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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE DISTRICT OF ARIZONA**

10 Don ADDINGTON, *et al.*,
11 Plaintiffs,
12 vs.
13 US AIRLINE PILOTS
14 ASSOCIATION, and US AIRWAYS,
INC.,
15 Defendants.

CONSOLIDATED CASES NO.
2:08-CV-1633-PHX-NVW;
2:08-CV-1728-PHX-NVW

**PLAINTIFFS' MEMORANDUM
DEMONSTRATING THAT USAPA DOES
NOT HAVE A RIGHT TO HAVE A JURY
DECIDE THAT IT BREACHED THE DUTY
OF FAIR REPRESENTATION.**

16 Don ADDINGTON, *et al.*,
17 Plaintiffs,
18 vs.
19 Steven H. BRADFORD, *et al.*,
20 Defendants.

21
22 Plaintiffs Don ADDINGTON, John BOSTIC, Mark BURMAN, Afshin
23 IRANPOUR, Roger VELEZ, and Steve WARGOCKI, file this memorandum in
24 response to *Defendant USAPA's Memorandum of Points & Authorities In*
25 *Support Of Its Seventh Amendment Right to A Trial By Jury* (doc. 159).
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27
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. OVERVIEW

3 USAPA has no Seventh Amendment right to a jury here because this
4 action seeks only a judgment recognizing equitable rights and granting
5 equitable remedies. It no longer matters that Counts One and Two raised
6 legal claims and sought legal remedies because both those counts were
7 dismissed. Consequently, there are no issues remaining here for a jury to
8 decide.

9 II. LEGAL ARGUMENT

10 As used in the Seventh Amendment, “suits at common law” means “suits
11 in which legal rights were to be ascertained and determined, in
12 contradistinction to those where equitable rights alone were regarded, and
13 equitable remedies were administered.” *Parsons v. Bedford, Breedlove &*
14 *Robeson*, 28 U.S. 433, 434 (1830). The Supreme Court, on that basis, has
15 held that there is no Seventh Amendment right to a jury in matters “where
16 equitable rights alone [are] recognized, and equitable remedies [are]
17 administered.” *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989)
18 (quotation marks omitted). Plaintiffs ask only that the Court recognize
19 equitable rights and provide equitable remedies. USAPA, because it fails to
20 show otherwise, fails to demonstrate a Seventh Amendment right to a jury.

21 A. Plaintiffs Make an Equitable Claim, Only.

22 Only the duty of fair representation (DFR) claim in Count Three remains.
23 This matter no longer has no breach of contract component. Breach of CBA
24 claims were originally stated in Counts One and Two, but the Court
25 dismissed these claims for lack of jurisdiction. *Order*, 17:15-16 (Nov. 20,
26 2008) (doc. 84). No jury would be able to decide, therefore, whether the
27 Company breached the CBA.

1 The DFR claim here is predicated on proving “that the union has taken
2 impermissible measures to avoid representing the West Pilots fairly.” *Id.* at
3 8:22-23. A DFR claim, by itself, is an equitable claim akin to a breach of
4 fiduciary duty claim. *Chauffeurs, Teamsters & Helpers, Local No. 391 v.*
5 *Terry*, 494 U.S. 558, 570 (1990).

6 The claim made here, therefore, raises only equitable rights.

7 **B. Plaintiffs Seek Equitable Remedies, Only.**

8 Plaintiffs seek equitable remedies only. They seek: (1) injunctive relief
9 and (2) an order directing USAPA to disgorge dues that have been paid by
10 West Pilots and to vacate outstanding West Pilot dues still owed.¹ There is
11 no question that “injunctive relief is equitable in nature.” *Official Airline*
12 *Guides, Inc. v. Goss*, 856 F.2d 85, 88 (9th Cir. 1988). Consequently, Plaintiffs
13 address in detail only the second remedy at issue—disgorgement of dues paid
14 (and vacation of unpaid dues outstanding).

15 1. Damages are equitable when restitutionary.

16 “Although an action for money damages is ‘the traditional form of relief
17 offered in the courts of law,’ not every ‘award of monetary relief must
18 necessarily be legal relief.’” *Gallagher v. Wilton Enterprises, Inc.*, 962 F.2d
19 120, 123 (1st Cir. 1992) (*quoting Curtis v. Loether*, 415 U.S. 189, 195 (1974)).
20 Damages are equitable, for example, where they are “restitutionary, such as
21 in actions for disgorgement of improper profits.” *Terry*, 494 U.S. at 571; *see*
22 *also Tull v. United States*, 481 U.S. 412, 424 (1987) (same). The remedy here
23 is equitable, therefore, if it is restitutionary in nature.

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26
27 ¹ Plaintiffs use “dues” to refer to dues charged to union member and/or
28 agency fees charged to nonmembers.

1 2. Disgorgement of dues wrongfully withheld is restitutionary.

2 As a general principle of equity, “misconduct and breach of duty results in
3 [an] agent's losing his right to compensation for services to which he would
4 otherwise be entitled.” *Haymes v. Rogers*, 70 Ariz. 408, 411, 222 P.2d 789,
5 790-91 (1950); *see also Shaeffer v. Blair*, 149 U.S. 248, 258 (1893) (same);
6 *Coldwell Banker Commercial Group, Inc. v. Camelback Office Park*, 156 Ariz.
7 226, 229-230, 751 P.2d 542, 545-46 (1988); *Restatement (Third) of Agency*
8 § 8.01 (2006) (For breach of fiduciary duty “the agent may be required to
9 forfeit commissions and other compensation paid or payable to the agent
10 during the period of the agent's disloyalty.”); *Restatement (Second) of Agency*
11 § 469 (1958) (“An agent is entitled to no compensation for conduct which is
12 disobedient or which is a breach of his duty of loyalty....”).

