Marty Harper (#003416)
mharper@stklaw.com
Kelly J. Flood (#019772)
kflood@stklaw.com
Andrew S. Jacob (#22516)
ajacob@stklaw.com
SHUGHART THOMSON & KILROY, P.C.
Security Title Plaza
3636 N. Central Ave., Suite 1200
Phoenix, AZ 85012
Phone: (602) 650-2000
Fax: (602) 264-7033
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Don ADDINGTON, John BOSTIC, Mark BURMAN, Afshin IRANPOUR, Roger VELEZ; and Steve WARGOCKI, *et al,*

Plaintiffs,

vs.

Steven BRADFORD, Paul DIORIO, Robert FREAR, Mark KING, Douglas MOWERY, and John STEPHAN, *et al.*,

Defendants.

CASE NO. CV-08-1728-PHX-NVW

RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS UNDER RULES 12(b)(1), (2), (3), (6), and (7)

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Plaintiffs ADDINGTON, BOSTIC, BURMAN, IRANPOUR, VELEZ; and WARGOCKI file this *Response In Opposition to Defendants' Motion To Dismiss Under Rules 12(b)(1), (2), (3), (6), and (7)* (doc. 17). The Court denied relief as to Rules 12(b)(3) and (7). It should now deny relief as to Rule 12(b)(2) because Defendants purposefully directed their activities at Arizona residents giving rise to Plaintiffs' claims. It should deny relief as to Rules 12(b)(1) and (6) because Plaintiffs seek to enforce an arbitration conducted outside of federal labor law. For these and other reasons explained in the Memorandum of Points and Authorities that follows, the Court should deny Defendants all relief on their motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. OVERVIEW

The Court addresses the claims that Plaintiffs pleaded, not the claims that Defendants say they pleaded. *See Sparta Surgical Corp. v. Natl. Assoc. of Securities Dealers*, 159 F.3d 1209, 1211 (9th Cir. 1998) (holding that Ninth Circuit determines the existence of a federal question from the face of plaintiff's complaint). Federal subject matter "in a state cause of action does not automatically confer federal-question jurisdiction." *See Lippitt v. Raymond James Financial Services, Inc.*, 340 F.3d 1033, 1040 (9th Cir. 2003).

Defendants' jurisdiction arguments are without merit for the reasons set out in *Plaintiffs' Reply in Support of Motion to Remand*, 2-7 (doc. 14) and incorporated here. In addition, because this litigation is not a dispute between labor and management, it is not subject to Norris-La Guardia. And, because Defendants' breach of contractual obligation to treat the Nicolau arbitration award as final and binding occurred in Arizona and/or was intended to adversely effect Arizona interests of Arizona residents this Court has specific personal jurisdiction. Defendants' Rule 12(b)(6) argument is without merit because Plaintiffs' allegation that "Defendants . . . directly participated and/or were fully and adequately

represented in the Nicolau Arbitration," FAC at ¶ 65, establishes that Defendants are bound to the arbitration outcome.

Because there is subject matter jurisdiction, specific personal jurisdiction, and a claim upon which relief can be granted, the Court should deny relief on Defendants' motion.

II. LEGAL ARGUMENT

A. The Court has ancillary subject matter jurisdiction.

1. This claim is not subject to RLA preemption.

As explained in their Motion to Remand, Plaintiffs do not plead a federal question and the RLA does not completely preempt related state law claims. Hence, Defendants' preemption challenges to subject matter jurisdiction must fail.

2. This claim is not subject to Norris-La Guardia.

a. This is not a dispute between labor and management.

