No. 123046

IN THE
SUPREME COURT OF ILLINOIS

1550 MP ROAD LLC,

Plaintiff-Appellee,

vs.

TEAMSTERS LOCAL UNION NO. 700,

Defendant-Appellant

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, JOINT COUNCIL 25 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, RANDY CAMMACK, JOHN COLI, PATRICK W. FLYNN, FRED GEGARE, and JAMES T. GLIMCO,

Defendants.

On Petition for Leave to Appeal from the Appellate Court of Illinois, First District, No. 1-15-3300. There Heard on Appeal from the Circuit Court of Cook County Illinois, County Department, Law Division, No. 10 L 5979.

The Honorable Raymond W. Mitchell, Judge Presiding.

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POINTS AND AUTHORITIES

I. The LPA Is Void *Ab Initio*.

Plaintiff does not, and cannot, refute that unincorporated associations could not purchase or lease property at common law. *Chicago Grain Trimmers Ass'n v. Murphy*, 389 Ill. 102, 107 (1945). Nor can it be contested that PUAA (and only PUAA) authorizes an unincorporated association to purchase or lease real property, but only when specific mandatory requirements set forth in that statute are satisfied. Those statutory mandates include that the contract has been "authorized by a vote of the members present at a regular meeting held… after at least ten days' notice has been given to all members[.]" See 765 ILCS 115/2. Lastly, it remains uncontested that the LPA was executed without *any* notice to, or approval by, the members of Local 726. Having failed to satisfy either, *much less both*, of these explicit requirements under PUAA, Local 726 was without legal authority to execute the LPA, and, therefore, the contract is void *ab initio* as a matter of law. See *Deutsche Bank Nat'l Tr. Co. v. Hart*, 2016 IL App (3d) 150714, ¶ 40.[1]

Unable to dispute the relevant facts, including that the explicit requirements of PUAA and Local 726's bylaws were not satisfied here, plaintiff makes a series of assertions as to why this Court should nonetheless

[1] As noted in Local 700's opening brief (Br. at 21, n. 11), apart from failing to comply with PUAA, the LPA was not executed in compliance with Local 726's bylaws, which provides yet another reason that Local 726 did not have the legal authority to execute the LPA. See *Alliance Prop. Mgmt., Ltd. v. Forest Villa of Countryside Condo. Ass'n,* 2015 IL App (1st) 150169, ¶ 36.

enforce the LPA. Each of these otherwise meritless arguments – which are predicated on a claimed judicial admission, waiver, and the application of the *Schnackenberg* Rule, respectively – are of no legal consequence if the LPA is correctly found to be void *ab initio*.[2] Moreover, each of these arguments was soundly rejected or disregarded by the appellate court.

A. Plaintiff's Attempts To Ignore The Plain Language Of PUAA Should Be Rejected.

Unable to refute that the LPA was executed without satisfying the explicit requirements of PUAA, plaintiff is forced to argue that noncompliance with the mandates of PUAA is simply of no consequence, because PUAA does not expressly state that a contract becomes "void" if these requirements are not satisfied. Resp. at 33. Plaintiff's strained construction of PUAA should be rejected.

First, while plaintiff assumes the legislature's intent here by focusing on language that is absent from the statute, it disregards the legislative intent reflected in the language *actually included in the statute*. PUAA is a statute enacted in derogation of the common law rule that unincorporated associations could not purchase or lease real property under any circumstances, and, thus, its express requirements must be followed to effect the least deviation from the common law rule. *Rush Univ. Med. Ctr. v. Sessions*, 2012 IL 112906, ¶ 16 (courts must construe a statute's express

[2] See *Illinois State Bar Ass'n Mut. Ins. Co. v. Coregis Ins. Co.*, 355 Ill. App. 3d 156, 164 (1st Dist. 2004) ("[A] contract that is void *ab initio* is treated as though it never existed; neither party can chose [*sic*] to ratify the contract by simply waiving its right to assert the defect.").

language "in order to effect the least – rather than the most – alteration in the common law."). Tellingly, plaintiff does not attempt to rebut this proposition of law.

