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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*.	CONSOLIDATED CASES NO. 2:08-CV-1633-PHX-NVW; 2:08-CV-1728-PHX-NVW **PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO COMPEL**
Don ADDINGTON, *et al.*, *Plaintiffs*, vs. Steven H. BRADFORD, *et al.*, *Defendants*.	

MEMORANDUM OF POINTS AND AUTHORITIES

I. OVERVIEW

USAPA's opposition to Plaintiffs' Motion is flawed. First, *Weil v. Investment/Indicators, Research and Management, Inc.*, 647 F.2d 18, 23 (9th Cir. 1981), does not preclude application of *Garner* doctrine to unions. Second, a convincing body of case law strongly favors application of subject matter waiver here. The Court should therefore grant Plaintiffs' Motion.

II. LEGAL ARGUMENT

A. *Garner* doctrine favors discovery.

1. USAPA concedes that the *Garner* factors favor finding good cause to allow discovery of attorney-client communications.

Courts apply *Garner* doctrine in a two-stage inquiry. *See Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1415 (11th Cir. 1994). In the context of this case, the first inquiry would be to determine whether "*Garner* doctrine applies to unions." *Id.* The second inquiry would be to determine whether, "on the facts of this case[,] discovery of the attorney-client communications should … be allowed." *Id.* USAPA has the burden on both inquiries. *See Weil* 647 F.2d at 25. It must show, therefore, either that the Ninth Circuit does not allow application of *Garner* doctrine to unions or that some aspect of this case forecloses finding good cause for discovery.

USAPA addresses the first stage of the inquiry, but not the second. It argues (incorrectly) that Ninth Circuit law precludes application of *Garner* doctrine to unions and it argues that *Garner* ought not to apply to union actions where the plaintiffs represent a minority of the represented workers. USAPA otherwise does not address the second stage of the *Garner* inquiry. USAPA, therefore, effectively concedes Plaintiffs' argument that the relevant

factors here favor allowing discovery of attorney-client communications. (Plts.' *Mot. to Compel*, 6-8 (Dec. 12, 2008) (doc. 106).)

2. Ninth Circuit law does not preclude applying *Garner* to unions.

The holdings in a published Ninth Circuit opinion define the law of the circuit in regard to issues that were "germane to the eventual resolution of the case" and were "resolve[d] … after reasoned consideration." *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1186 (9th Cir. 2003). *See Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826, 842 (9th Cir. 1999) (This panel is not bound by an earlier decision that "never considered the question that we must face squarely here."); *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628, 633 (9th Cir. 2008) ("[W]e conclude that the language employed in those cases constitutes dicta and, therefore, we are not bound by it."). The issue of whether *Garner* doctrine applies to a union is not germane to any published Ninth Circuit opinion.[1]

Whether *Garner* doctrine applies to unions surely was not germane in *Weil*. No party in *Weil* was a union and the phrase "duty of fair representation" does not appear in *Weil*. The *Weil* court did not make a "reasoned consideration" of whether *Garner* doctrine could be applied to a

[1] USAPA misleads the Court by asserting that some "overwhelming consensus of the law in the Ninth Circuit" precludes application of *Garner* to unions. (USAPA *Resp.*, 6:9-12 (Jan. 29, 2009) (doc. 167).) USAPA has no basis, therefore, to question the propriety of Plaintiffs' motion. (Id. at 3, nn.5, 6.) Indeed, it was improper for USAPA to do so. *Stevenson v. Employers Mut. Assn.*, 960 F.Supp. 141, 145, n.3 (N.D.Ill. 1997) ("Conducting litigation with civility requires, at the least, restraint from threatening opposing counsel with baseless Rule 11 motions."). *See also Morristown Daily Record, Inc. v. Graphic Communications Union, Local 8N,* 832 F.2d 31, 32, n.1 (3d Cir. 1987) ("We caution litigants that Rule 11 is not to be used routinely when the parties disagree about the correct resolution of a matter in litigation. Rule 11 is instead reserved for only exceptional circumstances.").

union. Rather, it merely held that *Garner* was "inapposite" to the facts of a case that had nothing to do with labor unions:

> Without passing on the merits of *Garner*, we find it inapposite to the case before us. 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.

