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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-1728-PHX-NVW **PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO REMAND**

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I. INTRODUCTION

Because Plaintiffs amended the complaint the issue is whether remand is proper based on the First Amended Complaint (doc. 8), not the original complaint. The Court must remand unless it now has original or supplemental jurisdiction over the causes of action alleged in the First Amended Complaint. *See Albingia Versicherungs A.G. v. Schenker Intern. Inc.,* 344 F.3d 931, 937 (9th Cir. 2003) ("once original jurisdiction is lost court must remand unless it takes supplemental jurisdiction).

Defendants, therefore, cannot defeat remand by proving that their removal was proper. Rather, Defendants must now show either: (1) that the First Amended Complaint raises a federal question on its face; or (2) that there was artful pleading of a substantial federal question; or (3) that the RLA completely preempts state law (and there was artful pleading to avoid the application of the RLA); or (4) that values of economy, convenience, fairness, and comity favor exercise of supplemental jurisdiction. *See Wellness Community-National v. Wellness House*, 70 F.3d 46, 49 (7th Cir. 1995) (noting that absent compelling reasons, "jurisdictional inquiry must proceed on the basis of the First Amended Complaint, not the original one").

The First Amended Complaint raises a simple state law breach of contract claim, not a federal question. The RLA does not completely preempt state law. Neither artful pleading nor complete preemption, therefore, provide the Court original jurisdiction. When a complaint, amended after removal, has no federal claims, "the best course is to remand the state law claims to the state court from which the case was removed." *Thurman v. DaimlerChrysler, Inc.*, 397 F.3d 352, 359 (6th Cir. 2004).

This Court, therefore, should remand this action to the Superior Court of Maricopa County.

II. LEGAL ARGUMENT

A. THE COURT MUST REMAND UNLESS ONE OF THREE ALTERNATIVES IS SATISFIED.

Unless at least one of the three alternatives is satisfied, the Court lacks jurisdiction and must remand. First, the Court may take jurisdiction if there is artful pleading of a substantial federal question. *See Lippitt v. Raymond James Financial Services, Inc.*, 340 F.3d 1033, 1041 (9th Cir. 2003); (Artful pleading doctrine is raised "only in limited circumstances" because it "often yields unsatisfactory results."). Second, the Court must take jurisdiction if there is artful pleading of a completely preempted claim. *Price v. PSA, Inc.*, 829 F.2d 871, 874-75 (9th Cir. 1987). Finally, the Court may exercise supplemental jurisdiction if "the *Gibbs* values 'of economy, convenience, fairness, and comity'" weigh strongly in favor of retaining jurisdiction. *Acri v. Varian Associates, Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997); *see United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). None of these three conditions are present here.

B. THERE IS NO ARTFUL PLEADING OF A SUBSTANTIAL FEDERAL QUESTION.

1. Overview of artful pleading doctrine

"Artful pleading exists where a plaintiff articulates an inherently federal claim in state-law terms." *Brennan v. Southwest Airlines Co.*, 134 F.3d 1405, 1409 (9th Cir. 1998). As such, it is "an exception to th[e] general rule" that "district courts have federal-question jurisdiction only if a federal question appears on the face of a plaintiff's complaint." *Id.* Artful pleading is used sparingly in two situations: "(1) complete preemption cases, and (2) substantial federal question cases." *Lippitt,* 340 F.3d at 1041 (citations omitted). Complete preemption is addressed later. Plaintiffs show here that there is no federal question alleged in the First Amended Complaint

and that there is no artful pleading to disguise or conceal a substantial federal question.

2. There is a "substantial federal question" only where the claim seeks a remedy that is available under federal law and state law remedy is excluded by federal law.

The *Lippitt* court explained that there is a substantial federal question "where the claim is necessarily federal in character, or where the right to relief depends on the resolution of a substantial, disputed federal question." *Id.* at 1041-42. There is a substantial federal question where federal law supplies the right to a remedy and the remedy depends on, and is exclusive to, federal law. *Brennan*, 134 F.3d at 1409.

