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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, US AIRWAYS, INC., Defendants,	Case No. 2:08-cv-1633-PHX-NVW (Consolidated) **DEFENDANT USAPA'S REPLY BRIEF IN SUPPORT OF ITS SEVENTH AMENDMENT RIGHT TO A TRIAL BY JURY**
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

The nature of this case has become increasingly elusive. In an effort to deprive USAPA of a jury trial, the Plaintiffs are seeking to violently force a round peg into a square hole in a number of respects.

First, Plaintiffs' First Amended Complaint (Dkt. No. 86, "FAC") strongly emphasized their interest in money damages (FAC, ¶¶ 120, 123, WHEREFORE ¶ C). Nevertheless, in support of their contention that there should be a non-jury trial in this matter, Plaintiffs' recent brief asserts: "Plaintiffs seek equitable remedies only." (Dkt. 161 at 3:8). In its initial jury brief, USAPA requested that Plaintiffs clarify the relief that they are or are not seeking on behalf of the named Plaintiffs and/or the proposed class. (Dkt. No. 160, 8:23). Plaintiffs still have not clearly indicated that they have, in fact, given up their claim for wage related damages on behalf of themselves and the proposed class.

Plaintiffs' counsel continued to dance around this issue at this week's depositions. (Declaration of Nicholas Granath ("Granath Decl.") ¶ 2, Ex. 1 at pp. 28-30). Therefore, so as not to mislead USAPA or the Court, Plaintiffs should seek leave to amend their Complaint or stipulate that they have voluntarily dismissed their request in the FAC that "judgment be entered against Defendants . . . for sufficient damages to compensate Plaintiffs for the value of lost wages and benefits . . ." (FAC, WHEREFORE, ¶ C, p. 23).

During depositions taken this week, it was revealed that Plaintiffs still considered themselves to have suffered monetary lost wages and related damages as a result of

USAPA's conduct, and had not foreclosed the possibility of seeking these damages from USAPA in the future. Plaintiff John Bostic testified as follows:

> Q. Is it your intention to file a new action in the future in federal court for the purpose of obtaining damages?
>
> A. I have to reassess that once we get there.

(Granath Decl. ¶ 3, Ex. 2 at 34:18-23). Plaintiff Burman testified in a similar manner:

> Q. Are you currently seeking any monetary compensation for – from USAPA for yourself, pursuant to this lawsuit, other than compensation related to dues, agency fees and attorney's fees?
>
> A. That's not the primary goal.
>
> Q. Well, is it any part of the goal of your litigation?
>
> A. Well, there is – my understanding is that there is that aspect of it that could **come in at some later date**, but the primary goal is ceasing the breach of the duty of fair representation and injunctive relief to that effect.

(*Id*. at ¶ 4, Ex. 3 at 39:7-40:13) (emphasis added). Despite Plaintiffs' claim that they now "seek equitable remedies only," it is apparent that they have not completely abandoned their pursuit of the wage related damages. Nevertheless, they currently seek to deprive USAPA of its Constitutional right to a trial by jury on common issues of fact that would form the basis of any future action to recover these damages. The question then is whether USAPA can be stripped of its Seventh Amendment right by a disingenuous and *temporary* elimination of wage related damages.

Second, Plaintiffs now assert that, due to the Court's jurisdictional dismissal of Counts One and Two: "This matter no longer has no [sic] breach of contract component." (Dkt. No. 161, 2:23). As set forth at length in USAPA's initial jury brief,

Plaintiffs' hybrid duty of fair representation claim is centered upon multiple alleged breaches and induced breaches of contracts and agreements – both actual and implied. (Dkt. No. 159, 4:4-18). Plaintiffs' FAC also pled that "Counts One and Two are inextricably linked to the breach of duty of fair representation claim, Count Three." (FAC ¶ 15).

Additionally, this week's depositions of the named Plaintiffs revealed that, contrary to their attorneys' submissions, there remains a general understanding that this action still encompasses breach of contract issues. This understanding was exemplified by the following testimony given by Plaintiff Iranpour:

> Q. [referring to paragraph 119 of the FAC] That says, "Because USAPA caused Defendant US Airways to breach its collective bargaining agreement with West Pilots, it caused plaintiffs and other West Pilots the injuries alleged in Counts One and Two." Is that still part of your federal lawsuit?
>
> A. I give you the same answer I gave to your previous question, that USAPA's breach of its duty of fair representation caused US Airways to breach its collective bargaining agreement with the West Pilots.

