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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 **REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

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I. SUMMARY

This action brought by Plaintiffs is nothing more than a disingenuous attempt, through the filing of duplicative litigation, to impose unnecessary costs on the named individual defendants. At the same time, this duplicative litigation continues to waste judicial resources as it requests the same relief that these exact plaintiffs are seeking against USAPA in their parallel federal action. This Court has already recognized the true nature of this action:

> Plaintiffs' complaint alleged a breach of the Transition Agreement, which modifies the collective bargaining rights of the parties. This suit alleging that unions and their members breached this agreement depends upon the interpretation of the Agreement and implicitly falls within the fair representation provisions of the Railway Labor Act.

(Docket No. 20, Order at 2:3-7). Therefore, just like Plaintiffs' analogous federal action, this case boils down to one claiming either an alleged breach of the applicable collective bargaining agreements and/or an alleged breach of the duty of fair representation. Plaintiffs' Amended Complaint does not affect this outcome. Despite Plaintiffs' effort to strip out all federal claims from their Original Complaint, their legal theory is still based on the terms of the collectively bargained Transition Agreement.[1]

Alleged breaches of the collectively bargained agreements are minor disputes under the Railway Labor Act over which this Court does not have subject matter jurisdiction. The alleged breach of the duty of fair representation, which this Court has found to underlie the Complaint, has been improperly brought against individuals, and it is well established by the Supreme Court and Circuit Courts that such an action cannot be maintained and therefore should be dismissed.

The [Supreme] Court has long held that "union agents" are not personally

[1] *See* Plaintiffs' Response in Opposition; Docket No. 26 at 11:15. (relying on the Transition Agreement to establish "an agreement to arbitrate the seniority dispute.").

> liable to third parties for acts performed on the union's behalf in the collective bargaining process. *Atkinson v. Sinclair Refining Co*., 370 U.S. 238, 247-49 (1962). …
>
> With monotonous regularity, court after court has cited *Atkinson* to foreclose state-law claims, however inventively cloaked, against individuals acting as union representatives within the ambit of the collective bargaining process. This principle has become so embedded in our jurisprudence that it brooks no serious challenge.

Montplaisir v. Leighton, 875 F.2d 1, 11-12 (1st Cir. 1989) (citations omitted).[2] The case law is clear. There is "no serious challenge" that Plaintiffs can present to withstand dismissal of this DFR claim that has been "cloaked" as a state-law contract action and brought against individuals.

In addition to these flaws in Plaintiffs' underlying legal theory, personal jurisdiction over the named Defendants is lacking. Additionally, the Norris-LaGuardia Act *does* apply to this labor dispute and therefore precludes the issuance of injunctive relief – which is the only relief sought by Plaintiffs in this action. (FAC, Docket No. 8, ¶ 88). It is time for the Court to put an end to this wasteful litigation and dismiss this action with prejudice. As set forth herein and in Defendants' Notice of Removal (Docket No. 1), Memorandum in Opposition to Remand (Docket No. 12), and Memorandum in Support of Motion to Dismiss (Docket No. 17), this duplicative action must be dismissed.

II. ARGUMENT

A. Plaintiffs' Claims are Subject to Railway Labor Act Preemption

As set forth above, the Court has already recognized that Plaintiffs' claims arise under the Railway Labor Act. By simply omitting any reference in the Amended Complaint to

[2] *See e.g.*, *Morris v. Teamsters Local 819*, 169 F.3d 782, 783 (2d Cir. 1999); *Felice v. Sever*, 985 F.2d 1221, 1230 (3d Cir. 1993); *Borowiec v. Boilmakers Local 1570*, 889 F.2d 23, 28 n.3 (1st Cir. 1989); *Carter v. Smith Food King*, 765 F.2d 916, 920-21 (9th Cir. 1985); *Ramsey v. Signal Delivery Serv., Inc*., 631 F.2d 1210, 1212 (5th Cir. 1980); s*ee also*, *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 416 (1981).

the Railway Labor Act or applicable collective bargaining agreements, Plaintiffs have not changed the true nature of this action. Therefore, for the reasons set forth in this Court's November 20th Order in *Addington v. US Airline Pilots Association*, this case, insofar as it alleges breach of applicable collective bargaining agreements, should be dismissed for lack of subject matter jurisdiction. (08-CV-1633, Docket No. 84 at 14:5-17:16).