"Congress's purpose" for enacting Norris-La Guardia was to "end[] the use of injunctions in labor disputes to upset the interplay of the competing forces of labor and capital" (management). *Local 2750, Lumber and Sawmill Workers Union, AFL-CIO v. Cole*, 663 F.2d 983, 985 & n.2 (9th Cir. 1981). "The act, interpreted in its historical context, seems aimed only at the traditional 'labor injunction'-typically an order which prohibits or restricts coercive conduct of a union in a labor dispute." *Id.* *See also Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 251 (1960) ("Congress attempted to correct … the interjection of the federal judiciary into union-management disputes."). Consistent with this, the Ninth Circuit holds that the Norris-La Guardia anti-injunction provisions "have no place in suits implicating internal union affairs." *Aguirre v. Automotive Teamsters*, 633 F.2d 168 (9th 1980).

Neither party here represents the interests of management. This dispute, therefore, is not one that Congress intended to address by Norris-La Guardia. *See*

Cole, *supra.*, 663 F.2d at 985 & n.2. This claim is technically not even an intra-union dispute because many pilots on both sides do not belong to USAPA. Defendants' argument based on Norris-La Guardia, therefore, must fail.

b. Alternatively, Norris-La Guardia does not apply because Section 4 activities are not at issue.

Section 4 of Norris La Guardia enumerates protected activities. 29 U.S.C. § 104. These are union self-help activities that pressure employers. *See Air Transport Assn. of Am. v. San Francisco*, 266 F.3d 1064, 1076 (9th Cir. 2001). Plaintiffs do not seek to enjoin activities that would pressure employers. Rather Plaintiffs seek an injunction directing Defendants to "treat the integrated seniority list created by the Nicolau Award as final, binding, fair and equitable" and they seek to enjoin Defendants "from actions that are intended to frustrate the Company's transition to integrat[ed] operati[ons]" that would implement the Nicolau Award." FAC at¶ 88(a) and (b). Defendants' argument based on Norris-La Guardia, therefore, must fail because Plaintiffs do not seek to enjoin protected activities.

B. There is specific personal jurisdiction over Defendants.

1. The Court need only have personal jurisdiction over the named Defendant class representatives.

"It has long been the law in the courts of the United States that in an otherwise proper class action suit, non-party members of the class need not be brought personally before the Court." *United States v. Trucking Emp., Inc.*, 72 F.R.D. 98, 99 -100 (D.D.C. 1976). "The same is true of defendant class actions (*i.e.,* [only] each and every named defendant must meet jurisdiction and venue criteria." *Abrams Shell v. Shell Oil Co.*, 165 F.Supp.2d 1096 (C.D.Cal. 2001). *See also* Newberg, *Class Actions*, § 6:12 (same).

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2. The Court must view Plaintiffs' evidence favorably.

The Court may consider evidence when determining jurisdiction. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1141, n.5 (9th Cir. 2003). Any "conflicts between the facts contained in the parties' affidavits must be resolved in [Plaintiffs'] favor for purposes of deciding whether a prima facie case for personal jurisdiction exists." *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001) (citation omitted).

3. The Court finds personal jurisdiction to the full extent permitted by Due Process.

In a non-federal question case, federal courts apply the law of the state in which the district court sits to determine personal jurisdiction. *Core-Vent Corp. v. Nobel Industries*, 11 F.3d 1482, 1484 (9th Cir. 1993). Arizona courts "exert personal jurisdiction over a non-resident litigant to the maximum extent permitted by the United States Constitution." *Cohen v. Barnard, Vogler & Co.*, 199 Ariz. 16, 18, ¶ 8, 13 P.3d 758, 760 (App. 2000); see also Ariz. R. Civ. P. 4.2(a); *Batton v. Tennessee Farmers Mut. Ins. Co.*, 153 Ariz. 268, 270, 736 P.2d 2, 4 (1987).