This Court must therefore reject USAPA's argument that Ninth Circuit law precludes application of *Garner* doctrine to unions.

3. Weil has been over read by non-controlling authority.

USAPA makes too much of a cursory summary of *Weil* made by two non-Ninth Circuit district courts (that do not define Ninth Circuit law). *Arcuri v. Trump Taj Mahal Associates*, 154 F.R.D. 97, 106 (D.N.J. 1994) (*Weil*, "while accepting *Garner*, … expressly limited its holding to shareholder derivative suits."); *Aguinaga v. John Morrell & Co.*, 112 F.R.D. 671, 678 (D.Kan. 1986) (*Weil* "refused to apply *Garner* outside the context of shareholder derivative litigation."). It is ironic that USAPA relies on these decisions because both of these courts concluded that *Garner* doctrine could apply to unions. *Arcuri*, 154 F.R.D. at 107-08 ("[M]embers of the defendant union … are entitled to invoke the *Garner* exception."); *Aguinaga*, 112 F.R.D. at 681 ([T]he *Garner* fiduciary exception to the attorney-client privilege applies in the union context.").

4. The reasoning from *Weil* does not apply here.

Because *Weil* is the only published Ninth Circuit decision applying *Garner* doctrine, it merits examination to confirm that the rationale used by that court does not foreclose application of *Garner* doctrine here. The *Weil*

court rejected application of *Garner* for two fact-based reasons: (1) because "Weil is not currently a shareholder of the Fund," and (2) because "Weil seeks to recover damages from the corporation for herself and the members of her proposed class." *Weil*, 647 F.2d at 23. Both reasons make sense. Neither reason, however, applies here.

a. *Plaintiffs are owed a fiduciary duty.*

The *Weil* court found that discovery based on a fiduciary duty exception was not justified in that instance because, at the time of the lawsuit, the defendant did not owe a fiduciary duty to the plaintiff. *Id.* ("Weil is not currently a shareholder of the Fund."). The present matter is materially distinguishable from *Weil* on this point because at the time of this lawsuit USAPA is the recognized bargaining representative for Plaintiffs and owes them, and every other West Pilot, a fiduciary duty. *See Air Line Pilots Assn., Intern. v. O'Neill*, 499 U.S. 65, 75 (1991) ("Just as … fiduciaries owe their beneficiaries a duty of care as well as a duty of loyalty, a union owes employees a duty to represent them adequately as well as honestly and in good faith."). The first basis to reject *Garner* doctrine in *Weil*, therefore, does not apply here.

b. *Plaintiffs seek a benefit for USAPA as an institution.*

The *Weil* court also found that an exception justified by a remedy that would benefit the Fund did not apply in that instance because *Weil* was seeking only remedies that would benefit individual plaintiffs. *Weil*, 647 F.2d at 23. The present matter is materially distinguishable from *Weil* on this point because Plaintiffs are seeking a remedy that would benefit USAPA as an institution. Plaintiffs seek a remedy that would deter USAPA from future violations of the duty of fair representation. (*Plts.'s Mot. for Class Cert.* (Dec. 29, 2008) (doc. 120).) Such remedies "necessarily render[ ] a substantial

service to [the] union as an institution and to all of its members." *Hall v. Cole*,412 U.S. 1,8-9 (1973) (LMRDA case); *see also Polonski v. Trump Taj Mahal Associates*, 137 F.3d 139, 147 (3d Cir. 1998) (applying *Hall* in a duty of fair representation suit because the remedy "impacts the future conduct of the defendant's affairs"). The second basis to reject *Garner* doctrine in *Weil*, therefore, does not apply here.

5. That Plaintiffs are a minority of the workers represented by USAPA does not foreclose application of *Garner* doctrine.