Nor are PUAA's requirements meaningless; they protect individual members by ensuring that they (1) have notice of any potential liability, and (2) are permitted to vote in favor or against entering into a contract that could potentially expose them to personal liability. It strains credulity to argue that the legislature did not intend for parties to comply with these explicit protections, thus leaving members exposed to liability without their consent. Plaintiff's interpretation of PUAA renders the express requirements of the statute meaningless. *Sylvester v. Industrial Comm'n*, 197 Ill. 2d 225, 232 (2001) (the court "must construe a statute so that each word, clause and sentence, if possible, is given a reasonable meaning and not rendered superfluous, avoiding an interpretation which would render any portion of the statute meaningless or void.").

B. Plaintiff Fails To Distinguish *Alliance* Or Demonstrate That *K. Miller* Should Be Expanded.

Alliance Prop. Mgmt., Ltd. v. Forest Villa of Countryside Condo. Ass'n, 2015 IL App (1st) 150169, stands for the proposition that where a party lacks authority to enter into a contract, the contract is void and cannot be enforced. Plaintiff's attempt to distinguish this case is wholly unavailing. Plaintiff argues that "unlike here, in *Alliance*, the party seeking the enforcement of the agreement did not make a claim of apparent authority, because the issue

there was not ***who*** executed the contract but only the duration of the contract." Resp. at 36 (emphasis in original). But plaintiff's apparent authority argument is a red herring, because a contract that is void *ab initio* is treated as if it never existed. *Illinois State Bar Ass'n Mut. Ins. Co.*, 355 Ill. App. 3d at 164. Moreover, the *Alliance* court did not find the contract void because of the duration of the contract as plaintiff insists; rather, it found the contract void because it was signed by a party without authority. *Alliance*, 2015 IL App (1st) 150169, ¶ 36 ("the Board lacked authority to execute the 36–month Agreement. *Without authority*, the contact is void and Alliance cannot recover under its terms.") (emphasis added). As in *Alliance*, Local 726 did not have the legal authority to execute the LPA because it had not complied with the requirements of PUAA (or, for that matter, its own bylaws). As such, the contract is void *ab initio*.

Plaintiff cannot dispute that *K. Miller Constr. Co. v. McGinnis*, 238 Ill. 2d 284 (2010), involved the limited issue whether a contract may be enforced if one of its *terms* violates a statute, as opposed to whether a contract may be enforced when one of the contracting parties lacked the *legal authority* to enter into the agreement. Plaintiff attempts to attack Local 700's distinction by looking to the authorities cited in *K. Miller*, but these authorities likewise do not address the issue at hand – *i.e.*, whether a contract entered into without authority is void. Rather, these authorities merely provide that a contract does not automatically become void *ab initio* if *one of its terms*

violates a statute.[3] None of these authorities contradict the several controlling cases cited by Local 700 for the premise that "[a] contract executed by a party that does not have authority is void *ab initio*." See *Siena at Old Orchard Condo. Ass'n v. Siena at Old Orchard, L.L.C.*, 2017 IL App (1st) 151846, ¶ 77, quoting *Alliance*, 2015 IL App (1st) 150169, ¶ 29. This legal principle is not mentioned, let alone distinguished in plaintiff's response brief.

C. Plaintiff's Remaining Arguments For Enforcing The LPA Were Correctly Rejected Or Disregarded By The Appellate Court.

Plaintiff's remaining arguments – (1) that Local 700 judicially admitted that the LPA was valid; (2) that Local 726 waived the protections of PUAA through its past conduct; and (3) that the trial court's application of the *Schnackenberg* Rule controls – were all correctly rejected or disregarded by the appellate court. Moreover, none of these arguments provide a legally cognizable basis to enforce a contract, like the LPA, that is void *ab initio*. See *Illinois State Bar Ass'n*, 355 Ill. App. 3d at 164 ("[A] contract that is void *ab*

