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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

DON ADDINGTON, JOHN BOSTIC, MARK BURMAN, AFSHIN IRANPOUR, ROGER VELEZ; and STEVE WARGOCKI, Plaintiffs, vs. STEVEN H. BRADFORD, PAUL J. DIORIO, ROBERT A. FREAR, MARK W. KING, DOUGLAS L. MOWERY, and JOHN A. STEPHAN, Defendants.	CASE NO. 2:08-CV-01728-NVW **MOTION TO REMAND** [28 U.S.C. § 1447(c)]

Pursuant to 28 U.S.C. § 1447(c), Addington, Bostic, Burman, Iranpour, Velez and Wargocki move to remand this action to the Superior Court of Maricopa County. Defendants' removal is a meritless, transparent attempt to recharacterize Plaintiffs' valid state law claims into federal question claims that would be preempted by the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.*, and the Labor Management Relations Act ("LMRA"). 29 U.S.C. §§ 141 *et seq.* Defendants pursue this tactic even though in a related action, where they were seeking to vacate the arbitration award that Plaintiffs seek to enforce here, the United States District Court for the District of Columbia ("D.C. District Court") held that removal was improper, and granted Defendants' motion to remand. Removal here was

improper for the same reasons identified by the D.C. District Court. Along with the filing of this motion, Plaintiffs amend their complaint, pursuant to Fed.R.Civ.P. 15(a)(1)(A), by removing background allegations that are unnecessary surplusage—thus clarifying for the Court that Plaintiffs only make state law claims. Further grounds in support of the Plaintiffs' motion are set forth in the Memorandum of Point and Authorities that follows.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Plaintiffs move for remand of this action to the Superior Court of Maricopa County. Defendants Steven H. Bradford, Paul J. Diorio, Robert A. Frear, Mark W. King, Douglas L. Mowery, and John A. Stephan, removed this action from the Superior Court to this Court on the asserted basis of federal question jurisdiction. (*See Notice Removal* at ¶ 17.) (doc. 1-1.) Plaintiffs, however, did not state a claim arising under federal law. They have amended their Complaint to more clearly demonstrate that, contrary to Defendants' mischaracterizations, their Complaint does *not* present a federal question, does *not* plead breach of any collective bargaining agreement, and does *not* otherwise rely on federal labor law. Rather, this is an action to enforce common law contract obligations related to an common law arbitration and is brought against ordinary individuals who were parties to that contract and that arbitration.

That underlying common law contract was made among the pilots employed by two airlines, America West and US Airways, that merged in 2005. This contract bound the pilots to conduct an arbitration to create an integrated seniority list that the carrier surviving the merger, the "Company," would use in its operations. This contract and the pilots participation in the arbitration bound the pilots to treat the arbitration award as final and binding. The arbitration was conducted with the pilots aligned in two groups—pilots that were employed by America West (the "West

Pilots") and pilots that were employed by US Airways (the "East Pilots").[1] Plaintiffs represent the West Pilots and Defendants represent the East Pilots.

State law governs enforcement of the arbitration because neither side here, either individually or in aggregate, was a "labor organization" subject to § 301 of the LMRA and no party was a "carrier" or a union subject to the RLA. Plaintiffs' First Amended Complaint, "FAC" (doc. 8), filed on October 20, 2008, alleges only claims for breach of this state law arbitration contract. The FAC neither names USAPA (the exclusive representative of US Airways pilots) as a party nor alleges, as a basis to establish breach of contract, any act or omission by USAPA as representative. Accordingly, the FAC does not present a claim for breach of the duty of fair representation by USAPA and does not challenge its certification by the National Mediation Board, "NMB." The FAC refers to the carriers and the collective bargaining agreement only to define the composition of each class—not to establish any element of a cause of action. It therefore does not present a claim for breach of a CBA. In short, the FAC does not present a federal question.

Because the FAC does not present a federal question (or any other basis for original jurisdiction), this Court lacks subject matter jurisdiction and must remand this action to the Maricopa County Superior Court.