4. Specific jurisdiction requires minimum contacts and reasonableness.

Where personal jurisdiction is limited only by Due Process, the Ninth Circuit "applies a three-part test to evaluate the propriety of exercising specific jurisdiction: (1) whether the defendant purposefully availed himself of the privileges of conducting activities in the forum, (2) whether the claim arises out of or results from the defendant's forum-related activities, and (3) whether the exercise of jurisdiction is reasonable." *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1123 (9th Cir. 2002).

a. Minimum Contacts

Arizona courts analyze purposeful availment and forum relationship "solely in terms of minimum contacts." *Batton, 153 Ariz.* at 270, 736 P.2d at 4. "Consequently, if the constitutionally required minimum contacts are present, the

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defendant's conduct necessarily satisfies Rule 4(e)(2)." *Id.* Requisite contacts exist if Defendants "purposefully created contacts with Arizona or purposefully directed [their] activities at Arizona residents." *Cohen v. Barnard, Vogler & Co.*, 199 Ariz. 16, 13 P.3d 758 (App. 2000) (internal citation and quotation marks omitted). *See also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (same). It logically follows, that it should be "reasonably foreseeable" to the defendant that "the effects of its activities" would be felt in Arizona. *Batton*, 153 Ariz. at 273, 736 P.2d at 7.

Several Defendants visited Arizona to further their goal of abrogating the Nicolau Award. *See Jacob Decl.,* ¶ 2 (Dec. 5, 2008) (Defendants Bradford and King visited Phoenix in March 2008 to assert that they were entitled to evade their obligation to support the Nicolau Award); *id.* at ¶ 3 (Defendants Bradford, King, and Mowery visited Arizona in May 2008 to begin contract negotiations with the Company); *id.* at ¶ 4 (Defendants Diorio, Frear and Mowery visited Arizona in September 2008 to provide USAPA's date-of-hire seniority list to the Company).

Other Defendants, while outside Arizona, encouraged East Pilots to obstruct implementation of single operations using the Nicolau Award seniority list. *Id.* at ¶ 5 (Defendant Stephan promoted plans to prevent implementation by refusing to agree to a single CBA); *Id.* at ¶ 6 (Defendant Theuer posted news releases on the USAPA web pages encouraging East Pilots to abrogate the Nicolau Award).

Each Defendant, therefore, took one or more specific actions to impair the seniority rights of Arizona pilots with an Arizona employer. These acts were in breach of the duties established by the Nicolau Arbitration. This was far more than mere "random, fortuitous or attenuated" contacts with the forum state. *See Burger King*, 471 U.S. at 475 (finding that insufficient for personal jurisdiction). Rather, such "deliberate action" taken toward Arizona establishes specific jurisdiction. *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995).

b. Personal jurisdiction is reasonable.

The final step in the specific jurisdictional inquiry determines whether the exercise of personal jurisdiction is reasonable. *Glencore*, 284 F.3d at 1125.

> To assess the reasonableness of exercising jurisdiction, we consider seven factors identified by the Supreme Court in *Burger King*: (1) the extent of a defendant's purposeful interjection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's home state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interests in convenient and effective relief; and (7) the existence of an alternative forum.

Id. The "presence of the reasonableness factors listed above may balance out an otherwise insufficient showing of minimum contact." *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1400 (9th Cir. 1986).

As in *Haisten*, "[n]o factor among those enumerated by the Supreme Court suggests that the exercise of jurisdiction would be unreasonable here." *Id.* Plaintiffs address each factor in turn.

Purposeful Interjection. Evidence that Defendants purposefully directed their action toward Arizona is sufficient to resolve the first factor in favor of jurisdiction. *See id.*

Burden of Defense. Defendants have a minimal burden to defend in Arizona. because they are represented by the same counsel who is defending USAPA in Arizona in the DFR claim before this Court. Moreover, Defendants have ongoing business in Arizona arising from their employment with US Airways. Given that Defendants reside in five states, from Massachusetts to Florida, it would be no less of a burden for them to defend in any other state. *See Mot.* at 12:18-21. Defendants argue only that North Carolina would be more convenient. Yet, none of them reside in North Carolina. Defendants do not claim that negotiations between USAPA and US Airways would take place in North Carolina.