B. Plaintiffs' Claims Amount to Allegations of the Breach of the Duty of Fair Representation and Cannot be Brought Against Individual Defendants

Established "case law provide[s] a shield of immunity for individual union members in suits for breach of the duty of fair representation." *Morris v. Teamsters Local 819*, 169 F.3d 782, 784 (2d Cir. 1999). Plaintiffs attempt to evade this established case law by arguing that this well settled precedent does not apply to actions seeking injunctive remedies. However, Plaintiffs failed to cite any authority that has drawn such a distinction to this embedded legal principle.

Plaintiffs' failure to cite case law supporting their argument is glaring given relevant case law that is contrary to their position. *See Borowiec v. Boilmakers Local 1570*, 899 F.2d 23, 28 n.3 (1st Cir. 1989) (discounting this exact argument due to plaintiffs' failure to cite any authority "that has drawn that distinction."); *McCuiston v. Hoffa*, 351 F. Supp. 2d 682, 691 (E.D. Mich. 2005) (holding that "as a general rule, in fair representation actions, individual union officers are not proper defendants" and that "[m]onetary and injunctive relief" would be available against the union); *King v. Boston Broadcasters, Inc*., 1981 U.S. Dist. LEXIS 17377 at *8 (D. Mass. Jan. 29, 1981) (dismissing DFR claim against individual defendants for failure to state a claim and noting that "any injunctive or declaratory relief which might issue against the Union would bind its officers in their official capacity.").

Plaintiffs also misstate the law when they claim that "breach of the CBA is the only

kind of contract claim covered by the doctrine." (Docket No. 14, 14:3-4). Plaintiffs have attempted to muddy the waters in an effort to minimize the dispositive effect that this well established doctrine has upon their case, but the argument supporting dismissal of Plaintiffs' claim in this respect is quite clear. As recognized by this Court, Plaintiffs' claim "implicitly falls within the fair representation provisions of the Railway Labor Act." (Docket No. 20, Order at 2:3-7). Therefore, since Plaintiffs' claim is, in actuality, one for breach of the duty of fair representation, and it was brought against individuals and not the union, it is not a viable action and must be dismissed.

In an analogous situation involving a DFR disguised in state law claims against ALPA and individual defendants, the Western District of Pennsylvania, citing Supreme Court precedent, explained why such an action must be dismissed:

> In this case, all of Plaintiff's state law claims are related to ALPA's representational functions and obligations. Indeed, Plaintiff's state law claims against the ALPA Defendants are essentially identical to his federal DFR claim. **Because Plaintiff's state law claims are inextricably intertwined and embodied in Plaintiff's federal DFR claim, those claims are barred and must be dismissed.**
>
> Plaintiff's state law claims against the individual defendants . . . fail for the additional reasons that only the union and not its officers and employees can be liable for a breach of the duty of fair representation. *See Atkinson v. Sinclair Refining Co*., 370 U.S. 238, 249 (1962). . . **A plaintiff cannot circumvent this policy "by the simple device of suing union agents or members whether in contract or in tort, or both, in a separate count or on a separate action for damages**." *Id*.

Garland v. US Airways, Inc., 2006 U.S. Dist. LEXIS 89714 at *17-18 (W.D. Penn. Dec. 12, 2006) (emphasis supplied) (some citations omitted). This Court has recognized that "the issues and the parties in this case fall squarely within the case or controversy of *Addington v. US Airway*s . . ." (Order, Docket No. 20 at 2:23). Therefore, similar to *Garland*, because Plaintiffs' state law claims are inextricably intertwined and embodied in their federal DFR claim against USAPA, these claims are barred and must be dismissed.