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[3] For instance, plaintiff first relies upon Williston on Contracts to argue that the appellate court underwent a proper balancing test in determining whether to enforce the LPA. Yet, that authority likewise involved the enforceability of a contract *when one of its terms is illegal*, and not when it is executed without legal authority. See generally 5 Williston on Contracts § 12:4 (4th ed.) (discussing the balancing test in reference to whether "a promise or term in an agreement is unenforceable on grounds of public policy."). Likewise, in *Pascal P. Paddock, Inc. v. Glennon*, 32 Ill. 2d 51 (1964), there was no question that the contract at issue was entered into with proper legal authority. *Id*. at 54. ("Plaintiff corporation … was therefore capable of entering into a valid contract for the furnishing of plumbing services.").

initio is treated as though it never existed; neither party can chose to ratify the contract by simply waiving its right to assert the defect.").

1. Local 700 Did Not, And Could Not, Judicially Admit The Validity Of The LPA.

Neither the trial court, nor the appellate court, held that Local 700 judicially admitted the validity of the LPA – and with good reason. Not only has the validity of the LPA been the central dispute throughout this litigation, the legal question whether the LPA is an enforceable contract is not a factual allegation that Local 700 is even *capable* of judicially admitting. Rather, the law is clear that legal conclusions and issues of law – such as whether the LPA is enforceable – cannot be judicially admitted and instead are questions of law for the court to determine. See, *e.g.*, *In re Marriage of Osborn*, 206 Ill. App. 3d 588, 594 (5th Dist. 1990); *Premier Elec. Constr. Co. v. LaSalle Nat'l Bank*, 132 Ill. App. 3d 485, 494 (1st Dist. 1984). Accordingly, even assuming *arguendo* that Local 700 conceded in its pleadings that the LPA was valid and enforceable (which it did not), the validity of the LPA is still a legal question that cannot be judicially admitted by a party.

Moreover, there is nothing in Local 700's pleadings that is tantamount to a deliberate, clear and unequivocal admission that the LPA is valid and enforceable. See *In re Estate of Rennick*, 181 Ill. 2d 395, 406 (1998) (judicial admissions are "deliberate, clear, unequivocal statements by a party about a concrete fact within the party's knowledge."). The allegations on which plaintiff relies state only that Clair entered into the LPA agreement and that

the parties "then entered into negotiations to modify the lease" and settle their dispute in good faith. At best, they are factual admissions that Clair (who was not authorized to do so) signed the LPA, and that Local 726 and plaintiff later negotiated a modification of the LPA. These statements do not constitute a "deliberate, clear, unequivocal" admission of the validity of the LPA, particularly when they are viewed, as they must be, in the context of Local 700's pleadings as a whole.[4] See *Thomas v. Northington*, 134 Ill. App. 3d 141, 147 (1st Dist. 1985) (before a statement can be deemed a judicial admission "it must be given a meaning consistent within the context in which it is found and it must be considered in relation to the other testimony and evidence presented.").[5]

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[4] See, *e.g.*, R.V5, C1151 (Answer at ¶ 24: noting that Thomas Clair unilaterally signed the LPA "without proper authority"); R.V5, C1176 (1st Aff. Def. at ¶ 8: "The unilateral execution of the Lease by Thomas P. Clair ("Clair"), the Secretary-Treasurer of Local 726, was, therefore, without authority"); R.V5, C1179 (3rd Aff. Def. at ¶ 6: "Under the circumstances, the Lease entered into without the membership's approval was a nullity").

[5] Plaintiff's reliance on *Daehler v. Oggoian*, 72 Ill. App. 3d 360 (1st Dist. 1979) is misplaced. In *Daehler*, the defendant's second affirmative defense alleged that he had engaged in negotiations with the landlord for a new lease. This factual statement "negated any possibility of a holdover tenancy," and thus rendered the allegations of a holdover tenancy in his first affirmative defense insufficient. *Daehler*, 72 Ill. App. 3d at 365. By contrast, the statements in Local 726's 7th Affirmative Defense indicating that it sought to modify the LPA because it could not comply with its terms do not constitute judicial admissions regarding the LPA's validity or its enforceability. R.V5, C1181. The fact that Local 726 agreed to meet with plaintiff and attempt to negotiate a modification of the LPA does not in any way establish an admission that the LPA was enforceable. To suggest otherwise would lead to the absurd result that a party that unsuccessfully attempts to resolve a contract dispute and who thereafter acknowledges that unsuccessful attempt in its pleadings, thereby admits the validity of the disputed contract.