Conflict with a Foreign State's Sovereignty. No other state has a particular interest in stopping Defendants from engaging in activity intended to impair he seniority rights of Arizona pilots. Even if some other state had such an interest, "this factor is not dispositive because, if given controlling weight, it would always prevent suit against a foreign national in a United States court." *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1333 (9th Cir. 1984). "Moreover, any clash between a forum's law with the 'fundamental substantive social policies' of another state may be resolved through choice of law rules, not jurisdiction." *Haisten.*, 784 F.2d at 1400 (*quoting Burger King*, 471 U.S. at 477).

Forum State Interest. Arizona surely has a strong interest in its "home town airline."[1] Arizona has a strong interest here because this dispute affects US Airways and US Airways has a substantial effect on "the state's economic vitality." *Gates Learjet Corp.*, 743 F.2d at 1336 (recognizing this as making jurisdiction reasonable).

Efficiency of Resolution. "In evaluating this factor, the Ninth Circuit look[s] primarily at where the witnesses and the evidence are likely to be located." *Core-Vent Corp.*, 11 F.3d at 1489. In this instance, however, there is an issue of judicial economy. Hence, the Court found that "it … would be an entire waste of state judicial resources to laden another judge" with his matter, other than the judge hearing *Addington v. US Airways. Order*, 3:1-2 (Nov. 21, 2008) (doc. 20). For the same reasoning, it would be inefficient to litigate out of state rather than in this Court.

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[1] *See Rotararizonia*, Vol. LXXX, No. 24, 4 (Dec. 12, 2003) (reporting a presentation by the head of America West, Mr. Parker, where "[h]e stressed the importance of the airline to the Phoenix business community. As the home town airline, an ASU study determined that the value to Arizona is $5 billion per year") (available at http://4rotary100.org/LinkClick.aspx?fileticket=mXOuF6%2BOxH0%3D&tabid=56&mid=660).

Plaintiffs' Interest. Plaintiffs' interests weigh in favor of jurisdiction because Plaintiffs reside and work in Arizona.

Alternative Forum. This factor too cuts in plaintiff's favor. Because no Defendant resides in North Carolina, it is hardly a preferable forum.

This Court, therefore, should find that it is reasonable to litigate this matter in Arizona.

C. Plaintiffs state a valid claim that Defendants are bound as if they were direct parties to the arbitration.

"A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." *Restatement (Second) of Contracts* § 1 (1981). "In order to state a claim in contract, the complaint must disclose an agreement, a right thereunder in the party seeking relief and a breach by the defendant." *City of Tucson v. Superior Court*, 116 Ariz. 322, 324, 569 P.2d 264, 266 (App. 1977); *accord Horton v. USAA Cas. Ins. Co.*, 2007 WL 564136, 2 (D.Ariz. 2007). This comports with the basic rule of notice pleading: "[A] complaint in an action on a contract which alleges the contract, performance by the plaintiff, and failure to perform on the part of the defendant, resulting in damage to the plaintiff, is good against a motion to dismiss for insufficiency." 61A *Am. Jur. 2d Pleading* § 212.

An arbitration award is a binding contract because it results from an agreement to be so bound. Hence, an 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 (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). "[F]ailure to honor" an arbitration award is actionable breach of contract. *Ruby-Collins, Inc. v. Huntsville,* 748 F.2d 573, 576 (11th Cir. 1984).

In this matter, two groups of pilots entered into mutual contract obligations "by virtue of their participation in the Nicolau Arbitration." FAC at ¶ 77. This had the same effect as an express agreement that every individual pilot "could obtain judicial relief to compel each other [pilot] to treat the Nicolau Award as final, binding, fair and equitable." *Id.*

Defendants more or less argue that it is impossible for them to be individually bound by the Nicolau Award. That is wrong because participation in arbitration by itself binds parties to the result.