C. The Exercise of Personal Jurisdiction Over the Defendants Violates Due Process and is Unreasonable

The Plaintiffs have failed to meet their burden of establishing personal jurisdiction. Plaintiffs cannot rest on the bare allegations of the complaint; they must come forward with facts supporting personal jurisdiction. *In Re Consolidated Zicam Product Liability Cases*, 212 Ariz. 85, 89-90 (App. 2006). The court is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *Merchant Transaction System, Inc. v. Nelcela, Inc.*, 2005 U.S. Dist. LEXIS 35348 (D. Ariz. Dec. 16, 2005).

Initially, we note that the Plaintiffs erroneously assert as a general proposition, despite the absence of any factual basis or certification of any class action under Federal Rule 23 in this case, that personal jurisdiction over the named Defendants in this lawsuit presumably confers personal jurisdiction over named and unnamed Defendants (Docket No. 26 at 3). As there has not been any certification of any class in this lawsuit, to confer personal jurisdiction on this basis would violate the Due Process Clause of the United States Constitution.

The Plaintiffs implicitly concede, by not making the argument, that any general jurisdiction against Defendants is unavailable, as Plaintiffs do not demonstrate that Defendants have "substantial" or "continuous and systematic" contacts with the forum state. *Helicopteros Nacionales v. Hall*, 466 U.S. 408, 414 (1984).

The Plaintiffs' sole basis for asserting personal jurisdiction over the Defendants is specific jurisdiction (Docket No. 26 at 3-8). Accordingly, this Court must determine whether the Defendants have *minimum contacts* with Arizona such that this Court may exercise specific jurisdiction over the Defendants without offending the Due Process Clause. Ariz. Civ. P. 4.2(a). The Due Process Clause protects a defendant's "liberty

interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Chandler v. Roy,* 985 F. Supp. 1205, 1210 (D. Ariz. 1997), *affd.* 1998 U.S. App. LEXIS 29785 (9th Cir. Nov. 19, 1998).

When specific jurisdiction is at issue, the minimum contacts inquiry focuses on the relationship between the defendant, the forum, and the litigation. *Batton v. Tennessee Farmers Mutual Ins. Co.*, 153 Ariz. 268, 271 (1987). Specific jurisdiction is proper only if [the instant plaintiffs' alleged breach of contract and breach of implied contract] – the conduct being litigated – establishes the necessary "minimum contacts" between defendants and Arizona. *Id.* Plaintiffs misinterpret *Batton*, which not only uses a "reasonably foreseeable" standard, but expressly states that "the Supreme Court has consistently held that the foreseeability of an injury or event in another state is not a 'sufficient benchmark' for exercising personal jurisdiction." *Id.* Instead, the first requirement of the specific jurisdiction test that this Court must determine is whether Defendants *purposefully* created contacts with Arizona. *Id.*

Defendants' contacts are insufficient to satisfy the purposely availed requirement of specific jurisdiction because the Defendants' contacts as asserted by Plaintiffs are too attenuated to confer personal jurisdiction. A corporate officer who has contact with a forum only with regard to the performance of his official duties is not subject to personal jurisdiction in that forum. *Skydive Arizona, Inc. v. Quattrochi*, 2006 U.S. Dist. LEXIS 63299 (D. Ariz. August 22, 2006), *mot. den.* 2007 U.S. Dist. LEXIS 66142 (D. Ariz. September 5, 2007). The exhibits attached to the Declaration of Andrew S. Jacob confirm that Defendants' contact with Arizona is limited to their capacity as officers of USAPA.

Personal jurisdiction over any non-resident individual must be premised upon forum-related acts personally committed by the individual. Imputed conduct is a

connection too tenuous to warrant the exercise of personal jurisdiction. *Id.* Accordingly, any attenuated contacts by USAPA officers with Arizona, including any web site postings, are not bases for personal jurisdiction against any named or unnamed defendants in this action.[3]

The second and third requirements of the specific jurisdiction test are that the claim must be one which *arises out of* or relates to the defendant's forum related activities, and the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable. *Chandler*, 985 F. Supp. at 1210.

