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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. US AIRLINE PILOTS ASSOCIATION, and US AIRWAYS, INC., Defendants.	Case No. 2:08-cv-1633-PHX-NVW (Consolidated) **DEFENDANT USAPA'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL (DOCKET NO. 106)**
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

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I. SUMMARY

This memorandum is served on behalf of the US Airline Pilots Association ("USAPA") in opposition to Plaintiffs' Motion to Compel (Docket No. 106), which seeks to pierce the attorney-client privilege that exists between USAPA and its legal counsel. Plaintiffs' argument is based on a legal theory that has not been accepted by the Ninth Circuit and on a waiver argument that has no basis in law or fact.

On December 4, 2008, Plaintiffs served their First Request for Production of Documents on USAPA. Request number three broadly seeks "[a]ll documents and correspondence to or from members of USAPA, between April 18, 2008 and the date of this Request, prepared or received by Lee Seham, Esq, or any member of his law firm, relating to USAPA…."[1] On December 12, 2008, well before the deadline for USAPA's response to Plaintiffs' document requests, Plaintiffs moved to compel USAPA "to produce all documents and materials created before September 4, 2008, that are related to its legal representation." (Docket No. 106 at 1:16).

On December 14, 2008, USAPA filed a Motion to Strike Plaintiffs' Motion to Compel (Docket No. 111), on the grounds that Plaintiffs' motion was premature and violated LRCiv. 7.2(j), LRCiv. 7.2(k), LRCiv. 37.2, this Court's order of November 21, 2008 (Docket No. 85), Fed. R. Civ. P. 34, Fed. R. Civ. P. 37, and the stipulation reached between Plaintiffs and USAPA and proposed by Plaintiffs in the Joint Case

[1] Plaintiffs' document requests are attached as Exhibit A to the Rule 37 Declaration of Andrew S. Jacob. (Docket No. 107).

Management Report (Docket No. 109, ¶ 17).[2] USAPA's pending Motion to Strike is incorporated herein by reference.

The bases presented by Plaintiffs in their Motion to Compel to pierce the attorney-client privilege are an unsubstantiated self-professed "need,"[3] combined with the arguments that: (1) the attorney-client privilege has no application where a union-represented employee seeks privileged communications from the union's attorney; and (2) USAPA waived any attorney-client privilege due to its publication of a January 23, 2008 letter written by USAPA counsel Lee Seham, during the National Mediation Board ("NMB") representation election campaign at US Airways.[4] The Seham letter was a non-confidential communication prepared for USAPA as part of the public discourse that occurred amongst the pilots at US Airways during USAPA's campaign to replace the Air Line Pilots Association ("ALPA") as the pilots' collective bargaining representative.

Plaintiffs assert that their argument concerning the inapplicability of the attorney-client privilege to a union's communications with its counsel is supported by the Fifth Circuit's ruling in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974, 91 S. Ct. 1191 (1971). However, Plaintiffs' Motion to Compel completely disregards controlling and contrary Ninth Circuit precedent, which explicitly limits the application of the *Garner* exception to shareholder derivative suits. *Weil v.*

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[2] Memorandum in Support of USAPA's Motion to Strike, Docket No. 112, ¶ 5.

[3] *See* Docket No. 106, page 1, line 21. There is no unavailability exception to the attorney-client privilege and the privilege cannot be overcome by a showing of need. *Admiral Ins. Co. v. United States Dist. Court for the Dist. of Ariz.*, 881 F.2d 1486, 1494-1495 (9th Cir. 1989).

[4] Exhibit D to Rule 37 Declaration of Andrew S. Jacob (Docket No. 107, pages 28-30).