1. Defendants' voluntary participation binds them to the outcome of the arbitration.

Agreement that makes an arbitration binding need not be a direct expression. Rather, participation in an arbitration, by itself, can create an enforceable obligation to be bound by that arbitration. "[A]greement to arbitrate a particular issue need not be express—it may be implied from the conduct of the parties." *Ficek v. Southern Pac. Co.*, 338 F.2d 655 (9th Cir. 1964). "[B]y voluntarily submitting the dispute to arbitration, Ficek and the railway evinced a subsequent agreement for private settlement which would cure any defect in the arbitration clause." *Id.* (internal quotation and alteration marks omitted). "A claimant may not voluntarily submit his claim to arbitration, await the outcome, and, if the decision is unfavorable, then challenge the authority of the arbitrators to act. *Id.* "We have long recognized a rule that a party may not submit a claim to arbitration and then challenge the authority of the arbitrator to act after receiving an unfavorable result." *Fortune, Alsweet & Eldridge, Inc. v. Daniel*, 724 F.2d 1355, 1357 (9th Cir. 1983). *See also Oglala Sioux Tribe v. C & W Enterprises, Inc.*, 542 F.3d 224, 232 (8th Cir. 2008) ("Once a party opts for, and participates in, arbitration ..., it is bound by the arbitrator's decisions."); *Teamsters Local Union No. 764 v.*

J.H. Merritt and Co., 770 F.2d 40, 42 (3d Cir. 1985) ("An arbitration agreement, however, need not be express; it may be implied from the conduct of the parties.").

In *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257 (9th Cir. 2006), the Ninth Circuit collected cases that illustrate what conduct binds an individual to the outcome of an arbitration:

> In *Nghiem v. NEC Electronic, Inc.*, 25 F.3d 1437, 1440 (9th Cir. 1994), we held that the plaintiff, a terminated employee, could not challenge the authority of the arbitrator because the plaintiff had "initiated the arbitration, **attended the hearings with representation**, **presented evidence**, and submitted a **closing brief** of fifty pages" before filing suit in state court. Similarly, in *Fortune, Alsweet & Eldridge, Inc. v. Daniel*, 724 F.2d 1355 (9th Cir. 1983) …, the plaintiff objected to arbitration **after attending two hearings** on the merits and **after his employer had presented all of its evidence**. *Id.* at 1356-57. * * * Similarly, in *Ficek v. Southern Pacific Co.*, 338 F.2d 655, 656-57 (9th Cir. 1964), we held that the claimant, an injured former employee, waived his right to contest arbitrability because he voluntarily participated in arbitration and waited until **after an unfavorable decision** had been handed down before challenging the authority of the arbitrators.

Id. at 1279 (emphasis added).

In contrast, an individual was not bound to the outcome of an arbitration where he "forcefully objected to arbitrability at the outset of the dispute, never withdrew that objection, and did not proceed to arbitration on the merits of the contract claim." *Id.*; *accord Olsen v. U.S. ex rel. U.S. Dept. of Agriculture*, 546 F.Supp. 2d 1122, 1129 (E.D.Wash. 2008).[2]

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[2] There are no choice of law issues here because the District of Columbia, where the Nicolau arbitration was conducted, follows the same doctrine. *See Jaffe v. Nocera*, 493 A.2d 1003, 1009 (D.C. 1985) (relying on cases that held that "participation in an arbitration without objection constitutes an agreement to allow the arbitrators to decide the issue submitted" and "even if no agreement to arbitrate, as long as party raising lack of agreement participated in arbitration of issue without objection, award will be confirmed"); *accord Migneault v. United Servs. Automobile Assn.*, 21 Ariz. App. 397, 399, 400, 519 P.2d 1162, 1164-65 (1974).

Defendants fully participated and never objected while the Nicolau arbitration was conducted. Defendants, therefore, are bound to its result as if they had expressly agreed to be so bound.