Courts typically find a substantial federal question where federal law expressly reserves the remedy at issue. For example, regardless how it is worded, a claim that seeks "the recovery of any [federal] revenue tax alleged to have been erroneously or illegally assessed or collected," raises a substantial federal question. *Id.*, *quoting* 26 U.S.C. § 7422(a). Such claims are called "tax refund suits" and are exclusively controlled by the Internal Revenue Code. *McMaster v. Coca-Cola Bottling Co. of Cal.*, 392 F.Supp.2d 1107 (N.D.Cal. 2005). In contrast, a claim that merely requires interpretation of the same section of the IRC but does not seek "the recovery of lost taxes," is not a tax refund suit and does not raise a substantial federal question. *Id.* The difference between the two is in the remedy. To decide whether a claim raises a substantial federal question, therefore, the Court should focus on the nature of the remedy at issue.

As one court explained, the analysis of the remedy has two steps:

> First, the court must determine whether it is apparent from a review of the complaint that federal law provides plaintiff a cause of action to remedy the wrong he asserts he suffered. Second, if federal law does provide an analogous substitute cause of action, then the court must determine whether the state law cause of action is preempted.

Machinists Automotive Trades Dist. Lodge No. 190 of No. Cal. v. Peterbilt Motors Co., 666 F.Supp. 1352, 1354 (N.D.Cal. 1987). To have a substantial federal

question, federal law must both provide the remedy in the district court and must exclude state law from providing that same remedy. In this case, the only remedy sought is an order of specific performance of a state common law contract directed at individual persons who participated in a binding arbitration controlled by state law.

3. Only state law provides the right at issue.

There are two sources for the state common law contract at issue in this action: (1) written documents of agreement and (2) the conduct of participation in the Nicolau arbitration. Because neither the RLA nor any other federal statute controls contracts between private individuals such as the parties here, only state common law provides the right to enforce this contract.

a. Written documents

The state common law contract here "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.'" *1st Amend. Compl.* at ¶ 16. Contrary to what the Defendants argue, even though the Transition Agreement serves to memorialize modifications to a CBA, it also establishes state common law contract rights distinct from the CBA. Similarly, it does not matter that ALPA Merger Policy was drafted by a union, because it was only a source of "policies, procedures and rule" agreed to by reference. *Id.*

The Transition Agreement clearly establishes contract duties outside federal labor law because it includes, as parties, two holding companies that are not subject to the RLA because they are neither an RLA employer nor a union—America West Holdings Corporation and US Airways Group, Inc. Because these two entities are not employers of any party, the Agreement established contract duties outside the federal labor law. There is no inherent reason, therefore, that the Transition Agreement could not also "establish contractual rights and obligations that ran

among all the individual pilots employed by the two airlines at the time of the Merger." *Id.* at ¶ 53.

b. Participation in the arbitration

Conduct also established a common law contract. 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). The pilots here participated in the arbitration just as in *Gvozdenovic*. *Plts.' Mot. Remand*, 2:25-26. Under state common law, this bound them to treat the Nicolau Award as final and binding. *Id.*

c. Federal law does not provide a right to enforce the contract.

Neither the RLA nor any other federal law provides a substantive basis to enforce a common law contract. *See 1st Amend. Compl.* at ¶ 19 ("The common law contract … 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."). The Federal Arbitration Act requires an independent basis for jurisdiction. *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1106 (9th Cir. 2002). In general, "[t]here is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Only "federal common law as articulated in rules that are fashioned by court decisions are "laws" as that term is used in § 1331." *Natl. Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985). No such rules are identified here. Federal law, therefore, does not provide a basis to enforce the Nicolau arbitration against Defendants.

Because federal law does not provides a basis for the relief requested in this case, there is no substantial federal question.

4. Federal law does not exclude state law remedy.

Plaintiffs seek a state law remedy that is not excluded by federal law. The first step to deciding whether a remedy is excluded by federal law is to look at the remedy itself. *See McMaster*, 392 F.Supp.2d at 1115 (remedy not excluded because, regardless that plaintiff objected to paying taxes, plaintiff did not seek recovery of money paid as taxes). The remedy at issue here is as follows below.

> ORDER: a) directing Defendants and other East Pilot Class members to treat the integrated seniority list created by the Nicolau Award as final, binding, fair and equitable; b) enjoining Defendants and other East Pilot Class members from actions that are intended to frustrate the Company's transition to operating using the integrated seniority list created by the Nicolau Award; and c) granting such other relief that the Court deems necessary and proper.

1st Amend. Compl. at ¶ 88(a)-(c).