II. Statement of Facts

Plaintiffs filed their original complaint on September 4, 2008, in the Maricopa County Superior Court of the State of Arizona. Defendants filed their Notice of Removal on September 22, 2008. (Doc. 1-1.) Plaintiffs filed their amended

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[1] The terms "West Pilots" and "East Pilots" have a different meaning in the related hybrid claim complaint that was filed in federal court (Case No. 2:08-cv-01633-PHX-NVW). In that matter, "West Pilots" and "East Pilots" includes those pilots who were hired by the Company after the arbitration was conducted. These newly hired pilots are not directly bound by a contract they did not enter or by an arbitration in which they did not participate. The hybrid action is based on a collective bargaining agreement ("CBA"). Because pilots hired after the arbitration have the same CBA rights as other pilots, they are included in the meaning of "West Pilots" and "East Pilots" in the hybrid claim complaint.

complaint (doc. 8), FAC, on October 20, 2008. The FAC states a dual class action wherein Plaintiffs seek an order directing Defendants to comply with the award of a common law contract arbitration. (FAC at ¶ 15.) The parties are pilots who were working for two airlines that merged in 2005. Plaintiffs represent the pilots who came from America West, the "West Pilot Class." (FAC at ¶ 35.) Defendants represent the pilots who came from US Airways, the "East Pilot Class." (FAC at ¶ 43.)

A. The Merger of America West and US Airways required the creation of an integrated seniority list.

The common law contract underlying this arbitration is memorialized in a multilateral, *multipurpose* document entitled the "Transition Agreement" and in a set of policies, procedures and rules, referred to as "ALPA Merger Policy."[2] Copies of these documents were filed with the original complaint and are incorporated into the FAC by reference. (FAC at ¶¶ 17, 18.) The pilots entered into this common law contract to define a process for creating an integrated seniority list that would be used by the Company. (FAC at ¶ 23.) The contract itself is neither an agreement between labor organizations subject to the Labor Management Relations Act, 29 U.S.C. §§ 185, *et seq.*, nor an agreement between an air carrier and its employees subject to the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.* (FAC at ¶ 22.)

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[2] In a related action filed in the D.C. Superior Court by persons representing the East Pilots and removed to the D.C. District Court by persons representing the West Pilots (an alignment opposite to that here), the East Pilots took a similar position—that there was an agreement to arbitrate according to the procedures stated in ALPA Merger Policy—as follows:

> The parties agreed to pursue ALPA Merger Policy, including arbitration under the policy, to resolve their dispute over combining the pilot seniority lists of the two airlines. ALPA Merger Policy therefore constitutes the parties' agreement to resolve their dispute by arbitration.

Mot. Remand at 5 (Aug. 20, 2007) (doc. 3, D.D.C. Case 1:07-cv-01309-EGS) (copy attached as Ex. A).

The common law contract at issue here obligated all of the pilots involved in the merger to select representatives who would engage in procedures to create an integrated seniority list. Those procedures provided for, and eventually led to, binding arbitration. (FAC at ¶¶ 54-57.) The pilots from both sides participated in the arbitration without objection, either directly or though chosen pilot representatives and attorneys. (FAC ¶¶ 21, 64-65.) This arbitration, the "Nicolau Arbitration," was conducted according to the procedures and standards set out in ALPA Merger Policy. (FAC at ¶ 20.) The award arising from the Nicolau Arbitration, the "Nicolau Award," created an integrated seniority list that defined the pilots' relative seniority rights. (FAC at ¶ 23.)

All pilots participated in the Nicolau Arbitration (directly or through chosen representatives and attorneys), agreeing that it would be conducted according to ALPA Merger Policy procedures and standards, and rules that were set out in a document entitled, "Ground Rules For The US Airways-America West Pilot Seniority Integration Arbitration." (FAC at ¶ 56.) "Ground Rules" stated that the parties were "the US Airways Pilot Merger Representatives and the America West Pilot Merger Representatives." (FAC at ¶ 60.) ALPA Merger Policy stated that the award from the arbitration "shall be final and binding on all parties to the arbitration" and that the award would be "a fair and equitable resolution" of the seniority dispute. (FAC at ¶ 58.) The East Pilots, therefore, agreed to treat the arbitration award as "final and binding." (FAC at ¶ 24.) Their agreement and participation in the arbitration provided to the West Pilots a common law contract right to enforce the arbitration award against individual East Pilots. (FAC at ¶ 53.)

The arbitration was conducted by George Nicolau who issued the arbitration award, the "Nicolau Award," on May 3, 2007. (FAC at ¶ 61.) A copy of the award was filed with the original complaint and is incorporated into the FAC by reference. (FAC at ¶ 62.) The Nicolau Award established an integrated seniority list that was fair and equitable. (FAC at ¶ 63.)

B. The East Pilots breached their common law contract obligations to treat the Nicolau Award as final, binding, fair and equitable.

