues related to retirement and profit-sharing plans shall be submitted for resolution to final and binding arbitration pursuant to Paragraph 14. The arbitrator shall be selected in accordance with the procedure set forth in paragraph 14 below, unless the parties mutually agree otherwise in writing.

11. During the life of this Agreement, the Union will not engage in a strike, picketing or other economic activity at any gaming facility covered by this Agreement, provided that if the Employer recognizes any other union as the exclusive collective bargaining representative of Employees at a gaming facility in the unit described in Exhibit A, or any part thereof, this paragraph shall terminate immediately and without notice.

12. In the event that the Employer sells, transfers, or assigns all or any part of its right, title, or interest in a gaming facility or substantially transfers any or all of the assets used in the operation of the gaming facility, or in the event there is a change in the form of ownership of the Employer, the Employer

shall give the Union reasonable advance notice thereof in writing, and the Employer further agrees that as a condition to any such sale, assignment, or transfer, the Employer will obtain from its successor or successors in interest a written assumption of this Agreement and furnish a copy thereof to the Union, in which event the assignor shall be relieved of its obligations hereunder to the extent that the assignor has fully transferred its right, title, or interest.

13. The Employer shall incorporate the entirety of paragraphs 4, 6, 7, 8, 9, and 10 of this of Agreement in any contract, subcontract, lease, sublease, operating agreement, franchise agreement or any other agreement or instrument giving a right to any person to operate any enterprise at a gaming facility employing employees in classifications listed in Exhibit A, or in classifications called by different names when performing similar duties, and shall obligate any person taking such interest, and any and all successors and assigns of such person, to in turn incorporate said paragraphs in any further agreement or instrument giving a right as described above. The Employer shall enforce such provisions, or at its option, assign its rights to do so to the Union. The Employer shall give the Union written notice of the execution of such agreement or instrument and identify the other party(ies) to the transaction within 15 days after the agreement or instrument is signed. The terms "Employer" and "gaming facility" shall be modified in such agreement or instrument to conform to the terminology in such agreement or instrument but retain

the same meaning as in this Agreement, and the terms "Employer" and "Employees" as used herein shall be modified to refer, respectively, to the person or persons receiving a right to operate an enterprise at a gaming facility and the employees of such person or persons.

14. The parties agree that any disputes over the interpretation or application of this Agreement shall be submitted to expedited and binding arbitration. The parties shall attempt to agree on a mutually acceptable person to serve as arbitrator. If the parties are unable to agree on such a person, or that person is unavailable to serve within fourteen (14) calendar days of notification, then the arbitrator shall be identified by alternate striking from a panel supplied by the American Arbitration Association (AAA) of eleven arbitrators who are members of the National Academy of Arbitrators and who appear on lists of arbitrators regularly provided by the Miami Regional Office of the AAA. The parties shall determine who strikes first by coin toss. The arbitrator whose name remains after each party has exercised five strikes shall be the arbitrator for that dispute; selection of an arbitrator for any subsequent dispute will follow the same procedure. If he is not available to serve within fourteen (14) calendar days of notification, the parties shall select another arbitrator by the same method until they are successful. The arbitrator shall have the authority to determine the arbitration procedures to be followed. The arbitrator shall also have the authority to order the non-compliant party to comply

with this Agreement. The parties hereto agree to comply with any order of the arbitrator, which shall be final and binding and supported by a written statement of the reasons for the order, and furthermore consent to the entry of any order of the arbitrator as the order or judgment of the United States District Court for the Southern District of Florida, without entry of findings of fact and conclusions of law.

15. This Agreement shall be in full force and effect for 4 years from the installation of the first slot machine, Video Lottery Terminal or similar gaming device at the gaming facility, or, only with respect to a Unit at any particular gaming facility, if sooner, upon execution of a collective bargaining agreement or issuance of an interest arbitration award which concludes the collective bargaining agreement negotiations for that Unit, either of which explicitly supersedes this document. This Agreement is not in effect if slot machines, Video Lottery Terminals or similar gaming devices are not installed and open to the public at the gaming facility.

For Hollywood Greyhound Track, Inc.		For Local 355 of UNITE-HERE (AFL-CIO)	
By: /s/	Dan Adkins	By: /s/	Andre J. Balash
Its:	V.P.	Its:	Secretary Treasurer Business Mgr
Date:	8/23/04	Date:	August 23, 2004

Exhibit A

All regular full-time and regular part-time bell department, hotel housekeeping, casino, food and beverage, banquet, conference services, janitorial, cleaning, laundry and shipping and receiving employees (including room cleaners, house persons, bell persons, baggage handlers, door persons, change persons, slot attendants, booth cashiers, carousel attendants, cooks, kitchen employees, utility employees, servers, bussers, bartenders, hotel and dining room cashiers, hosts, concierges, non-hotel public space cleaners, restroom attendants, office cleaners, laundry employees and front desk employees), but excluding all secretarial, office clerical, sales and all managers, supervisors, and guards as defined in the National Labor Relations Act.