The *arising out of* requirement is met if "but for" the contacts between the defendant and the forum state, the cause of action would not have arisen. *Id.* at 1213. Significantly, Plaintiffs cannot satisfy the *arising out of* requirement that 'but for' Defendants' attenuated contacts with Arizona that the Plaintiffs' claims for breach of contract and implied breach of contract would not have arisen. Plaintiffs must show, and they have not, that they would not have been injured 'but for' Defendants' contacts with Arizona. *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1123 (9th Cir. 2002) (Due Process requires that a federal court have jurisdiction over a defendant's person or property in a suit to confirm a previously issued arbitration award).

Finally, personal jurisdiction over the defendants would be unreasonable under the third requirement for specific jurisdiction. Plaintiffs' assertion that "none" of the seven factors suggest unreasonableness is simply not credible (Docket No. 26 at 6).

Factor one – the extent of Defendants' purposeful interjection into Arizona's affairs – weighs in favor of Defendants since their contacts with Arizona are attenuated.

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[3] Scott Theuer is not a named defendant in this action. However, Andrew Jacob, through his declaration, erroneously identifies Mr. Theuer as "Defendant Theuer." (Jacob Decl., Docket No. 27, ¶ 6; *see also* Docket No. 26 at 5:18).

Factor two – the burden on Defendants of defending in Arizona – is equal to the burden facing Plaintiffs of litigating in the other state venues suggested. However, where the burdens are equal, this factor tips in favor of the defendant because the law of personal jurisdiction is primarily concerned with the defendant's burden. *Chandler*, 985 F. Supp. at 1205. Accordingly, factor two weighs in favor of Defendants.

Factor three – the extent of conflict with the sovereignty of the Defendants' home states – weighs in favor of Defendants because the other states have at least an equal interest to Arizona, and as previously indicated, Defendants' contacts with Arizona are attenuated.

With respect to factor four – Arizona's interest in adjudicating this dispute – Plaintiffs only cite Arizona's "strong interest in [US Airways] its home town airline" (Docket No. 26 at 7:10). However this is not a factor that weighs in Plaintiffs' favor because US Airways is not a party to this lawsuit and has been dismissed from the parallel federal action. In addition, the willingness of Defendants to litigate in North Carolina should be considered under the circumstances where multiple defendants are located in different states. More importantly, Plaintiffs have failed to show, as indicated previously, that they would not have been injured 'but for' Defendants' contacts with Arizona.

Factor five – the most efficient judicial resolution of the controversy –weighs in favor of neither party because witnesses and evidence are located in various other states as well as Arizona.

Factor six – the importance of Arizona to the Plaintiffs' interests in convenient and effective relief – weighs in favor of the named Plaintiffs as they all reside in Arizona.

Factor seven – the existence of an alternative forum – weighs in favor of Defendants because Plaintiffs' argument that no named Defendant resides in North Carolina is irrelevant when Defendants are willing to litigate there.

Of the above seven factors assessing the reasonableness of exercising jurisdiction, five favor Defendants, one favors Plaintiffs and one favors neither Defendants nor Plaintiffs. Accordingly, the exercise of specific jurisdiction over the Defendants would be unreasonable under the Due Process Clause. Accordingly, Due Process bars personal jurisdiction over Defendants in this case because Defendants did not purposefully establish minimum contacts with Arizona, and the exercise of personal jurisdiction would be unreasonable.

D. Labor Disputes Covered by the Norris-LaGuardia Act are not Limited to Disputes Between Labor and Management

The Plaintiffs argue that the definition of the term "labor dispute" contained within the Norris-LaGuardia Act ("NLGA") is limited to disputes between labor and management. Plaintiffs are wrong. The definition of "labor dispute" contained within Section 113 of the NLGA is broadly drafted to specifically include disputes between "one ore more employees or associations of employees and one or more employees or associations of employees …" 29 U.S.C. § 113(a)(3). Furthermore, the statute expressly states that:

> The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of person in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, **regardless of whether or not the disputants stand in the proximate relation of employer and employee**.

29 U.S.C. § 113(c) (emphasis supplied). The Supreme Court has "recognized that the term 'labor dispute' must not be narrowly construed because the statutory definition itself is extremely broad and because Congress deliberately included a broad definition . . ." *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 711 (1982).