(Granath Decl. ¶ 5, Ex. 4 at 53:13-16). A similar understanding was shared by Plaintiffs Addington, Bostic, Burman and Wargocki. (Granath Decl. ¶¶ 1-2, 3, 5, Ex. 1 at 27:15; Ex. 2 at 38:19; Ex. 3 at 38:20; Ex. 4 at 56:20-57:21). The Plaintiffs cannot be allowed to succeed in persuading the Court to retain jurisdiction over the contract claims they assert against USAPA and subsequently be allowed to disingenuously deny that such contract

claims exist – all for the purpose of denying USAPA its right to a trial by jury as provided by the Seventh Amendment of the United States Constitution.[1]

Finally, assuming *arguendo* that the Plaintiffs have abandoned, for now, their request for wage related damages, Plaintiffs still undisputedly seek monetary dues related damages that would involve hundreds of thousands of dollars and painstaking individualized factual analyses relating to dues calculations, agency fee calculations, membership status, individual pilot settlements and other case specific issues. In short, Plaintiffs have, perhaps, temporarily shaved off one form of damages and replaced it with an extremely complex alternative form of monetary relief. The Plaintiffs' attempt to characterize this enormously complex damage claim as restitution in equity has no legal support.

II. ARGUMENT

A. The Jurisdictional Dismissal of US Airways Does Not Alter the Legal Nature of Plaintiffs' Claim Against USAPA

As set forth in USAPA's brief supporting its right to a jury (Dkt. No. 159 at 3:20-5:7), Plaintiffs' hybrid DFR action is premised entirely on alleged breaches of the pre-merger America West pilot CBA, ALPA Merger Policy, the Transition Agreement, and "contract duties" allegedly owed by individual East pilots to individual West pilots. (FAC ¶ 76). Plaintiffs' DFR claim is that USAPA's conduct allegedly induced these breaches.

[1] USAPA advised the Court of its willingness to have all contract related issues under Count III adjudicated by a System Board composed of a single arbitrator. (USAPA Motion for Reconsideration, Dkt. No. 94 at pp. 3-5) (*citing* October 29, 2008 Transcript at p.43 lines 10-15). The Court's subsequent rejection confirms that it has retained jurisdiction over all contractual breaches alleged in Count III. (Order, Dkt. No. 104).

Notwithstanding the clear language of their own pleadings and the current understanding of the named Plaintiffs, Plaintiffs claimed in their response to USAPA's jury brief that since US Airways was dismissed from this action on jurisdictional grounds, the breach of contract component in this action has suddenly disappeared. (Dkt. No. 161, 1:3-7). This argument is unsupported by fact or law.[2]

The Supreme Court, in *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 164-65 (1983), explained the dynamics of a hybrid suit as follows:

> Such a suit, as a formal matter, comprises two causes of action. The suit against the employer . . . alleging a breach of the collective-bargaining agreement. . . . [and] [t]he suit against the union is one for breach of the union's duty of fair representation . . . Yet the two claims are inextricably interdependent. … The employee may, if he chooses, sue one defendant and not the other; **but the case he must prove is the same whether he sues one, the other, or both**.

Id. (internal citations omitted) (emphasis added). The same reasoning applies in this case even though Plaintiffs' hybrid claim is not the typical employee termination and grievance related matter. According to Plaintiffs' own pleadings, the breach of contract claims against US Airways are "inextricably linked to the breach of duty of fair representation claim [against USAPA]." (FAC ¶ 15). Therefore, the case Plaintiffs must prove is the same even though US Airways has been dismissed. In order to recover

[2] This Court recognized that "Count 2 is inseparable from Count 3. Whether the employer has breached a duty to negotiate in good faith is entirely dependent on whether they make their case that the union has breached its duty of fair representation. So I don't see how you can arbitrate one and not the other. You can't decide one and not the other, whether it's an arbitrator or me." (October 29, 2008, Tr. at p. 43, lines 2-9).

against USAPA, as Plaintiffs have built their claim, they must show that the alleged DFR conduct induced a breach of the relevant collective bargaining agreements.