13 A similar rationale justifies disgorgement of union dues because a union
14 stands as a fiduciary to the bargaining unit. *Air Line Pilots Assn., Intern. v.*
15 *O'Neill*, 499 U.S. 65, 75 (1991) (“Just as ... fiduciaries owe their beneficiaries
16 a duty of care as well as a duty of loyalty, a union owes employees a duty to
17 represent them adequately as well as honestly and in good faith.”). Indeed,
18 courts have ordered restitution remedies against a union that breached its
19 duty of fair representation. *See, e.g., Intl. Assn. of Machinists v. Street*, 367
20 U.S. 740, 775 (1961) (RLA case); *N.L.R.B. v. Teamsters and Allied Workers,*
21 *Hawaii Local 996*, 313 F.2d 655, 661 (9th Cir. 1963).

22 The Supreme Court explained:

23 [A] plaintiff could seek restitution in equity ... where money ...
24 identified as belonging in good conscience to the plaintiff could clearly
25 be traced to particular funds ... in the defendant's possession. * * *
26 Thus, for restitution to lie in equity, the action generally must seek
27 not to impose personal liability on the defendant, but to restore to the
28 plaintiff particular funds ... in the defendant's possession.

1 *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213-214
2 (2002). In cases where an agent or fiduciary is ordered to disgorge fees paid
3 by the principal or beneficiary, the remedy is restitutionary because the
4 defendant is giving back to the plaintiff that which it received from the
5 plaintiff and in good conscience ought not to retain. Such remedies are not
6 intended to compensate for an injury. Rather they is based on the principle
7 that it would be “wrong” for the fiduciary to retain a benefit received while in
8 breach of its duty. *See Curtis*, 415 U.S. at 197.

9 The remedy sought here by Plaintiffs is along just such lines. Plaintiffs
10 ask this Court to hold that, as a matter of equity, USAPA is not entitled to
11 retain dues paid by West Pilots. The Court should find that any dues paid by
12 West Pilots are funds wrongfully withheld by USAPA. An order directing
13 USAPA to disgorge such funds, therefore, would be restitutionary in nature.

14 The claim made here, therefore, seeks only equitable remedy.

15 **C. Neither *Terry* nor *Wooddell* Apply Here.**

16 1. *Terry* addressed a hybrid claim with a breach of CBA
17 component.

18 In *Terry*, 494 U.S. 558, the Supreme Court held that the Seventh
19 Amendment applied to a hybrid duty DFR claim. Unlike the DFR claim here,
20 a hybrid claim has breach of the CBA as an essential element of the DFR
21 claim. The breach of CBA component of a hybrid claim is akin to a common
22 law breach of contract action. *Id.* at 570. In contrast, the DFR component of
23 a hybrid claim is akin to a common law breach of fiduciary duty action. *Id.*
24 The legal nature of the breach of contract component invokes a right to a jury
25 while the equitable nature of the breach of fiduciary duty component does
26 not. *Id.* Because the nature of the two components of a hybrid claim were
27 balanced, the Court was at “equipose as to whether [the parties] are entitled
28

1 to a jury trial.” *Id.* (The Court’s equipoise tipped toward a Seventh
2 Amendment jury right in *Terry* because the remedy at issue there was a legal
3 remedy. *Id.* at 573.)

4 It logically follows, that where (as here) the DFR claim has no breach of
5 contract component, there ought not to be equipoise. In addition, the remedy
6 here (disgorgement of dues) is quite different from that at issue in *Terry*
7 (back pay damages). In cases such as this, there is no question that the
8 action is akin to a traditional equity action and there is no Seventh
9 Amendment right to a jury.

10 2. Wooddell addressed an LMRDA claim.

11 USAPA reliance on *Wooddell v. Intl. Bhd. of Elec. Workers, Loc. 71*, 502
12 U.S. 93 (1991), to argue that all DFR claims trigger a Seventh Amendment
13 right to a jury is misplaced. In *Wooddell*, the Supreme Court did not even
14 address a DFR claim. Rather, it addressed an LMRDA claim. The Supreme
15 Court decided that case by holding “that actions under the LMRDA are
16 closely analogous to personal injury actions [and] [a] personal injury action is
17 of course a prototypical example of an action at law, to which the Seventh
18 Amendment applies.” *Id.* at 98 (citations omitted).

19 Neither *Terry*, nor *Wooddell*, therefore, applies to this matter.

20 **III. CONCLUSION**

21 Plaintiffs originally stated a hybrid DFR action that invoked a Seventh
22 Amendment right to a jury. The landscape changed when the Court
23 dismissed Counts One and Two. All that remains is Count Three, which is a
24 DFR claim without any breach of contract component. Now, with only Count
25 Three, Plaintiffs neither assert a legal right nor seek a legal remedy.
26 Plaintiffs, therefore, do not make a claim that provides a Seventh
27 Amendment right to a jury.

1 Dated this 23d day of January, 2009.

2 SHUGHART THOMSON & KILROY, P.C.

3 */s/ Andrew S. Jacob*

4 By: _____

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12 **CERTIFICATE OF SERVICE**

13 I hereby certify that on January 23d, 2009, I electronically transmitted
14 the foregoing document to the U.S. District Court Clerk's Office by using the
15 CM/ECF System for filing and transmittal of a Notice of Electronic Filing.

16 *s/ Andrew S. Jacob*