2. Local 726 Did Not Waive The Protections Of PUAA.

Plaintiff's next argument, which was similarly disregarded by the trial and appellate court, contends that Local 726 waived the protections afforded to it under PUAA. This argument fails on multiple levels. First, as previously noted, because the LPA is void *ab initio*, it cannot be ratified or deemed enforceable even assuming Local 726 had somehow waived the protections under PUAA (which it did not). See *Illinois State Bar Ass'n*, 355 Ill. App. 3d at 164. None of the cases cited by plaintiff – *Louise v. Dep't of Labor*, 90 Ill. App. 3d 410 (1st Dist. 1980), *Maton Bros. v. Central Pub. Serv. Co.*, 356 Ill. 584 (1934) and *Solinger v. Board of Fire and Police Comm'rs*, 37 Ill. App. 3d 1044 (1st Dist. 1976) – stand for the proposition that a void contract, entered into without authority, may become enforceable through waiver.

Second, there is absolutely nothing in the record establishing that Local 726's *members* waived the protections afforded to them under PUAA by making "a clear, unequivocal, and decisive act" manifesting their intention to waive their rights. *In re Nitz*, 317 Ill. App. 3d 119, 130 (2d Dist. 2000). Instead, plaintiff argues that Local 726 waived its rights under PUAA through the practice of having one representative, Clair, sign real estate contracts without providing notice to the members or allowing the members to vote on the contracts. Resp. at 28-29. Significantly, the "contracts" to which plaintiff refers were made with other third parties and have no relation to plaintiff or the contract at issue here. Plaintiff cites no authority

(and Local 700 is aware of none) for the proposition that a party's past conduct with third parties can waive protections in a future transaction involving different parties. Moreover, even if the *officers* of Local 726 have previously disregarded PUAA's requirements, plaintiff is unable to point to any "clear, unequivocal, and decisive act" by the *members* that demonstrates they waived PUAA's protections.

3. The *Schnackenberg* Rule Is Inapplicable.

Plaintiff's reliance on the *Schnackenberg* Rule is equally fruitless, as that doctrine does not deal with the issue whether a contract can be enforced if it was not executed with proper authority. *Schnackenberg v. Towle*, 4 Ill. 2d 561 (1954). The principle set forth in *Schnackenberg* states that "where a contract is illegal or against public policy a court of equity will not, at the instance of one of the parties who participates in the illegal or immoral intent, either compel the execution of the agreement or set it aside after it has been executed, because to give relief in such a case would injure and counteract public morals." *Id*. at 565. This doctrine is therefore confined to the enforcement of illegal contracts or those manifestly against public policy. It does not provide any guidance on the validity of contracts, like the LPA at issue, executed without authority.

Plaintiff also claims that the *Schnackenberg* Rule exempts it from complying with PUAA because only Local 726 was in a position to obtain member approval. Again, *Schnackenberg* did not deal with authority to enter into a contract and, in any event, makes no such distinction between the

parties' relative culpability in performing an illegal contract. To the contrary, either party to an illegal contract can raise its illegality as a defense to enforcement, regardless of their relative participation in the underlying illegal conduct. *O'Hara v. Ahlgren, Blumenfeld & Kempster*, 127 Ill. 2d 333, 349 (1989) (holding that attorneys who drafted a contract were not estopped from asserting the "the illegality of an agreement which they drafted and from which they benefitted"); *Hall v. Woods*, 325 Ill. 114, 135 (1927) (noting that "the circumstance that the relief is asked by a party who is *particeps criminis* is not in equity material" when a stock agreement violated the terms of a statute). Plaintiff's attempt to lay the blame exclusively on the members of Local 726 – who were denied their statutory right to approve the contract – is unavailing.