Investment/Indicators Research & Management, 647 F.2d 18 (9th Cir. 1981).[5] Thus, Plaintiffs' legal contentions are not warranted by existing law, as required by Fed. R. Civ. P. 11(b)(2), and Plaintiffs have made no argument for "extending, modifying, or reversing" the existing Ninth Circuit law. Fed. R. Civ. P. 11(b)(2). Accordingly, the baseless nature of Plaintiffs' argument supports a finding under Fed. R. Civ. P. 37(a)(5)(B) that Plaintiffs be required to pay USAPA its reasonable costs and attorneys' fees incurred in opposing the Motion to Compel.[6]

Second, in similar superficial fashion, Plaintiffs argue that the attorney-client privilege between USAPA and its attorneys was waived through publication of the Seham non-confidential letter, dated January 23, 2008.[7] Here too Plaintiffs ignore well-established precedent that a waiver of the privilege cannot be based on the publication of a letter from legal counsel that was specifically drafted for the purpose of public consumption.

II. ARGUMENT

A. The *Garner* Exception Does Not Apply In This Case

Plaintiffs' argument for piercing the attorney-client privilege in this case rests on the *Garner* exception. The Fifth Circuit in *Garner* held that where a corporation is in suit against its stockholders on charges of acting inimically to stockholder interests,

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[5] Plaintiffs cite *Weil* in their waiver argument (Motion to Compel at 9), but do not mention *Weil's* ruling with respect to the *Garner* doctrine.

[6] "[I]f the omitted case law and statutory provisions would render the attorney's argument frivolous, he or she should not be able to proceed with impunity in real or feigned ignorance of them, and sanctions should be upheld." *United States v. Stringfellow*, 911 F.2d 225, 226 (9th Cir. 1990).

protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why the attorney-client privilege should not be invoked in this particular instance. *Garner*, 430 F.2d at 1103. "[I]t is clear that *Garner* did *not* establish an absolute exception to the attorney client privilege rule." *Ward v. Succession of Freeman*, 854 F.2d 780, 785 (5th Cir. 1988), *cert. denied*, 490 U.S. 1065, 109 S. Ct. 2064 (1989). For policy reasons, communications sought to be used to "second-guess or even harass [management] in matters purely of judgment" resulting in a deterioration of candid attorney-client communication are not open to shareholders. *Id.*

Plaintiffs' motion fails to inform the Court that the Ninth Circuit has expressly limited application of the *Garner* exception to shareholder derivative suits. In the Ninth Circuit *Weil* case, the plaintiff sought attorney-client privileged documents from one of the defendants in an action alleging violation of federal securities laws. Plaintiff urged the court to apply the *Garner* exception. However, the Ninth Circuit found *Garner* inapposite, and stated as follows:

> Weil is not currently a shareholder of the Fund, and her action is not a derivative suit. The Garner plaintiffs sought damages from other defendants in behalf of the corporation, whereas Weil seeks to recover damages from the corporation for herself and the members of her proposed class. Garner's holding and policy rationale simply do not apply here.

Weil, 647 F.2d at 23.

[7] Docket No. 106 at 8:25-9:19.

The Ninth Circuit's holding in *Weil* is clear and unambiguous. Indeed, the Fifth Circuit, which decided *Garner*, expressly recognized that the Ninth Circuit has only applied *Garner* to shareholder derivative suits. *Ward*, 854 F.2d at 786 ("Under *Weil*, the factors in the *Garner* good cause index are not even considered unless the suit is derivative in nature").[8] Although the court in *Ward* rejected the Ninth Circuit's narrow interpretation of *Garner*, the Fifth Circuit "recognized reason in the *Weil* holding," explaining as follows:

> Where shareholders bring a successful derivative action on behalf of the corporation, they benefit *all* shareholders. Where, however, shareholders seek to recover damages from the corporation for themselves, they do not even seek a gain for all others. In the latter circumstance, the motivations behind the suit are more suspect, and thus more subject to careful scrutiny, in determining if good cause for suspending the privilege exists.

Ward, 854 F.2d at 786. In this case, as in *Weil*, the *Garner* exception does not apply because the Plaintiffs do not seek relief for all, or substantially all, of the pilots on behalf of the union.

