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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DON ADDINGTON, *et al.*, Plaintiffs, vs. US AIRLINE PILOTS ASSOCIATION, and US AIRWAYS, INC., Defendants.	CASE NO. 2:08-CV-1633-NVW **PLAINTIFFS' MOTION TO COMPEL USAPA TO PRODUCE**

Plaintiffs move for an Order compelling Defendant USAPA to produce all documents and materials created before September 4, 2008, that are related to its legal representation. Such materials are neither protected by attorney-client privilege nor work-product confidentiality pursuant to the *Garner* fiduciary exception. *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970). Because this material goes directly to demonstrate USAPA's bad faith and is needed to properly conduct discovery in this matter, Plaintiffs ask that the Court provide an expedited determination of this motion. This motion is supported by the Memorandum of Points and Authorities that follows and the Declaration of Andrew S. Jacob filed herewith.

Memorandum of Points and Authorities

I. Background

On December 3, 2008, Marty Harper, counsel for Plaintiffs, sent a letter via email and by US Mail to Lee Seham, counsel for USAPA, wherein he asserted Plaintiffs' "position that all documents and materials related to your representation of USAPA that were created between April 18, 2008 and September 4, 2008, are subject to discovery pursuant to the *Garner* fiduciary duty exception to attorney-client privilege." A. Jacob, *Decl.*, ¶ 2 (Dec. 12, 2008). Mr. Harper explained as follows:

> After formation of USAPA and its certification as the bargaining agent for all pilots of US Airways, you and your firm owed a fiduciary duty to all pilots, not just to the control group. Courts widely recognize that when those demanding information enjoy the status of stockholders they are given the opportunity to show cause why the privilege should not be invoked in the particular instance. In connection with the current litigation, West Pilots are therefore entitled to find out what advice was given to USAPA about fulfilling or avoiding the duties USAPA owed to its members.

Id. at ¶ 3 (citations, quotation and alteration marks omitted). After making additional legal argument, which is incorporated in this memorandum, Mr. Harper concluded his letter as follows:

> The purpose of this letter is to explain our legal position so that we can either agree on a limited production, or a privilege log with in-camera review, or otherwise ask the Court for a ruling on December 15, 2008.
>
> We look forward to hearing from you.

Id. at ¶ 4.

Mr. Seham has not directly responded to this letter.

On December 4, 2008, Plaintiffs propounded requests for production on USAPA via formal discovery. *Id.* at ¶ 1.

At an in-person meet-and-confer conducted between counsel on December 8, 2008, the attorneys for USAPA indicated their position that the *Garner* exception

did not apply and that they did not intend to produce what they regarded as privileged materials. *Id.* at ¶ 5. Additionally, counsel for USAPA has stated in writing that it will seek a protective order with respect to these materials:

> vii. Absent a Stipulated Protective Order, a motion pursuant to Rule 26(c) for a Protective Order is intended by USAPA. The issue to be decided whether USAPA is entitled to protect from discovery, pursuant to Rule 26 (c)(A), attorney client privileged communications and work product presently sought by Plaintiffs in their First Request For Documents (and other issues depending on the scope of an agreed to Stipulated Protective Order).

Id. at ¶ 6.

USAPA's actions, particularly because they were motivated by bad faith and/or hostility to Plaintiffs' interests (and those of the other West Pilots), constituted violations of its duty of fair representation. *See*, *generally*, *Order*, 8:20-14:4 (Nov. 20, 2008) (doc. 84). Regardless, USAPA has freely disclosed Mr. Seham's legal advice that such actions could not be proven to be violations of the duty. *Jacob Decl.* at ¶ 7. This advice was set out in a letter that Mr. Seham wrote to Stephen Bradford on January 23, 2008. *Id.* In this letter, Mr. Seham opined on "the legal right of US Airways pilots to negotiate and implement a seniority-based pilot integration agreement." *Id.* The letter states that it would not be a violation of the duty of fair representation if USAPA adhered to a date of hire seniority integration, stating that Mr. Seham was "confident that USAPA's goal is not susceptible to challenge under the DFR standard, which requires proof that the union's activity was wholly irrational or arbitrary." *Id.*[1]

Plaintiffs seek discovery of all evidence that will fully demonstrate the nature of "USAPA's goal" and the full scope of the advice that USAPA was given in regard to that goal. This information directly speaks to USAPA's *raison d'étre* and to the

[1] Mr. Seham stipulated that this letter could be used as evidence and presented to the Court by Plaintiffs. Plaintiffs included it among their exhibits for the hearing on October 29, 2008.

motivation behind USAPA's actions—both of which speak to the magnitude of its violations of the duty of fair representation.

Because "[t]he appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach," *Vaca v. Sipes*, 386 U.S. 171, 195 (1967), Plaintiffs must have a full and fair opportunity for discovery.