II. The Appellate Court Erred As A Matter Of Law In Imposing Successor Liability Against Local 700.

Plaintiff does not dispute that the substantial continuity test has never previously been adopted under Illinois law; nor does Plaintiff dispute that its use in other jurisdictions has been strictly limited to avoiding the frustration of federal labor laws, and not to impose successor liability for common law claims like breach of contract. Moreover, plaintiff does not contest that the appellate court's novel application of the substantial continuity test outside of the federal labor law context is inconsistent with prior federal courts decisions that refused to extend that test to other areas of successorship law. As the substantial continuity doctrine should be limited to this unique

context (*i.e.*, avoiding the frustration of federal labor laws), the appellate court's application of the test here was erroneous.

As the Supreme Court has explained, the concept of successorship, as it relates to enforcing or otherwise avoiding the frustration of federal labor laws, is less narrowly defined than successor liability in the context of common law claims like those at issue here. See *Golden State Bottling Co., Inc. v. N.L.R.B.*, 414 U.S. 168, 182, n. 5 (1973) ("the perimeters of the labor-law doctrine of successorship…have not been so narrowly confined."). Successorship principles, including the substantial continuity test, were developed to protect important labor policies, such as protecting employees' free choice to select their bargaining representatives, assuring continuity of bargaining representatives on behalf of employees, preventing labor strife, and promoting stable bargaining relationships. See generally 5 ILCS 315/1, *et seq*. (Illinois Public Labor Relations Act); see also *In re Gen. Teamsters, Warehousemen & Helpers Union, Local 890,* 265 F.3d 869, 874 (9th Cir. 2001) ("Labor relations are governed by a unique set of labor relation laws that are designed in large measure to insure that the workers are represented by the collective bargaining representative of their choice.").

Preserving these important labor policies and workers' rights prompted the development of the substantial continuity test, but, as Local 700 explained in its opening brief, federal courts have recognized that the doctrine is "<u>particular to the labor law context</u>[,]" and "cannot easily be

extended to other areas of federal common law." *New York v. National Servs. Indus., Inc.*, 352 F.3d 682, 686 (2d Cir. 2003) (emphasis added). Plaintiff does not, and cannot, dispute that no court in Illinois or elsewhere has applied that test outside the federal labor law context. Yet, plaintiff attempts to distinguish the *National Services Industries* case in the most superficial manner, arguing that "there is no CERCLA claim, no federal common law issues, and no asset purchase" at issue here. Resp. at 43. Plaintiff's narrow reading of *National Services Industries* clearly fails. The fact that the court there refused to extend the substantial continuity test to the CERCLA claim in that case is hardly the point. The court's justification for refusing to extend the substantial continuity test – *i.e.*, that the test is "particular to the labor law context" and has not been, and cannot be, easily extended to other areas of the law – is the controlling rationale that plaintiff has deliberately overlooked. *National Servs. Indus., Inc.*, 352 F.3d at 686.

It is a distinction without difference that there is no CERCLA claim here, or that the instant case involves an Illinois common law claim as opposed to a federal common law claim. What is significant is that this case is entirely devoid of the circumstances (namely, the frustration of important labor law policies) that have previously justified the use of the substantial continuity test. See, *e.g.*, *Equal Emp't Opportunity Comm'n v. Local 638*, 700 F. Supp. 739, 745 (S.D.N.Y. 1988) (enforcing labor rights under collective bargaining agreements against successor employers); *Parker v. Metropolitan*

Transp. Auth., 97 F. Supp. 2d 437, 452 (S.D.N.Y. 2000) (holding successor entities liable for their predecessor's discriminatory acts or unfair labor practices in violation of federal law). Indeed, plaintiff does not (and cannot) dispute this fact. As such, there is no justification for the appellate court's departure from the well-settled exceptions to successor non-liability in Illinois and its erroneous application of the less stringent substantial continuity test.[6]