Plaintiffs' argument that the *Garner* exception applies to DFR suits is not based on Ninth Circuit precedent. Plaintiffs rely on *Arcuri v. Trump Taj Mahal Associates*, 154 F.R.D. 97 (D.N.J. 1994), without disclosing in their motion that the *Arcuri* court

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[8] Even if good cause were considered, Plaintiffs could not satisfy good cause for at least the following reasons: (1) There is no evidence that all, or substantially all, of the USAPA-represented pilots seek the relief in this motion. Even assuming *arguendo* that all of the West Pilots side with the Plaintiffs in seeking to pierce the attorney-client privilege, this entire group is not "all or substantially all" of the US Airways Pilots, but a number less than the majority of Pilots at US Airways. (2) Plaintiffs' support for the necessity of discovery of privileged materials is conclusory and speculative; and (3) Plaintiffs' request fails to identify any specific documents; their request for "all

specifically recognized that the Ninth Circuit, "while accepting *Garner*, has expressly limited its holding to shareholder derivative suits." *Id*. at 106 (*citing Weil*).

Similarly, in support of their argument premised on the *Garner* exception, Plaintiffs cite *Aguinaga v. John Morrell & Co.*, 112 F.R.D. 671 (D. Kan. 1986), without disclosing that the *Aguinaga* court referred to the Ninth Circuit in *Weil* as "[o]ne court [that] refused to apply *Garner* outside the context of shareholder derivative litigation. *Id. at 678.*

Accordingly, the overwhelming consensus of the law in the Ninth Circuit, as recognized both in and out of this Circuit as set forth above, is that a case, such as the instant one, which does not concern a shareholder derivative suit, cannot be the basis for application of the *Garner* exception to the attorney-client privilege.

B. The Rationale for the *Garner* Exception Does Not Exist in this Case Because There is No Mutuality of Interest Between the Plaintiffs and the Non-Plaintiff Union Members.

As the *Weil* court recognized, the policy rationale for the *Garner* exception does not exist where there is no mutuality of interest between all, or substantially all, of the shareholders. In the union context, other courts have recognized that "[u]nlike shareholders in a derivative suit, there is no mutuality of interest between different factions of a union." *Arcuri*, 154 F.R.D. at 109.

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documents" created before September 4, 2008 shows that Plaintiffs are "blindly fishing." *Garner*, 430 F.2d at 1104.

In *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386 (11th Cir. 1994), the court distinguished *Garner* in rejecting the plaintiffs' attempt to pierce their union's attorney-client privilege:

> This case is also unlike the shareholder derivative suit in *Garner* …because there is no identity of interests between the plaintiffs and the non-plaintiff Union members. Instead, their interests are adverse. The plaintiffs in the present case seek damages not on behalf of the Union, but for their personal benefit at the expense of the Union and its other members. Their interests are directly adverse to those of the other Union members. *Garner* noted that "due regard must be paid to the interests of nonparty stockholders, which may be affected by impinging on the privilege." *Id*. at 1101 n. 17. Where such a small fraction of the Union's membership seeks to pierce the attorney-client privilege at the expense of the remaining ninety-nine and one-half percent, "due regard" for the interest of the non-party members requires that the plaintiffs' request be rejected.

Id. at 1416.

Similarly, in this case, there is no identity of interests between the plaintiffs and the non-plaintiff Union members. Their interests are adverse. Plaintiffs do not seek relief on behalf of the Union, but for their personal benefit at the expense of the Union and its other members. "Due regard" for the interest of the non-plaintiff members of USAPA requires that the Plaintiffs' request be rejected.

C. **The Attorney-Client Privilege Cannot Be Waived By a Communication That Is Not Confidential**.

Plaintiffs argue that USAPA's publication of its counsel's letter dated January 23, 2008, during the NMB representation election campaign, "waived its attorney-client privilege in regard to all related documents." (Docket No. 106 at 9:15-16). However, a

non-confidential communication, such as the January 23, 2008 letter, does not constitute a waiver of the attorney-client privilege.

The attorney-client privilege applies only when the communication is confidential. *Weinstein's Federal Evidence* § 503.15[1]. Confidentiality is defined by the client's intent. If the client intended the matter to be made public, the requisite confidentiality is lacking, and the privilege does not apply. *Weinstein's Federal Evidence* § 503.15[2].