2. It does not matter that Defendants were not signatories to the Transition Agreement.

It does to matter that, in *Addington v. USAPA*, Plaintiffs stipulated that US Airways and USAPA were parties to the Transition Agreement. *See Mot.* at 13:16-18. Plaintiffs did not stipulate that these were the only parties. Quite clearly, the holding companies were also parties. Regardless, Defendants would be just as bound as non-signatories:

> [N]onsignatories of arbitration agreements may be bound by the agreement under ordinary contract and agency principles. Among these principles are 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel. In addition, nonsignatories can enforce arbitration agreements as third party beneficiaries.

Comer v. Micor, Inc., 436 F.3d 1098, 1101 (9th Cir. 2006).

There is no question that the Transition Agreement established an agreement to arbitrate the seniority dispute. There is no question, whether or not ALPA was the only direct party, that it was representing individual pilots. The individual pilots, therefore, are bound by the agreement to arbitrate.

3. Defendants are also bound by the participation of their representatives.

Under the doctrine of collateral estoppel:

> [T]he persons for whose benefit and at whose direction a cause of action is litigated cannot be said to be strangers to the cause. One who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own is as much bound as he would be if he had been a party to the record.

Montana v. United States, 440 U.S. 147, 154 (1979) (alteration and quotation marks omitted). "Substantial participation or control by the non-party in the named party's suit weighs heavily in favor of a finding of virtual representation." *Irwin v.*

Mascott, 370 F.3d 924, 930 (9th Cir. 2004). In a context closely analogous to the present matter, workers who "voluntarily and actively" participated through representatives in a merger related seniority arbitration were "bound by its outcome." *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1103 (2d Cir. 1991).[3]

Courts treat a union and its members as the same party in matters where the union "has no beneficial interest" itself. *St. Louis Typographical Union No. 8, AFL-CIO v. Herald Co.*, 402 F.2d 553, 556 (8th Cir. 1968).[4] In such circumstances, "a decision against a union can be binding on union members in a subsequent action." *American Postal Workers Union Columbus Area Local AFL-CIO v. U.S. Postal Service*, 736 F.2d 317, 318 -319 (6th Cir. 1984); *accord Sumaron v. International Longshoremen's & Warehousemen's Union*, 450 F.Supp. 1026, 1029 (D.C.Cal. 1978).

The Preamble to "Ground Rules" for the Nicolau arbitration stated that the "the US Airways Pilot Merger Representatives" were a party. FAC at Ex. D. Furthermore, the Preamble to ALPA Merger Policy stated that "pilot groups" would

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[3] This doctrine also applies to bind an employer to the outcome of an arbitration that was conducted by its representatives:

> In the instant case, Merritt voluntarily submitted its dispute to arbitration and was **represented at the arbitration** by two high ranking employees with full authority to bind the company with respect to labor matters. Thus, Merritt's conduct manifests a clear intent to arbitrate its dispute with the Union, and Merritt accordingly is bound by the decision of the Board.

Merritt, 770 F.2d at 42 (emphasis added).

[4] The court explained in more general terms as follows:

> In determining whether the parties are the same, substance over form controls. Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different, and parties nominally different may be, in legal effect, the same.

Id. (alteration and quotation marks omitted).

"arrive at the merged seniority list … through their respective merger representatives." *Id.* at Ex. C. Part (D)(3) stated, "merger representatives [would be] elected by the [members of each] MEC" and that the members of each MEC could, at any time, replace their representatives. *Id.* ("Nothing herein is intended to limit the discretion of respective MECs in the selection or replacement of their merger representatives…."). Finally, Part (J)(4) of the Policy stated that the costs of arbitration "are a proper expense of the pilots involved in the merger." *Id.* This establishes that the Merger Representatives participated in the Nicolau arbitration in a representative capacity and that the real parties in interest, therefore, were the individual pilots.

This also shows that Defendants had control over both funding and the selection of their representatives. *See Gvozdenovic*, 933 F.2d at 1105.