Plaintiff's remaining arguments concerning the traditional exceptions to the Illinois rule of successor non-liability are likewise unavailing, as it fails to demonstrate the applicability of any of these traditional exceptions to the facts of this case. Indeed, beyond making a series of hyperbolic characterizations of Local 700's positions and generally distorting the record to infer that Local 700 was chartered as a means to avoid the LPA,[7] plaintiff

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[6] Although plaintiff asserts that Local 700 has not explained why the substantial continuity test is "less stringent," Local 700 previously explained that the substantial continuity test allows for successorship to be established without continuity of ownership, without showing an express or implied assumption of liability, and without showing a fraudulent purpose. Br. at 34-37. Under the existing framework of Illinois successorship law, at least one of the three foregoing circumstances must be present in order to establish successor liability.

[7] Plaintiff simply ignores the fact that Local 726 and Local 714 were dissolved because they both had troubled histories, including multiple investigations, mandated trusteeships and officer expulsions. R.V22, 225; R.V23, 12-15. Both the trial court and appellate court found that the majority of the IBT GEB members that voted to dissolve these locals and charter Local 700 had no knowledge of the LPA. A. 11, 33; R.V6, C1293; S.R.V6, 1355-56, 1359-60, 1363-64, 1367-68, 1371-72, 1375-76; S.R.V2, 401-02. Plaintiff's narrative is simply contrary to the record.

generally seeks to advance arguments that were either not addressed, or otherwise properly rejected, by the appellate court.

Plaintiff's first assertion, that Local 700 should be a successor in liability under the "express or implied agreement of assumption of liability" exception, is not supported by the record. Indeed, Local 700 gave this exception little consideration in its opening brief because neither the trial court, nor the appellate court, found that Local 700 expressly or implicitly assumed liability for the LPA. While Local 726 transferred approximately $75,416 in liabilities to Local 700 (in addition to $47,883 in assets[8]), the LPA was not among the specific liabilities transferred. S.R.V2, 460. Thus, even according to the evidence cited by plaintiff, the LPA was not among the specific liabilities assumed by Local 700. Plaintiff's Statement of Facts likewise acknowledges this fact. See Resp. at 21 ("Local 700 Assumed Local 726's Collective Bargaining Agreements and All of Local 726's Assets and Liabilities, Except for the Lease.") (emphasis added). Plaintiff further offers no authority for its bald assertion that the use of the descriptive terms such as merger, successor, or consolidation on various documents serves to automatically create an implied assumption of *all* liabilities of Local 726, particularly where certain liabilities, such as the LPA, are excluded from the Local 726 liabilities specifically assumed by Local 700.

[8] It bears repeating that the transfer of Local 726 assets and liabilities to Local 700 resulted in a net loss of $27,533. While plaintiff notes that nearly $1,600,000 in net assets were ultimately received by Local 700 (Resp. at 23), there is no dispute that the net gain was the result of assets transferred by Local 714, not Local 726.

Additionally, plaintiff once again incorrectly claims that the fraudulent purpose exception applies here. In doing so, plaintiff makes no attempt to address Local 700's arguments to the contrary, including that there is no dispute that the "transaction at issue" (*i.e.*, the dissolution of Local 726 and formation of Local 700) *was not effectuated by Local 700 or its members*, but by a vote of the IBT GEB (the vast majority of which did not even have knowledge of the LPA[9]). A. 11, 33; S.R.V2, 398, 401-02. Plaintiff offers no argument – much less a persuasive one – for imputing the actions of the IBT GEB (which both the appellate and trial courts held were privileged in any event) against Local 700 or its members, more than 60% of whom are not even former Local 726 members.[10]

Instead, plaintiff attacks the members of Local 700, disingenuously claiming that they are not "victims" since they "unceremoniously abandoned the property after four months[.]" Resp. at 42. Of course, plaintiff knows that when Local 700 was moved out of the subject property, it was likewise

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[9] Plaintiff also fails to address the fact that, given their lack of knowledge, the IBT GEB's actions could not have been designed or intended to avoid performance by Local 726 under the LPA such that the fraud exception would apply. See Br. at 34-37.