Courts generally do not apply *Garner* doctrine unless the plaintiffs represent at least a substantial minority of the group owed a fiduciary duty by the defendant. *See Cox*, 17 F.3d at 1415 (not finding good cause to apply *Garner* where "only a tiny percentage of the defendant Union's members are members of the plaintiff class"); *Fausek v. White*, 965 F.2d 126, 133 (6th Cir. 1992) (finding good cause where plaintiffs owned 40% of corporation's stock); *Ward v. Succession of Freeman*, 854 F.2d 780, 786 (5th Cir. 1988) (not finding good cause where plaintiffs owned only 4% of corporation's stock); *Arcuri*, 154 F.R.D. at 109 (not finding good cause where only 5% of workers were aligned with plaintiffs); *Aguinaga*, 112 F.R.D. at 681 (finding good cause where "a substantial percentage of the employees" would benefit with plaintiffs).

Plaintiffs represent the interests of the West Pilots. The West Pilots comprise approximately 1/3 of the pilots represented by USAPA. USAPA does not assert otherwise. Plaintiffs, therefore, represent a substantial enough interest to find good cause to allow discovery pursuant to *Garner* doctrine. The Court must therefore find good cause here to allow discovery of attorney-client communications.

B. Publication of Mr. Seham's January 23, 2008, letter resulted in waiver of attorney-client privilege as to all communications on the subject matters addressed in that letter.

1. The form and use of Mr. Seham's letter weigh in favor of finding good cause to allow discovery on the same subject matters.

Mr. Seham's January 23, 2008, letter was written in the form of an attorney's advice to a client. According to Mr. Seham's declaration, it "was created as a public document for the express purpose of being made public by posting it for public viewing on USAPA's website." (*Seham Decl.*, ¶ 9 (Jan. 29, 2009) (doc. 168).) If so, styling a legal argument as advice to a client with the intention of presenting that argument to third parties violates the spirit of the ethical rule prohibiting an attorney from giving legal advice to an unrepresented person.[2]

In a very similar context, the Delaware district court explained that it was of "critical importance" that a letter was written as if it was intended to give balanced advice to a client where the intention was to disclose the letter to third parties. *Smith v. Alyeska Pipeline Service Co.*, 538 F.Supp. 977, 980 (D.C.Del. 1982).

> There is a fundamental difference between a letter written to the client giving a balanced and objective presentation of the factual

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[2] Arizona Ethical Rule 4.3 provides:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Rule 42, Ariz.R.Sup.Ct., ER 4.3.

> and legal issues and a letter written to the opposing party presenting the factual and legal position in an adversarial posture. If an adversary receives a letter from the opposing attorney which purports to be an opinion letter to an attorney's client, the adversary is more likely to give it greater weight and not discount the factual and legal propositions as being merely adversarial, as one may do when he receives a letter written for his adversary.

Id. In *Smith*, the inherent unfairness and impropriety of disclosing such a document warranted finding good cause to allow discovery of all attorney-client communications relating to the subject matter covered in that letter. *Id.* at 982. Similar considerations apply here because Mr. Seham's letter intentionally couched USAPA's legal argument in the guise of advice to a client.

In a similar context, the Fourth Circuit found substantial subject matter waiver where a party intentionally disclosed legal advice that was created for the purpose of inducing others to rely on the validity of that advice. *United States v. Jones*, 696 F.2d 1069, 1073 (4th Cir. 1982).

> The success of appellants' business venture depended upon convincing potential investors that purported tax benefits existed in fact, and this rested on interpretation of the tax laws. The appellants not only obtained the tax law opinions for the ultimate use of persons other than themselves, but also publicized portions of the legal opinions in brochures and other printed material. They cannot now assert a right to quash the subpoenas (1) to block the grand jury's access to documents[,] substantial portions of which the appellants have published to the public at large, or (2) to prevent the revelation of the factual communications between the appellants and their attorneys underlying the published opinion letters.

Id. Similar considerations apply here because USAPA obtained and published Mr. Seham's letter for the purpose of convincing others to accept his interpretation of the Railway Labor Act.