On June 26, 2007, representatives of the East Pilots filed an application to set aside the Nicolau Award in the Superior Court of the District of Columbia. *Mot. Remand* at 5 (D.C. District Court). Representatives of the West Pilots removed that action to federal court on July 24, 2007. (Doc. 1, D.D.C. Case 1:07-cv-01309.) The East Pilots filed a Motion to Remand on August 20, 2007. The district court granted this motion, in a published decision, holding that: (1) the right to vacate this arbitration award did not depend on federal law; (2) the RLA does not create complete preemption; and (3) a preemption defense would not create original jurisdiction. *US Airways Master Executive, Council, Air Line Pilots Assoc., Int'l. v. America West Master Executive, Council, Air Line Pilots Assoc., Int'l.*, 525 F.Supp.2d 127, 133-34 (D.D.C. 2007). The East Pilots made no further efforts to vacate the Nicolau Award.

In July 2007, East Pilot Class representatives stated that it was "abundantly clear" that East Pilot Class members will never ratify a CBA that uses the Nicolau Award integrated seniority list. (FAC at ¶ 68.) These representatives encouraged East Pilot Class members to act in concert to prevent the Company from operating using the Nicolau Award integrated seniority list. (FAC at ¶ 69.) Their stated that their goal was that "[t]he Nicolau Award will never see the light of day." (FAC at ¶ 70.) In August 2007, Defendant Stephan, an East Pilot Class representative, announced that East Pilot Class members would never treat the Nicolau Award as final, binding, fair or equitable. (FAC at ¶ 71.)

If the East Pilot Class members and/or their chosen representatives had honored their obligations to treat the Nicolau Award as final, binding, fair and equitable, the Company would now be operating using the Nicolau Award integrated seniority list. (FAC at ¶ 72.) Because the East Pilot Class members did not honor these obligations, the Company is not operating using the Nicolau Award integrated seniority list. (FAC at ¶ 73.) Because the Company is not operating

using the Nicolau Award integrated seniority list, the West Pilot Class members have suffered and are continuing to suffer the following injuries: (a) furloughs, (b) missed promotions, and (c) loss of other seniority related benefits. (FAC at ¶ 74.)

I. Standard for Deciding Motion to Remand

A. The Court should consider the First Amended Complaint.

"[W]here, as here, the complaint has not been previously amended and no responsive pleading has been served, a plaintiff retains the right to amend the pleading 'as a matter of course' without leave of court to eliminate federal question jurisdiction." *Chinn v. Belfer*, 2002 WL 31474189, 7 (D.Or. 2002) (collecting cases that considered a post removal amended complaint on a motion to remand); *see also U.S. Mortg., Inc. v. Saxton*, 494 F.3d 833, 843 (9th Cir. 2007) (approving *Chinn*); *c.f Baddie v. Berkeley Farms, Inc.*, 64 F.3d 487, 489 (9th Cir. 1995) (allowing a second amendment to eliminate an express DFR claim).

B. The Court should apply a strong presumption in favor of remand for lack of a federal question.

"Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). A defendant who removes bears the burden to prove original jurisdiction when the plaintiff makes a motion to remand. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The court must resolve any ambiguities concerning the propriety of removal in favor of remand. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

"The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar*, 482 U.S. at 392. "The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Id.* "Even when the area involved is one where complete preemption is the

norm, if the complaint relies on claims *outside of the preempted area* and does not present a federal claim on its face, the defendant must raise its preemption defense in state court." *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1319 (9th Cir. 1998) (emphasis added). "[A] case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar*, 482 U.S. at 393.

II. This Action Should be Remanded Because the Claims Arise Under Arizona State Law.

A. The right to enforce a common law arbitration arises under state common law.

Under principles of state common law, workers who, through representatives, participate "voluntarily and actively" in a seniority rights arbitration, are "bound by its outcome." *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1103 (2d Cir. 1991). An arbitration "award is a contract right that may be used as the basis for a cause of action." *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984); *see also Centurion Air Cargo, Inc. v. United Parcel Serv. Co.*, 300 F.Supp.2d 1281, 1286 (S.D.Fla. 2004) (same). Because an arbitration award functions as a contract, it can be enforced under common law. "[A] state or federal court which lacks the statutory or contractual authority to enter judgment enforcing an arbitration award may still hear and adjudicate an action based upon a party's failure to honor the award itself." *Ruby-Collins, Inc. v. City of Huntsville, Ala.*, 748 F.2d 573, 576 (11th Cir. 1984).

The nature of the relief sought in the FAC confirms that the claims are based on state common law. The relief sought is an order directing individual East Pilots to comply with common law contract duties established in the agreement to arbitrate, by participation in the arbitration, and in the Nicolau Award itself. (FAC at ¶ 88.) The Court should conclude, therefore, that the claims plead in the FAC arise under Arizona state law.

B. The FAC does not state a claim for breach of a CBA because it does not seek a remedy against the Company and it does not address any provisions of the CBA.