In determining the plaintiff's right to a jury trial, the Supreme Court, in *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558 (1990), was confronted with a situation where plaintiffs brought a hybrid claim against their employer and union based on the employer's engagement in continued layoffs and the union's decision not to pursue further grievances on behalf of plaintiffs related to those layoffs. *Terry*, 494 U.S. at 562. After the action was commenced, the employer in *Terry* filed for bankruptcy and the action against it was subsequently dismissed – leaving only the union as a defendant. *Id*. at 563.

Taking the employer's absence from the litigation into consideration, the Supreme Court in *Terry* determined that "to recover against the Union here, respondents must prove both that . . . [the employer breached] the collective bargaining agreement and that the Union breached its duty of fair representation." *Id*. at 530. The Court determined, even in the absence of the company in the litigation, it was proper to analyze both interdependent issues. *Id*. at 570, n. 6.[3] The First Circuit recently reaffirmed this principle. In *Goulet v. New Penn Motor Express, Inc*., 512 F.3d 34 (1st Cir. 2008), the First Circuit upheld the district court's decision, in a hybrid DFR action, to direct verdict in favor of the employer while allowing the remaining claim against the union to be tried to the jury. The First Circuit noted that even though the employer "ceased to be a party,

[3] *See* USAPA's initial Memorandum in Support of a Jury Trial (Dkt. No. 159 at 5:4).

the jury trial went forward against [the union], involving the same issues and evidence as would have been presented had [the employer] not been let out." 512 F.3d at 42.[4]

The same is true in this matter. Plaintiffs have pled and maintain that USAPA's alleged DFR induced a breach of the relevant collective bargaining agreements. Plaintiffs also allege that USAPA was used as a vehicle to circumvent contractual obligations under the Transition Agreement and ALPA Merger Policy. In short, Plaintiffs' DFR claim is built on a foundation of alleged contractual breaches, and to now argue that the DFR nature of Count III is distinguishable from the contract based claims is to raise form over substance. Therefore, this matter must be governed by the case law discussed above.

Any finding that the most recent metamorphosis of this action lies in equity is precluded by the fact that the complex dues related remedy sought by Plaintiffs does not fall under any exception to the general rule that an action for money damages is the traditional form of legal relief. Therefore, since the second prong of the Seventh Amendment analysis – examination of remedy sought – "is the more important. . ." 494 U.S. at 565, USAPA is entitled to a jury trial given Plaintiffs' continued pursuit of legal remedies.

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[4] Plaintiffs attempt to distinguish *Wooddell v. International Bhd. Of Elec. Workers*, 502 U.S. 93 (1991), by claiming that it "did not even address a DFR claim." (Dkt. No. 161, 6:14). However, as recognized by the District of Columbia Circuit, the Supreme Court in *Wooddell* "followed *Terry* to hold that the petitioner was entitled to a jury trial for his claim that the Union had violated its duty of fair representation." *Hubbard v. Envtl. Prot. Agency*, 982 F.2d 531, 545, n.8 (D.C. Cir. 1992).

B. The Dues Related Damages Sought by Plaintiffs Do Not Qualify as Restitution in Equity

Assuming *arguendo* that Plaintiffs, for now, have renounced their wage related damage claim in this action, they have merely replaced it with a massive and complex compensatory claim for "dues paid by West Pilots." (Dkt. No. 161, 3:10). USAPA notes that the Plaintiffs glibly equate dues and agency fees as if there was no difference in the respective financial obligations. (Dkt. No. 161, p. 3, n. 1). In fact, as conceded by Plaintiffs in this week's depositions, dues obligations arise from a member's voluntary agreement to accept the contractual obligations embodied in the union constitution. By contrast, agency fee obligations are born from contractual obligations arising from a collective bargaining agreement. Aside from the contractual source of the respective obligations, each financial obligation is subject to its own rules of calculation and basis for mitigation or reduction. (Granath Decl. ¶¶ 2-7, Ex. 1 at pp. 67-73; Ex. 2 at pp. 76-83; Ex. 3 at pp. 82-86; Ex. 4 at pp. 97-103; Ex. 5 at pp. 125-128; Ex. 6 at pp. 75-87).