Given the close analogy of the facts of this matter to the facts addressed by the *Smith* and *Jones* courts, the result here should be analogous to the results in those cases. This Court should therefore find that there is subject matter waiver that allows Plaintiffs to discover all attorney-client communications on the subjects addressed in Mr. Seham's letter.

2. Subject matter waiver here is consistent with the holdings of the *Weil and von Bulow* courts.

USAPA is plainly wrong to suggest that courts only apply subject matter waiver where disclosures provided an advantage in litigation. Rather, courts have discretion to apply subject matter waiver in other settings, particularly where the party resisting discovery "made some use" of the disclosed attorney-client communications. *See Jones*, 696 F.2d at 1072 ("[C]ourts apparently retain discretion not to impose full waiver as to all communications on the same subject matter where the client has merely disclosed a communication to a third party, as opposed to making some use of it."); *In re Sealed Case*, 676 F.2d 793, 808, n.54 (C.A.D.C. 1982) (same).

Along such lines, *Weil* applied typical subject matter waiver even though the disclosure at issue did not cause prejudice in the litigation "in any way." *Weil*, 647 F.2d at 25. The disclosures in *Weil* were relevant to determining the Fund's intent to comply with securities law. *Id.* They were made to the opposing party and to the SEC, both of whom had an interest in knowing whether the Fund had such intent. *See id.* The court held, as a result of these disclosures, that privilege was waived "as to communications **about the matter** actually disclosed namely, the substance of Blue Sky counsel's advice regarding registration of Fund shares pursuant to the Blue Sky laws of the various states." *Id.* (emphasis added). This was fairly broad subject matter

waiver because the scope was limited by subject, not by specific communications.

In contrast, the waiver in *In re Claus von Bulow*, 828 F.2d 94 (2d Cir. 1987), was defined by specific communications. Because the disclosures in *von Bulow* were made in a book, *Reversal of Fortune*, they were directed at the general public, rather than at individuals with a personal interest in the subject matter. *See id.* at 100. The court found that it was error to extend waiver to other attorney-client communications on the basis that they addressed related subjects. *Id.* at 103.

Although *von Bulow* cites *Weil* favorably, the two courts reached different results. *Weil* applied subject matter waiver. *Von Bulow* did not. The difference was that the disclosures in *Weil* could benefit the Fund more directly because they were made to individuals who had a legal interest in the subject matter. In contrast, the disclosures in *von Bulow* were made to members of the general public who were merely curious about the subject matter.

USAPA's disclosure of Mr. Seham's January 23, 2008, letter is more analogous to the disclosure in *Weil* than to the disclosure in *von Bulow*. The subject of the letter was whether USAPA had greater freedom than ALPA, under the Railway Labor Act, to reject the Nicolau Award. The letter purported to reflect Mr. Seham's balanced advice to his client on this issue. USAPA disclosed the letter to give force to its efforts to encourage pilots to favor USAPA in the NMB election and to discourage West Pilots from challenging USAPA's right to reject the Nicolau Award. USAPA, therefore, made use of the letter in contexts related to this litigation. Plaintiffs, therefore, are entitled to discovery "as to communications about the matter actually disclosed" in the letter—just as was allowed in *Weil*.

In sum, the Court should allow Plaintiffs to discover all attorney-client communications that concern the subjects raised in Mr. Seham's letter because such discovery is entirely consistent with *Weil* and *von Bulow*.

C. Plaintiffs do not seek work-product.

Although Plaintiffs seek discovery of attorney-client communications, they do not seek discovery of work-product at this time. Consequently, they do not ask for materials that were created after their lawsuit was filed. If USAPA believes that any materials created before that date are protected by work-product doctrine, it can identify such materials and make its argument to that effect.

III. CONCLUSION

Plaintiffs demonstrate that *Garner* doctrine applies to unions, that the *Garner* factors here weigh in favor of finding good cause to allow discovery of attorney-client communications, and that subject matter waiver as recognized in *Weil* applies to Mr. Seham's letter. The Court should, therefore, grant Plaintiffs' Motion to Compel.

Dated this 4th day of February, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on February 4th, 2009, 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/ Andrew S. Jacob