Under the fairness doctrine, the extrajudicial disclosure of an attorney-client communication – one not subsequently used by the client in a judicial proceeding to his adversary's prejudice – does not waive the privilege as to the undisclosed portions of the communication. *In re Claus Von Bulow v. Claus Von Bulow*, 828 F.2d 94, 102 (2d Cir. 1987) (Waiver by Von Bulow as to particulars *actually disclosed* in the book was correct, but it was an abuse of discretion to broaden the waiver to include portions of four identified conversations which, because they were not published, remained secret). The court in *Von Bulow* explained as follows:

> But where, as here, disclosures of privileged information are made extrajudicially and without prejudice to the opposing party, there exists no reason in logic or equity to broaden the waiver beyond those matters actually revealed. Matters actually disclosed in public lose their privileged status because they are no longer confidential. The cat is let out of the bag, so to speak. But related matters not so disclosed remain confidential. Although it is true that disclosures in the public arena may be "one-sided" or "misleading", so long as such disclosures are and remain extrajudicial, there is no *legal* prejudice that warrants a broad court-imposed subject matter waiver. The reason is that disclosures made in public rather than in court – even if selective – create no risk of *legal* prejudice until put at issue in the litigation by the privilege-holder.

Id. at 103.

The Seham letter, dated January 23, 2008, is not a confidential communication, but was created as a public document for USAPA for the express purpose of being made public by posting it for public viewing on the internet. (Seham Decl. ¶ 9). This letter, which preceded the commencement of Plaintiffs' lawsuit by nearly eight months, was prepared for USAPA as part of the public discourse that occurred amongst the pilots at US Airways during the election campaign, and was intended to assist USAPA in obtaining the support of a majority of the pilots. (*Id*. ¶ 10). USAPA has not injected the advice of its counsel into the instant case and therefore the cases cited by Plaintiffs in support of a waiver on this basis are distinguishable.

Accordingly, as the content of the January 23, 2008 letter is not a confidential communication, but a document created for public view sufficiently in advance of this litigation, the attorney-client privilege does not apply to this letter and there is no privilege to waive under these circumstances. Assuming *arguendo* the letter were deemed to be a disclosure of privileged information, then its extrajudicial disclosure approximately seven and a half months before this lawsuit does not result in any legal prejudice to Plaintiffs when defendant USAPA, as privilege-holder, has not put this letter or the advice of counsel at issue in this litigation.

Only the information that the client intends to disclose lacks confidentiality; other matters that the client intends to hold confidential remain privileged. *Weinstein's Federal Evidence* § 503.15[2]; *Chevron v. Pennzoil Company*, 974 F.2d 1156, 1162 (9th Cir. 1992) (Pennzoil's waiver with respect to two legal memoranda involving subsidiary

tax issues disclosed to an auditor did not constitute waiver as to all communications with respect to all documents touching on the tax deferral question not produced to the auditor); *Weil v. Investment/Indicators, Research and Management, Inc.*, 647 F.2d 18, 25 (9th Cir. 1981) (Where a corporate defendant discloses the contents of a privileged attorney communication to opposing counsel early in a proceeding and the individual plaintiff is not prejudiced in any way by the disclosure, the corporate defendant waives its privilege only as to communications about the matter actually disclosed, in this case, the substance of counsel's advice regarding registration of the corporate defendant's shares pursuant to the Blue Sky laws of various states); *State Farm Mutual Automobile Ins. Co. v. Lee*, 199 Ariz. 52, 58 (2000) (Privilege waived as to communications between State Farm and its counsel regarding the propriety of State Farm's policy of denying stacking does not mean the privilege was waived as to communications between State Farm and its counsel on other subjects pertaining to the stacking claims).