II. Legal Argument

A. The *Garner* exception applies in DFR suits.

Courts often refer to the fiduciary exception to attorney-client privilege as the "*Garner* exception." *See*, *e.g.*, *Arcuri v. Trump Taj Mahal Associates*, 154 F.R.D. 97, 105 (D.N.J. 1994); *Aguinaga v. John Morrell & Co.*, 112 F.R.D. 671, 676 (D.Kan. 1986). Under the fiduciary exception, "certain fiduciaries who obtain legal advice in the execution of their fiduciary obligations are precluded from asserting the attorney-client privilege against their beneficiaries." *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 226 (3d Cir. 2007). For example, under this doctrine where shareholders can demonstrate "good cause," communications between the corporate officers and the corporate attorneys is discoverable by the shareholders. *Garner*, 430 F.2d at 1101.

In so holding, the *Garner* court "recognized that corporate managers, and even sometimes the corporate entity, may have interests adverse to some or all of the shareholders, particularly because shareholders' varying ownership interests mean that the shareholders' interests often are not uniform" and that "when all is said and done the management is not managing for itself." *Wachtel*, 482 F.3d at 232 (internal quotation marks omitted). As noted by the Third Circuit in *Wachtel*, "[c]entral to this conclusion [in *Garner*] was the fundamental fact that corporate managers in the ordinary course can have no legitimate personal interests for which the advice of corporate counsel (paid for from corporate funds) is needed." *Id.*

The fiduciary exception "has been adopted and extended by other courts to other contexts in which one party wishes to invoke the privilege against another party to whom it owes a fiduciary duty." *Arcuri*, 154 F.R.D. at 105. District courts that have considered the issue in a published decision have uniformly applied the *Garner* exception in the context of a DFR suit. *See Arcuri*, 154 F.R.D. at 105-06 ("relationship between a union and its members, as a general proposition, is properly subject to an analysis under the Garner exception"); *Nellis v. Air Line Pilots Assn.*, 144 F.R.D. 68, 71 (E.D.Va. 1992) (applying the *Garner* exception because unions owe a fiduciary duty to their members); Aguinaga, 112 F.R.D. at 681 (applying *Garner* exception because "union officials' association with their members possesses all the essential characteristics of a fiduciary relationship"). No Circuit has yet ruled directly on the issue.

B. The *Garner* exception requires good cause for discovery.

The *Garner* exception does not completely remove "attorney-client privilege from the grasp of the corporation client." *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1414 (11th Cir. 1994). "Rather, stockholders are given the opportunity to show cause why [the privilege] should not be invoked in the particular instance." *Id.* Courts apply nine non-exclusive factors when determining whether good cause has been shown. *Id.* These are as follows:

> [1] the number of shareholders [seeking discovery] and the percentage of stock they represent; [2] the bona fides of the shareholders; [3] the nature of the shareholders' claim and whether it is obviously colorable; [4] the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; [5] whether, if the shareholders claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; [6] whether the communication related to past or to prospective actions; [7] whether the communication is of advice concerning the litigation itself; [8] the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; [9] the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

Id.

C. Each factor identified in *Garner* supports good cause here.

Each of the nine *Garner* factors here favors finding good cause to allow discovery of all material that is relevant to Plaintiffs' claims. We address them in turn.

[1] *Numerosity.* In the context of DFR claims, "the relevant inquiry" looks at the proportion of workers potentially adversely affected by the union who support the plaintiff group. *Arcuri*, 154 F.R.D. at 108 ("nearly 100% of the Union members who were adversely affected are members of the Arcuri plaintiff group"). The adversely affected workers here are the West Pilots and the West Pilots overwhelmingly support Plaintiffs.

[2] *Bona fides of plaintiffs*. West Pilots are represented by USAPA, thus this weighs in their favor.

[3] *Colorable claim*. This was determined in favor of discovery when the Court determined that Plaintiffs pled valid claims.

[4] *Necessity or desirability of discovery*. Mr. Seham's letter of January 28, 2008, strongly suggests that the organizers of USAPA relied his opinion that USAPA could step into ALPA's shoes for all purposes favorable to the East Pilots while avoiding the obligation to support the Nicolau Award to the detriment of West Pilots. After USAPA was certified as the bargaining agent, it is logical that Mr. Seham continued to advise USAPA how to orchestrate a plan that preserved and protected the interests of the East Pilots, without regard to the adverse consequences to West Pilots. He undoubtedly played a role in advising USAPA about the need for and wording of the "Conditions and Restrictions" USAPA proudly presented to this Court as "protection" for West Pilots, as well as USAPA's constitution. It is very likely, therefore, that Mr. Seham provided USAPA with a detailed legal analysis and advice that was at the very heart of Plaintiffs' DFR

claims. Indeed, his fingerprints appear to be on every decision and action by USAPA, as evidenced by not only his widely-disseminated written opinion, but also his appearance and advice given at various road show presentations. Full discovery of all these materials is necessary to demonstrate the intention motivating USAPA's wrongful conduct.

[5] *Wrongfulness of union conduct.* The Court recognized that USAPA abrogated its duty of fair representation by failing to include West Pilots in any meaningful way in the bargaining process. It has also recognized that, because USAPA stands as the successor to ALPA, it is bound to the results of the Nicolau Award. Creating a union for the express purpose of putting the interests of East Pilots, even furloughed pilots and new hires, ahead of the interests of West Pilots and rejecting any aspect of the Nicolau Award is sufficient wrongful conduct to find good cause to allow discovery.