Plaintiffs made no argument in response to USAPA's position that the dues-related damages are not incidental to or intertwined with the injunctive relief they seek. (Dkt. No. 159, 9:16).[5] Consequently, Plaintiffs' only remaining argument that these damages do not constitute legal relief is that they seek restitution in equity. This is not so.

[5] In a similar manner, Plaintiffs failed to respond to USAPA's argument that *Ramey v. International Ass'n of Machinists & Aerospace Workers*, 473 F. Supp. 2d 365 (E.D.N.Y. 2007), is distinguishable from the present case and therefore not authority upon which to rely when determining the right to a jury trial in this matter. (Dkt. No. 159, pp. 12-15).

The Supreme Court, in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), drew a "fine distinction between restitution at law and restitution in equity. . ." *Id.* at 214. "The Court explained that equitable restitution is available only in limited circumstances, where there is an identifiable res." *Honolulu Joint Apprenticeship & Training Comm. of United Ass'n Local Union No. 675 v. Foster*, 332 F.3d 1234, 1237 (9th Cir. 2003) (*citing Great-West Life*, 534 U.S. at 213-14)).

> [A] plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could **clearly be traced to particular funds or property in the defendant's possession**. A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner. But where the property sought to be recovered or its proceeds have been dissipated so that no product remains, the plaintiff's claim is only that of a general creditor, and the plaintiff cannot enforce a constructive trust of or an equitable lien upon other property of the defendant. Thus, **for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore the plaintiff particular funds or property in the defendant's possession**.

Great-West Life, 534 U.S. at 214 (internal quotations and citations omitted) (emphasis added). *See also Sereboff v. Mid Atlantic Med. Serv., Inc.*, 547 U.S. 356, 363 (2006) (noting that restitution in equity exists where recovery is sought "through a constructive trust or equitable lien on a specifically identified fund, not from [the defendant's] assets generally"). Plaintiffs do not seek an equitable lien or constructive trust on an identifiable res. What Plaintiffs seek is a judgment to impose personal liability on USAPA to pay a sum of money from its general assets to compensate Plaintiffs and the proposed class for their alleged dues-related damages. This is not equitable relief.

The basis for Plaintiffs' claim is not that USAPA holds "particular funds that, in good conscience, belong to [Plaintiffs]." *Great-West Life*, 534 U.S. at 214. To the contrary, Plaintiffs' claim is that they are "entitled to some funds for benefits that they conferred [upon USAPA]" *Id*. As the Supreme Court held in *Great-West Life*, "[t]he kind of restitution that [Plaintiffs] seek, therefore, is not equitable – the imposition of a constructive trust or equitable lien on *particular property* – but legal – the imposition of personal liability for the benefits that they conferred upon [USAPA]." *Id*. (emphasis added).

Plaintiffs have attempted to label their newly concocted dues-related legal relief as restitution in equity so that they may continue to pursue money damages while, at the same time, denying USAPA its Seventh Amendment right to a jury trial. There is a "time-tested adage [that if something] walks like a duck, quacks like a duck, and looks like a duck, then it's a duck." *BMC Indus. Inc. v. Barth Indus. Inc*., 160 F.3d 1322, 1337 (11th Cir. 1998) (*citing Hurston v. Director, Office of Workers Compensation Programs*, 989 F.2d 1547, 1549 (9th Cir. 1993)). *See also Sorah v. Sorah*, 163 F.3d 397, 401 (6th Cir. 1998). This time-tested adage directly applies to Plaintiffs' current attempt to mischaracterize its new damages as equitable restitution. These dues related damages walk, talk and quack like a legal remedy for which USAPA is entitled to a trial by jury.

III. CONCLUSION

Based on the pleadings, evidence, arguments, record, and any argument, live testimony, or evidence to be presented at hearing, USAPA respectfully submits that it has a right to a jury trial on all issues triable of right by a jury, and respectfully requests that its Rule 38(b) demand for same be upheld.

Respectfully Submitted,

Dated: January 30, 2009 By:

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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 pleading, *to wit*,

- Defendant USAPA's Reply Brief in Support of its Seventh Amendment Right to a Trial by Jury;
- Declaration of Nicholas Granath, Esq. (with attachments);
- 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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