An affirmative act of putting the privileged materials at issue is necessary to constitute a waiver, and mere denial of the allegations in the complaint is not an implied waiver. *Id*. The mere filing of a bad faith action, the denial of bad faith, or the affirmative claim of good faith do not constitute an implied waiver. *Id*. at 62. The party that would assert the privilege has not waived it unless it has asserted some claim or defense, such as the reasonableness of its evaluation of the law, which necessarily includes the information received from counsel. *Id*. The privilege is also not waived simply because a litigant has consulted counsel or denied the allegations made by its adversary. *Id*. at 65. Nor is the mere fact of relevance sufficient to place the

communications at issue. *Id*. It is assumed that most if not all actions taken by a client will be based on counsel's advice, which does not waive the privilege. *Id*. Based on counsel's advice, the client will always have subjective evaluations of its claims and defenses, which does not waive the privilege. *Id*. As the court noted in *Arcuri*:

> Under the plaintiffs' waiver analysis, the attorney-client privilege might be waived any time a client defers to an attorney's judgment in matters legal about which the client is uninformed, simply by acknowledging that he has received and acted (or failed to act) upon his attorney's advice. Such an interpretation of waiver would make a shambles of the privilege.

Id. at 110.

Accordingly, because Defendant USAPA has not engaged in any conduct to waive the attorney-client privilege, Plaintiffs' Motion to Compel USAPA to produce all documents and materials created before September 4, 2008, that are related to its legal representation should be denied in its entirety.

D. Plaintiffs Are Not Entitled to Discovery of Work Product

Plaintiffs argue at the beginning of their motion that the documents and materials that they are seeking are not protected either by the attorney-client privilege or the work product rule, pursuant to the *Garner* exception. (Docket No. 106 at 1:18-19). After this one reference to work product on the first page of their motion, Plaintiffs never mention it again. Nevertheless, they are not entitled to the work product of USAPA's attorneys.

First, there is no discussion in *Garner* regarding the work product rule. Therefore, *Garner* is no authority for overcoming the work product rule.

Second, Plaintiffs do not satisfy the strict requirements for overcoming the work product rule. The work product rule is a qualified immunity protecting from discovery

documents and tangible things prepared by a party or his representative in anticipation of litigation or for trial. Fed. R. Civ. P. 26(b)(3); *Admiral Ins. Co.*, 881 F.2d at 1494. The rule affords special protections for work product that reveals an attorney's mental impression and opinions, while other work product materials "nonetheless may be ordered produced upon an adverse party's demonstration of substantial need or inability to obtain the equivalent without undue hardship. *Id*. "Substantial need" for discovery of work product materials is something more than relevancy under Rule 26(b)(1). *Fletcher v. Union Pacific Railroad Co.*, 19 F.R.D. 666, 671 (S.D.Cal. 2000).

Here, Plaintiffs have not made a sufficient showing to overcome the work product rule because Plaintiffs' showing consists solely of conclusory and unsubstantiated statements of need. Plaintiffs' Motion to Compel further fails to set forth "specific facts" to demonstrate undue burden. *Id.* at 675. Instead of sufficiently particularizing the information sought, Plaintiffs impermissibly engage in a fishing expedition for "all documents and materials created before September 4, 2008, that are related to its [USAPA's] legal representation." Plaintiffs' failure to explain their efforts made to obtain the specific information claimed to be needed and allowed through discovery further demonstrates Plaintiffs' fishing expedition approach to discovery in this case.

Accordingly, Plaintiffs are not entitled to discovery of either work product or attorney-client privileged communications in this case.

III. CONCLUSION

Based on the pleadings, evidence, arguments, record, and any live testimony, or evidence to be presented in the hearing, if any, Defendant USAPA respectfully requests that the Court grant USAPA's Motion to Strike, deny Plaintiffs' Motion to Compel in its entirety, and grant such other and further relief as this Court deems just and proper, including an award of costs and attorneys' fees in favor of USAPA.

Respectfully Submitted,

Dated: January 29, 2008

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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*,

- Defendant USAPA's Memorandum in Opposition to Plaintiffs' Motion to Compel;
- Declaration of Lee Seham in Opposition to Plaintiffs' Motion to Compel;
- 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: January 29, 2009, by:

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