Consistent with this broad interpretation and contrary to Plaintiffs' argument, the "term 'labor dispute' includes conflicts between employees, as in this case, and not only conflicts between employers and employees." *Jou-Jou Designs, Inc. v. Int'l Ladies Garment Workers Union*, 643 F.2d 905, 911 (2d Cir. 1981). The "critical element" to determining the existence of a labor dispute is not whether it involves one between labor and management, but rather "whether the employer-employee relationship is the matrix of the controversy." *Jacksonville Bulk Terminals*, 457 U.S. at 712. In applying this analysis, there can be no question that Plaintiffs' Complaint is a labor dispute covered by the Norris-LaGuardia Act.[4] The Plaintiffs' remaining argument that Norris-LaGuardia Section 4 activities "are not at issue" (Docket No. 26 at 3:5) has been addressed in prior briefing and will not be repeated here. (*See* Docket No. 17 at 11:4-12:2).

E. Plaintiffs Continue to Mischaracterize Individual Pilots as Parties to the Transition Agreement and the Nicolau Arbitration

As has already been briefed by Defendants and stipulated to by Plaintiffs, individual pilots were not parties to either the Transition Agreement or the Nicolau Arbitration.[5] Plaintiffs' response in opposition to Defendants' Motion to Dismiss offers no new argument in this respect. However, Plaintiffs now attempt to add words to ALPA Merger Policy in an effort to support their position and contradict facts to which they have previously stipulated.[6]

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[4] *See* (Defendants' Memorandum in Support of Motion to Dismiss; Docket No. 17 at 10:15-11:3).

[5] *See* (Defendants' Memorandum in Opposition to Plaintiffs' Motion to Remand, Docket No. 12 at 13:16-14:7; Defendants' Memorandum in Support of Motion to Dismiss, Docket No. 17 at 13:12-14:8); *see also* (08-cv-1633, Docket No. 77, ¶¶ 16, 21, 28-29).

[6] Plaintiffs' cite, in part, Section D(3) of ALPA Merger Policy as such: "merger representatives [would be] elected by the [members of each] MEC." The bracketed language added by Plaintiffs creates an important distinction that does not exist within ALPA Merger Policy. That section of ALPA Merger Policy correctly states that "The

Plaintiffs also place an undue amount of reliance on *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100 (2d Cir. 1991), to support their argument that individual pilots are bound by the outcome of the Nicolau Arbitration because they "voluntarily and actively participated through representatives." (Docket No. 26 at 12:2). Despite Plaintiffs' description of *Gvozdenovic* as "closely analogous to the present matter," the facts of that case are distinguishable from the case at hand – especially given the proposition for which Plaintiffs attempt to use it.

Specifically, in *Gvozdenovic*, the Pan American Pacific Division flight attendants that sought to vacate the seniority merger arbitration award were given the express option to transfer to United and participate in the seniority integration arbitration or continue flying for Pan Am. 933 F.2d at 1103. Unlike the flight attendants in *Gvozdenovic*, the individual pilots were not given an option and did not agree to ALPA's process.[7]

III. CONCLUSION

Based on the pleadings, evidence, arguments, record, and any live testimony, or evidence to be presented in the hearing, if any, Defendants respectfully request that the Court grant the motion and dismiss Plaintiffs' Complaint, with prejudice.

Merger Committee for each MEC shall consist of two or three merger representatives elected by the MEC. . ."

[7] *See* (Defendants' Memorandum in Opposition to Plaintiffs' Motion to Remand, Docket No. 12 at 13:17.).

Respectfully Submitted,

Dated: December 12, 2008
By: **/s/ *Lee Seham***

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CERTIFICATE OF SERVICE

This is to certify that on the date indicated herein below a true and accurate copy of the foregoing pleadings, *to wit*,

- Defendants' Reply Memorandum in Support of their Motion to Dismiss
- Certificate of Service

were electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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And further that paper hard copies were provided to The Honorable Neil V. Wake, District Court Judge, 401 W. Washington Street, SPC 52, Phoenix, AZ 85003.

On: December 12, 2008, by:

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