A review of the FAC shows that it seeks only an order directing Defendants to "comply with a common law contract arbitration." (FAC at ¶ 15.) The FAC, therefore, asserts claims arising from a state common law contract made among individuals. (FAC at ¶¶ 9-14.) It does not identify the Company as a party to this action. It does not identify it as a party to the contract that gives rise to the action. It does not allege any act or omission by the Company. It does not allege breach of a CBA. It, therefore, does not state a claim that arises under, or is controlled by, federal law.

It does not matter that the document that established the initial agreement to arbitrate—the Transition Agreement—established other contract rights involving an RLA carrier. The FAC makes it very clear that the Transition Agreement was a multilateral, *multipurpose* document. (FAC at ¶ 16(a).) As such, there is no need to link the contract rights at issue here to contract rights that involve the Company. All that matters is that Plaintiffs do *not* rely on any rights that require the involvement of the Company. Because Plaintiffs' claims do not assert rights against the Company, these claims are *not* subject to mandatory RLA arbitration. *See Hawaiian Airlines v. Norris,* 512 U.S. 246, 261 (1994) (Claims under state laws that do not require interpretation of collective bargaining agreements under the RLA are not preempted by federal law.).[3]

Because the FAC neither names the Company as a party, seeks relief directed against the Company, nor addresses any provision of the CBA, it does not make a claim for breach of a CBA.

[3] As noted in Section III below, however, even if the plaintiffs' claims did require interpretation of a CBA, this is a basis for the state court to dismiss but is not a basis for removal to federal court.

C. The FAC does not state a DFR claim because it does not allege any improper actions by a union.

The FAC does not identify the union, USAPA, as a party to this action. It does not identify USAPA as a party to the contract that gives rise to the action. It does not allege any act or omission by USAPA. It does not allege breach of a duty owed by USAPA. It, therefore, does not state a claim that arises under, or is controlled by, federal law.

The FAC is plainly distinguishable from the complaint in *Harper v. San Diego Transit Corp.*, 764 F.2d 663 (9th Cir. 1985), where the court upheld removal on the basis that "there is no question of artful pleading or implying claims not apparent from the face of the complaint" such claims were "apparent from the face of [the] complaint." *Id.* at 667. Defendants have no basis to argue that arbitration related subject matter creates a DFR claim involving the union. Defendants' examples of courts that addressed arbitration related DFR claims are entirely distinguishable because those cases addressed arbitration of claimed breaches of a CBA by an employer. One case addressed a claim that charged a union with improper arbitration of the employee's "claim against the employer … for wrongful discharge." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976). Another case charged a union with negligently advising an employee on how "to file an injury grievance" against the employer. *Peterson v. Kennedy*, 771 F.2d 1244, 1252 (9th Cir. 1985).

No such allegations are found in the FAC. Absent such allegations, the Court should hold that the FAC does not state a DFR claim.

D. The FAC does not challenge USAPA's representational status.

Plaintiffs show below that no part of the RLA is subject to complete preemption. The RLA provision that gives exclusive jurisdiction to the NMB over representational disputes, therefore, is not subject to complete preemption. Plaintiffs claims, therefore, are not preempted by the NMB's exclusive jurisdiction unless the FAC states a claim challenging the validity of the NMB certification of

USAPA. There is nothing in the FAC, however, that states such a claim. USAPA is *not* named as a party. Plaintiffs do *not* seek an order decertifying USAPA. Any allegations in the original complaint that mention USAPA did so merely to give context for the Court and are not necessary to state valid claims. That these were surplusage is shown by the fact that all mention of USAPA was removed from the FAC without detracting from its validity.

E. LMRA § 301 does not apply because pilots are RLA employees.

Defendants know that LMRA § 301 does not preempt the claims made here. Although § 301 *is* subject to compete preemption, § 301 does not apply to RLA employees. It, therefore, cannot apply here because all parties are RLA employees.

The LMRA is an amendment to the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.* Section 301 regulates actions between employers and labor organizations that are subject to the NLRA, and regulates actions upon a contract between labor organizations subject to the NLRA (*e.g.*, actions brought under a union's constitution or internal policies). Section 301 states that it applies to "[a]ny labor organization which represents employees in an industry affecting commerce as defined in this chapter." 29 U.S.C. § 185 (b). The NLRA defines a "labor organization" in Section 2 as any organization in which "employees" subject to the Act participate. 29 U.S.C. § 152(5). The NLRA, however, specifically excludes employees covered by the RLA from its definition of "employee." 29 U.S.C. § 152(3). The pilots here are all RLA employees. Accordingly, no matter how the Court might construe the two classes (West Pilots and East Pilots) neither is a "labor organization" subject to the LMRA. *Cf. Davenport v. Int'l Brotherhood of Teamsters*, 334 U.S. App. D.C. 228, 166 F.3d 356, 365 n.10 (D.C. Cir. 1999) (subordinate union organization whose members are employed by employer subject to RLA is not a "labor organization" within meaning of § 301).