[10] Plaintiff also concedes that there was no continuity of management or employees between Local 726 and Local 700. Resp. at 42. While plaintiff aimlessly points out that both locals were subject to the IBT constitution and the "ultimate control" of the IBT, (id.), this fact does not demonstrate continuity between the two organizations. Indeed, every local IBT chapter is subject to the IBT constitution and arguably under the "ultimate control" of the IBT in that sense, but that does not render them successors in liability to another local's debts or liabilities.

not an act effectuated by the Local 700 members, who were still under IBT trusteeship and had no control over that decision. R.V23, 152-53.[11] And while plaintiff resorts to further hyperbole with regard to the members' knowledge of the LPA, claiming that Local 700 "unbelievably" continues to assert the "simply laughable" notion that its members had no knowledge of the LPA, (Resp. at 42), plaintiff then cites no evidence to the contrary. Instead, plaintiff points to the selective knowledge of trustees Coli and Strzechowski, neither of whom were members of Local 700. Plaintiff does not and cannot dispute that the members that joined Local 700 – some of which were former Local 726 members, but most of which were former Local 714 members – had no knowledge of the LPA or any liability thereunder.

In short, while claiming this case fits "squarely" within the analytical framework of imposing successor liability against Local 700, none of the well-established exceptions to the rule of successor liability apply to the facts of this case. There is no continuity of ownership between the two organizations, which, as a matter of law, eliminates the *de facto* merger and mere continuation exceptions. As both the trial court and appellate court correctly found, there was no express or implied assumption of liability for the LPA. And, despite plaintiff's claims to the contrary, there is no evidence that Local 726 was dissolved, and Local 700 chartered, for the fraudulent purpose of avoiding liability of the LPA.

[11] Furthermore, the actions of Coli, who, as trustee, was responsible for moving Local 700 out of the subject property, were held to be privileged by the appellate court. A. 32-33.

The appellate court recognized that this case *did not fit* within these traditional exceptions, departed from Illinois law, applying the substantial continuity test in a context it has never been employed before (liability for common law breach of contract), with entirely inequitable results. Indeed, under the court's ruling, Local 700, which received no net assets from Local 726, is held liable for a contract that was not even authorized by the former Local 726 members (much less the roughly 60% of its membership that are former Local 714 members). Local 700 respectfully submits that this unjust result is directly attributable to the appellate court's decision to misapply the substantial continuity test in order to impose successor liability against it.

III. Section 14(B)(i) Of The LPA Is An Unenforceable Liquidated Damages Provision.

Plaintiff cannot credibly dispute that Section 14(B)(i) impermissibly penalizes Local 700 by permitting plaintiff to recover liquidated damages in the form of future rent payments for the full term of the lease *in addition* to actual damages. Contrary to plaintiff's argument that damages were not ascertainable, damages would not have been difficult to calculate. As the appellate court acknowledged, "the present value of future lost rent is an appropriate measurement of a commercial lessor's damages." *1550 MP Road LLC v. Teamsters Local Union No. 700*, 2017 IL App (1st) 153300, ¶ 88; A. 36. Given that actual damages were ascertainable and could have been calculated based on the present value of lost rent, the appellate court's

decision to uphold the unconscionable liquidated damages penalty under Section 14(B)(i) should be reversed.

Plaintiff is incorrect that Section 14(B)(i) serves to distinguish between default and non-default damages. Resp. at 44-45. Indeed, the plain language of the provision provides that the landlord may "be entitled to recover forthwith, *in addition to any other sums or damages for which Tenant may be liable to Landlord*, as liquidated damages, a sum of money equal to the value of the Rent provided to be paid by Tenant for the balance of the Term." (Emphasis added). There is no reference, express or implied, to other sections of the LPA, including Sections 5(B) or 7. Instead, the plain language of Section 14(B)(i) allows the non-breaching party to improperly recover, as liquidated damages, a veritable windfall far in excess of actual ascertainable damages, purely to secure performance. *Walker v. Ridgeview Constr. Co., Inc.*, 316 Ill. App. 3d 592, 596 (1st Dist. 2000) ("Compensation awarded in a breach of contract action should not provide plaintiff with a windfall.").[12] Accordingly, the provision on its face is invalid. [13]