> The record demonstrates their active and voluntary participation in the arbitration; for example, through the IUFA, they chose a committee to represent them in the arbitration, and, on their behalf, the committee withdrew funds from the bank account set up to cover its expenses, chose counsel to represent the transferring flight attendants in the arbitration and argued vigorously that they should receive full credit for their time of employment with Pan Am.

Id. (explaining why flight attendants were bound to an arbitration conducted by their merger representatives).

Defendants, therefore, are bound by the Nicolau arbitration.

D. It does not matter that USAPA is in violation of the duty of fair representation.

In a very twisted logic, Defendants assert that they can freely breach their arbitration contract because USAPA is in breach of its duty of fair representation. They rely on doctrine that "prohibit[s] claims, both state and federal, tort and otherwise, against individuals who are employees of or acting as agents or representatives of their unions." *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985). The *Peterson* court talked in general terms of contract claims but used

breach of a collective bargaining agreement to illustrated a contract claim precluded by this doctrine. *Id.* (*citing United Steelworkers of America v. Lorain*, 616 F.2d 919, 924 (6th Cir. 1980)). The underlying rationale recognized by *Peterson* indicates that breach of CBA is the only kind of contract claim covered by the doctrine.

Peterson explains that "[u]nion officers, employees and agents are not subject to individual liability for acts performed on behalf of the union in the collective bargaining process" because the defendant owes its principle duty to the union, not the plaintiff. *Id.* at 1258 & 1259. ("Although the attorney may well have certain ethical obligations to the grievant, his principal client is the union; it is the union that has retained him, is paying for his services…."). There is no justification to apply *Peterson* where the defendant owes its principle duty to the plaintiff.

Peterson is also limited to actions for damages.[5] It has not been applied to actions seeking equitable relief.

In this case, ordinary union members accepted a contract duty to treat the Nicolau award as final and binding. The gravamen of this action is that Defendants breached this contractual obligation. It is not that they caused the union to violate its duty of fair representation. Indeed, Defendants are in breach whether or not their union is in violation of the duty of fair representation. In other words, Defendants are in breach even if USAPA gave due consideration to Plaintiffs" interests and had a rational basis for its actions.

Peterson, therefore does not apply here and Plaintiffs are not precluded from seeking an order directing Defendants to comply with their duty to treat the Nicolau Award as final and binding.

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[5] Indeed, all the cases cited by Defendants address actions for money damages. *See Mot.* at 15:14-19. Consistent with *Peterson*, Plaintiffs seek damages only in their lawsuit against USAPA.

E. The statute of limitations is not six-months.

Because the claim is for an equitable remedy, it would be subject to laches not limitations. The presumptive time for laches would be derived from the limitations used for legal remedy of a breach. *Telink, Inc. v. United States*, 24 F.3d 42, 45 (9th Cir. 1994). In this case, that would be the six-year limitation for debt on a written contract. *See* A.R.S. § 12-548. This action, therefore, is not time barred.

III. CONCLUSION

Plaintiffs seek equitable relief—an order enjoining the continued breach of the duty to treat the Nicolau Award as final and binding. Because the contract at issue is between individuals, this action is not preempted by the RLA. Because the arbitration was conducted by their representatives, Defendants are bound as if they directly participated. Because Defendants' duty in this regard was primarily to Plaintiffs, and because Plaintiffs do not seek money damages, this action is not precluded by *Peterson* doctrine. Finally, because this is not breach of the duty of fair representation, it is not subject to six-month limitations. In sum, because Defendants failed to make a valid Rule 12 challenge, this Court should deny them all relief on their motion.

Dated this 5th day of December, 2008.

SHUGHART THOMSON & KILROY, P.C.

/s/

By:________________________________
Andrew S. Jacob
3636 N. Central Ave., Suite 1200
Phoenix, AZ 85012

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 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/
By:________________________________