The arbitration agreement at issue in Plaintiffs' causes of action is between RLA employees who are not subject to § 301. No carrier is party to the arbitration

agreement. Plaintiffs, therefore, are free to enforce the Nicolau Award arising from the arbitration in Arizona state court.

III. Because the RLA Does Not Completely Preempt State Law, a Putative State Law Claim is Not Removable Merely Because it Could be Re-Characterized as an RLA Claim.

A. In 2003, the Supreme Court established that the RLA does not provide complete preemption of state law claims.

Defendants wrongly assert that the RLA completely preempts state law causes of action that can be re-characterized as colorable RLA claims. (*Notice Removal* at ¶¶ 49-50.) Rather, ever since the Supreme Court, in *Beneficial Natl. Bank v. Anderson*, 539 U.S. 1, 6 (2003), omitted the RLA when it enumerated the three federal statues that provide complete preemption, courts have generally agreed that the RLA does *not* support complete preemption. *See Hall v. North American Van Lines, Inc.*, 476 F.3d 683, 688, n.3 (9th Cir. 2007) ("The Supreme Court has identified only four[4] such statutes: section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185; section 502(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a); and sections 85 and 86 of the National Bank Act of 1864, as amended, 12 U.S.C. §§ 85, 86.")[5]; *US Airways Master Executive, Council, Air Line Pilots Assoc., Int'l. v. America West Master Executive, Council, Air Line Pilots Assoc., Int'l.*, 525 F.Supp.2d 127, 134 (D.D.C. 2007)

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[4] *Hall* counts two sections of the National Bank Act to get four statutes.

[5] The Ninth Circuit has yet to fully resolve the intra-circuit split noted here:

> There is apparently a conflict in this circuit over whether complete preemption applies to suits involving the Railway Labor Act (RLA), 45 U.S.C. § 151, et seq. *Compare Price v. PSA Inc.*, 829 F.2d 871 (9th Cir. 1987) (RLA does not have complete preemptive power) *with Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307 (9th Cir. 1990), (*citing Price* with approval on a related issue, but then holding, without discussion, that RLA does have complete preemptive power).

Holman v. Laulo-Rowe Agency, 994 F.2d 666, 669, n.4 (9th Cir. 1993) (internal citation truncated).

(establishing, for these parties that the RLA does not support complete preemption). Defendants cite only cases that came before *Beneficial* for authority that there is complete preemption under the RLA. *See Notice Removal* at ¶¶ 28, 49, n.3. This Court should find, therefore, that under well-settled law, complete preemption does not apply to the RLA.

B. It has already been established in this case that the RLA does not provide compete preemption of claims addressing enforcement of the Nicolau Award; Issue preclusion bars relitigating this point.

Collateral estoppel, or issue preclusion, bars relitigation of issues actually adjudicated in previous litigation. *Clark v. Bear Stearns & Company, Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992). The determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action. *Id.* at 1321. The doctrine applies to a nonparty to the former suit if they were adequately represented by someone with the same interests who was a party to the suit." *Taylor v. Sturgell*, __ U.S. __ 128 S.Ct. 2161, 2172 (Jun. 12, 2008) (internal quotation and alteration marks omitted). The issue of complete RLA preemption was litigated in the District of Columbia action by individuals who represented the interests of the East Pilots. *See US Airways Master Executive*, 525 F.Supp.2d at 134. Issue preclusion from the D.C. action applies to Defendants because they were adequately represented in the D.C. action. This court established that the RLA does *not* completely preempt a claim addressing enforcement of the Nicolau Award. *Id.* Defendants, therefore, should be precluded from arguing otherwise here.

IV. CONCLUSION

Plaintiffs state a straight forward Arizona common law claim for breach of contract. Defendants removed without a valid basis to assert original federal jurisdiction. It is well established—indeed it was successfully argued by these Defendants in a closely related matter—that the RLA is not subject to complete preemption. It is also well established—indeed it was also successfully argued by

these Defendants in that same closely related matter—that Section 301 does not apply to airline pilots. Plaintiffs, therefore, respectfully ask this Court to order this matter remanded to Arizona state court.

Dated this 20th day of October, 2008.

SHUGHART THOMSON & KILROY, P.C.

/s/

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2008, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant(s):

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s/ *Andrew S. Jacob*