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[12] Plaintiff's contention that a fixed sum of damages is required for the holding in *GK Dev., Inc. v. Iowa Malls Fin. Corp.*, 2013 IL App (1st) 112802, to apply in this case is wrong. Instead, the relevant issue in *GK Dev., Inc.* was whether the damages paid by the seller were reasonable at the time of contracting and directly related to the damages sustained by the buyer. *Id.* at ¶¶ 73-75 (holding that the provision was invalid, when it required the seller to pay the same set amount for a minor breach as it did for a major breach). Here, as in *GK Dev., Inc.*, the LPA damages provision does not bear a reasonable relation to the damages sustained by the non-breaching party.

[13] Plaintiff also argues that Local 700 cannot object to the language of Section 14(B)(i) because Local 726 fully performed on a different lease with a similar

Plaintiff's next contention – that the parties could not have known the specific amount of liquidated damages at the time of contracting – is likewise unpersuasive. As with many real estate contracts, it would not be difficult for the parties to calculate lost rent and/or lost profits that, but for the breach, would have been received by plaintiff during the entire lease term. The appellate court acknowledged that damages here were easily ascertainable (*i.e.*, "the present value of future lost rent is an appropriate measurement of a commercial lessor's damages."). *1550 MP Road LLC*, 2017 IL App (1st) 153300, ¶ 88; A. 36. Nonetheless, the court ignored well-settled law rejecting liquated damages clauses where damages can be readily determined. See *Grossinger Motorcorp, Inc. v. American Nat'l Bank & Trust Co.*, 240 Ill. App. 3d 737, 749 (1st Dist. 1992) (a liquidated damages provision should only be enforced if "actual damages would be uncertain in amount and difficult to prove.").

Plaintiff generally contends that "cases involving real estate sales contracts do not provide an apt comparison to the issues presented here." Resp. at 47. Plaintiff provides nothing to support this assertion, or its contention that *Hickox v. Bell*, 195 Ill. App. 3d 976 (1st Dist. 1990), is inapt. As Local 700 explained in its opening brief, the *Hickox* court specifically held that "it would not be difficult to calculate the rent and or profits generated

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provision. Resp. at 46. Even assuming *arguendo* that this argument has merit, the prior lease to which plaintiff refers contained a provision to offset damages "less the rental value of the Premises for said period[.]" S.R.V2, 384. The omission of similar language in the LPA is precisely what makes Section 14(B)(i) an unenforceable liquidated damages provision.

during any party's possession of the premises." *Id.* at 987-88. That is precisely Local 700's contention here – that it would not have been difficult to calculate the lost rent and/or lost profits that, but for the breach, would have been received by plaintiff during the tenancy. As such, the actual damages under the lease for any given month, and the entire lease term, were easily calculable at the time of contracting. Since the provision provides a windfall for plaintiff, and since actual damages were otherwise ascertainable, the liquidated damages provision is invalid.

CONCLUSION

For the reasons stated herein and in its opening brief, Defendant Teamsters Local No. 700 respectfully requests that this Court find that the LPA does not satisfy the requirements of the Property of Unincorporated Association Act and/or the bylaws of Local 700, and that as a result thereof, is void and unenforceable; that the general rule of successor non-liability precludes the imposition of liability against Local 700 for any breach of the LPA by Local 726; and that the liquidated damages clause of the LPA is unenforceable. Accordingly, defendant respectfully prays that the decision of the Illinois Appellate Court be reversed, and that this cause be remanded to the Circuit Court of Cook County for entry of judgment for defendant.

Dated: October 12, 2018

Respectfully submitted,

By: /s/ Richard J. Prendergast
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RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 5603 words.

/s/ Richard J. Prendergast

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. The undersigned, an attorney, certifies that **REPLY BRIEF OF DEFENDANT-APPELLANT** was electronically filed with the Clerk's Office of the Illinois Supreme Court and served upon:

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