[6] *Whether the communication related to past or to prospective actions.* This factor looks at whether the communication occurred before or after the wrongful conduct at issue. *See Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 31 (D.C.Ill. 1980) (collecting cases). Communication that preceded the wrongdoing is more likely to have contributed to causing the wrongdoing and less worthy of protection. The Fourth Circuit, in an opinion withdrawn on unopposed motion (without explanation), explained this factor by drawing analogy to the crime/fraud exception:

> [T]he *Garner* court drew an analogy between good cause and the crime/fraud exception to the attorney-client privilege. Under the crime/fraud exception, communications with an attorney for the purpose of perpetrating or facilitating a crime or fraud in the future are not privileged. In such a context, the societal interests in preventing crime and fraud outweigh the confidentiality between a client and his attorney. Communications seeking legal advice regarding past crimes or fraud are, however, privileged.
>
> The past/prospective distinction in this case is analogous to the past and prospective portion of the crime/fraud exception. This case is not a criminal action and the civil lawsuit does not expressly state a cause of

> action for fraud. Nevertheless, the improprieties, breaches of fiduciary duties, and violations of securities laws alleged (and proved) by Plaintiffs encompass conduct of a magnitude that should be accorded significant weight in the balance between society's interests in enforcing fiduciary duties and the corporation's interest in confidential communications with its attorney.

Sandberg v. Virginia Bankshares, Inc., 979 F.2d 332, 353-54 (4th Cir. 1992) (withdrawn 1993 WL 524680, but subsequently cited 406 times).

Here, Mr. Seham encouraged USAPA to engage in wrongful conduct. What Plaintiffs seek to discover, therefore, were communications with an attorney for the purpose of perpetrating or facilitating a violation of the duty of fair representation in the future. Plaintiffs, by limiting their discovery to communications that preceded the filing of this lawsuit are not interfering with USAPA's ability to obtain confidential legal advice to defend its past wrongful acts. Hence, this factor also favors allowing discovery.

[7] *Whether the communication is of advice concerning the litigation itself.* In order to avoid arguments about advice during litigation, Plaintiffs limit the scope of their request to communication that preceded this litigation. Work-product generated when litigation is merely imminent is not protected. *See Aguinaga*, 122 F.R.D. at 682.

[8] *Extent to which the communication is identified.* Until USAPA produces a detailed privilege log along the lines that it requested in its written discovery, Plaintiffs are unable to identify specific documents for discovery. Given the expedited discovery schedule, USAPA waived any right to have Plaintiffs make such identification by resisting discovery.

[9] *Risk of trade secrets.* No trade secrets appear to be at issue.

D. Subject matter waiver doctrine also applies.

The attorney-client privilege is not absolute and may be waived by the client's voluntary disclosure of the protected information. "[I]t has been widely held that

voluntary disclosure of the content of a privileged attorney communication [such as this] constitutes waiver of the privilege as to all other such communications on the same subject." *Weil v. Investment/Indicators, Research and Management, Inc.*, 647 F.2d 18, 23 -24 (9th Cir. 1981). This exception, when applied, is applied broadly:

> The disclosure of … advice and reliance on that advice waived the attorney-client privilege with respect to all documents which formed the basis for the advice, all documents considered by counsel in rendering that advice, and all reasonably contemporaneous documents reflecting discussions by counsel or others concerning that advice.

In re Pioneer Hi-Bred Intern., Inc., 238 F.3d 1370, 1374-75 (Fed. Cir. 2001). "The deliberate injection of the advice of counsel into a case waives the attorney-client privilege as to communications and documents relating to the advice." *Handgards, Inc. v. Johnson & Johnson*, 413 F.Supp. 926, 929 (D.C.Cal. 1976).

Mr. Seham's letter of January 23, 2008, is evidence that he advised Mr. Bradford and other East Pilots that they were free to create and use USAPA for the purpose of abrogating the Nicolau Award seniority list in favor of a date-of-hire seniority list. By publicizing this letter, USAPA waived its attorney-client privilege in regard to all related documents, including those: (1) "which formed the basis for the advice" given in this letter; (2) that Mr. Seham "considered … in rendering that advice, and" (3) "all reasonably contemporaneous documents reflecting discussions by counsel or others concerning that advice." *Pioneer*, 238 F.3d at 1374-75.

III. Conclusion

All nine *Garner* factors weigh in favor of allowing discovery of all material related to communications between the law firm of Seham, Seham, Meltz & Petersen, LLP and USAPA (and their respective agents, officers and representatives). In particular, there is substantial evidence that this advice preceded, encouraged and contributed to the wrongful conduct establishing USAPA's violations of the duty of fair representation. In addition, by intentionally

disclosing some of the advice that Mr. Seham provided on this subject, USAPA has waived the privilege as to all materials related to that subject. Plaintiffs therefore respectfully ask the Court to issue an order compelling USAPA and its attorneys to produce all documents and materials related to USAPA's legal representation that were created before September 4, 2008.

Dated this 12th day of December, 2008.

SHUGHART THOMSON & KILROY, P.C.

s/ Andrew S. Jacob

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 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/ _____