In contrast to *Brennan*, where § 7422 expressly excluded state law remedy, no federal statute here expressly excludes state law remedy here. This is not an intra-union dispute because many of the pilots belonging to each side of this dispute are not members of USAPA. Even if it were, an injunction is not excluded by federal law because "the anti-injunction provisions of Norris-La Guardia are inapplicable to intra-union disputes." *Aguirre v. Automotive Teamsters*, 633 F.2d 168, 172 (9th Cir. 1980).[1]

Because federal law does not exclude state law remedy, there is no substantial federal question.

5. The remedy from the original compliant is irrelevant.

Defendants suggest that the Court has jurisdiction because the original complaint sought an order compelling them to "'negotiate' as ordered by this Court." *Defs.' Memo.* at 11:1. That does not matter because Plaintiffs no longer ask for such relief. Rather, Plaintiffs ask for the converse of the relief that the East Pilot group

[1] Similarly, it makes no sense to see ALPA as the parties to the arbitration because it could not arbitrate with itself.

sought in the District of Columbia action. There, the East Pilots sought to vacate the arbitration. Here, the West Pilots seek to enforce it.

C. THE RLA DOES NOT SUPPORT COMPLETE PREEMPTION.

In contrast to artful pleading of a substantial federal question, artful pleading of a completely preempted claim does not require the existence of a federal remedy. *Newberry v. Pacific Racing Assn.*, 854 F.2d 1142 (9th Cir. 1988). Defendants argue that the Ninth Circuit recognizes RLA complete preemption, but they rely on precedents that were abrogated by *Beneficial Natl. Bank v. Anderson*, 539 U.S. 1, 6 (2003). *See Defs.' Memo.* at 16:10-18 (citing cases decided between 1989 and 2000). In *Beneficial*, the Supreme Court indicated, once and for all, that the RLA does not completely preempt state law. It did so by omitting the RLA when it made an inclusive enumeration of all the federal statues that completely preempt state law. 539 U.S. at 6. After *Beneficial*, no circuit has held that the RLA completely preempts state law. *See US Airways Master Executive, Council, Air Line Pilots Assoc., Intl. v. America West Master Executive, Council, Air Line Pilots Assoc., Intl.*, 525 F.Supp.2d 127, 134 (D.D.C. 2007) (collecting cases).

Therefore, the issue is settled, and the RLA does not completely preempt state law. The First Amended Complaint, therefore, did not plead, artfully or otherwise, a completely preempted claim.

D. THE COURT DOES NOT HAVE ORIGINAL JURISDICTION.

This Court does not have original jurisdiction under any of the possible theories of jurisdiction. First, Defendants do not even suggest that there is a federal claim on the face of the complaint. Second, no current authority holds that the RLA has complete preemption. Third, there is no federal right to enforce a common law contract. Fourth, no federal law expressly or implicitly excludes a state law injunction against breaching a common law contract.

The Court, therefore, does not have original jurisdiction.

E. THE STANDARDS FOR SUPPLEMENTAL JURISDICTION ARE NOT SATISFIED.

In the absence of original jurisdiction, the Court must remand upon motion by one of the parties unless "the *Gibbs* values 'of economy, convenience, fairness, and comity'" weigh strongly in favor of supplemental jurisdiction. *Acri v. Varian Associates, Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997); *see Gibbs*, 383 U.S. at 726 (exercise of supplemental jurisdiction should be rare when there are no longer any federal claims). When weighing the *Gibbs* values, courts begin from a presumption that "a state forum will provide just as fair a proceeding as a federal one." *Millar v. Bay Area Rapid Transit Dist.*, 236 F.Supp.2d 1110 (N.D.Cal. 2002). The *Gibbs* values do not weigh in favor of supplemental jurisdiction, however, where a plaintiff eliminates "federal claims and move[s] for remand with all due speed after removal." *Baddie v. Berkeley Farms, Inc.*, 64 F.3d 487, 490-91 (9th Cir. 1995) (noting that "[t]here would be little to be gained in judicial economy by forcing plaintiffs to abandon their federal causes of action before filing in state court"). Indeed, the district court may not assess fees against the plaintiff in such cases. *Id.* at 491.

There is no basis here to differ from *Baddie*. Hence, the *Gibbs* values favor remand and the Court should not exercise supplemental jurisdiction.

III. CONCLUSION

This Court does not have original jurisdiction and the *Gibbs* values do not favor supplemental jurisdiction. Plaintiffs, therefore, respectfully ask the Court to grant their motion and remand this action to the Superior Court of Maricopa County.

/ / /

Dated this 14th day of November, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 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.

s/ *Andrew S. Jacob*