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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
NOTICE OF MOTION,
MOTION, AND MEMORANDUM
IN SUPPORT OF MOTION TO
DISMISS PLAINTIFFS'
DUES RESTITUTION CLAIM**

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

1 The dues restitution claim was discussed in a telephonic hearing with the Court on
2 February 20, 2009. During that conference, the Court informed counsel that “our own
3 initial research which I don't pretend to be complete or exhaustive, fails to disclose any
4 legal basis that would authorize a remedy of disgorgement of union dues in these
5 circumstances.” (Feb. 20 Tr. 5:14-17). The Court instructed plaintiffs’ counsel “if you
6 have got something, the time is going to come sooner rather than later which you are
7 going to have to show me, because it doesn't, at least initially, doesn't appear there's any
8 legal remedy in these circumstances for that.” (Tr. 5:18-22).

9
10 At the end of the February 20, 2009 conference, the Court invited USAPA to file a
11 Rule 12(c) motion to dismiss plaintiffs’ unpled dues restitution claim. But before the
12 filing of such a motion to dismiss, the Court ordered plaintiffs’ counsel to disclose the
13 legal basis for their claim:

14 Before you file the motion, obviously, I don't want you to file a motion just
15 to find out it's wrong. I would rather you dialogue with Mr. Stevens and
16 find out what cards he's holding. And if he's got enough cards, then don't
waste your clients' money or my time with the motion. We'll go forward.

17 (Tr. 28:23 – 29:3). Plaintiffs’ counsel has failed to comply with the order to disclose
18 “what cards he’s holding,” thus conceding that counsel is unable to satisfy the Rule 11
19 requirement to certify that the claim is “warranted by existing law or by a nonfrivolous
20 argument for extending, modifying, or reversing existing law or for establishing new
21 law.” Fed. R. Civ. P. 11(b)(2).

22 Further, plaintiffs have failed to file a motion to amend their complaint, as
23 required by Fed. R. Civ. P. 15. Even if plaintiffs were to file a motion to amend, it

1 should be denied due to plaintiffs' inexcusable delay. *Foman v. Davis*, 371 U.S. 178, 182
2 (1962).

3 By order dated March 13, 2009, the Court ordered "that Defendants may file a
4 Rule 12(c) motion concerning the availability of union fees recovery or suspension by
5 March 20, 2009." (Dkt. No. 253).

6 **II. Legal Standard on Rule 12(c) Motion.**

7 Fed. R. Civ. P. 12(c) provides that "[a]fter the pleadings are closed – but early
8 enough not to delay trial – a party may move for judgment on the pleadings." A Rule
9 12(c) judgment will be granted if the pleadings demonstrate that the moving party is
10 entitled to judgment as a matter of law. *Poehl v. Countrywide Home Loans, Inc.*, 528
11 F.3d 1093, 1096 (8th Cir. 2008). In this case, USAPA submits that it is entitled to
12 judgment as a matter of law dismissing plaintiffs' unpled dues restitution claim.

13 **III. Plaintiffs Have Not Adequately Pled a Claim for Dues Restitution.**

14 Plaintiffs did not plead a claim for restitution of dues in their initial complaint or
15 in their amended complaint, nor have they made any motion to amend their complaint in
16 order to add this new claim. The Court has recognized that "it is unclear whether the
17 Plaintiffs have adequately alleged recovery of dues and fees as a form of relief in their
18 First Amended Complaint." (Dkt. No. 202, at 8:6-7; Dkt. No. 248, at 6:20-23).

19 Plaintiffs argue that their claim for dues restitution is somehow contained within
20 the First Amended Complaint's boilerplate request for "such other relief that the Court
21 deems necessary and proper." (Dkt. No. 214, at 13, fn. 5). However, this does not satisfy
22 even the liberal pleading requirements of Fed. R. Civ. P. 8(a)(2), which requires "a short
23

1 and plain statement of the claim showing that the pleader is entitled to relief.” The
2 purpose of this rule is to “give the defendant fair notice of what the ... claim is and the
3 grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47 (1957); *see also Bell*
4 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007) (pleader is required to more than
5 merely incant labels, conclusions, and the formulaic elements of a cause of action);
6 *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S. Ct. 2499, 2507 (2007);
7 *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 346-47 (2005). Clearly, the request
8 for “such other relief that the Court deems necessary and proper” in plaintiffs’ First
9 Amended Complaint does not give USAPA “fair notice” (or any notice) of their claim for
10 restitution of dues.
11

12 **IV. Injunctive Relief is Not an Available Remedy for Plaintiffs’**
13 **Dues Restitution Claim.**

14 Plaintiffs have argued that they “seek dues disgorgement/forgiveness as part of the
15 equitable remedy for USAPA’s blatant violation of its duty of fair representation.” (Dkt.
16 No. 214, at 12:17-18). According to plaintiffs, they do not seek “true damages”; they
17 seek only equitable relief. (Dkt. No. 214, at 12:18-22). Thus, as plaintiffs have
18 characterized it, the equitable remedy that they seek with respect to their dues restitution
19 claim is an injunction.

20 However, the Supreme Court has denied the very type of relief that the plaintiffs
21 would seek had they moved to amend their complaint. In *International Association of*
22 *Machinists v. Street*, 367 U.S. 740 (1961), the Supreme Court denied a request for an
23 injunction restraining the enforcement of a union security agreement, which was sought

1 by employees who objected to the use of union funds for political causes. The Supreme
2 Court held that an injunction restraining enforcement of the union-shop agreement is not
3 an appropriate remedy because “[r]estraining the collection of all funds from the [union]
4 sweeps too broadly” and that such an injunction “might well interfere with the appellant
5 unions' performance of those functions and duties which the Railway Labor Act places
6 upon them to attain its goal of stability in the industry.” *Id.* at 771.

7
8 Pursuant to *Street*, the plaintiffs are not entitled to restrain the collection of
9 required union dues paid by West pilots because such a remedy is overbroad and would
10 interfere with USAPA’s performance of its functions and duties that are mandated under
11 the Railway Labor Act.

12 **V. Plaintiffs’ Dues Restitution Claim Should be Dismissed Because**
13 **There is No Legal Authority for Dues Restitution in DFR Cases,**
14 **and the Remedy of Restitution of Union Dues is Punitive.**

15 USAPA agrees with the Court that there are no cases that can be found that
16 authorize a remedy of restitution or disgorgement of union dues in the context of a DFR
17 claim. In one case where an employee sought a refund of all of his dues based on his
18 claim that his union breached its duty of fair representation, the court did not reach the
19 remedy issue because it dismissed the complaint for failure to state a claim. *Morris v.*
20 *Local 819*, 954 F. Supp. 573 (E.D.N.Y. 1997), *aff’d*, 169 F.3d 782 (2d Cir. 1999). Dues
21 restitution has been raised in non-DFR cases, but courts in these cases have found this
22 remedy to be punitive, and therefore, not permitted.

23 The dues restitution remedy appears most often in cases brought by union non-
members who challenge their union’s explanation or calculation of the non-member

1 agency fee pursuant to *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).¹ In
2 these cases, courts have denied restitution of union dues on the grounds that such a
3 remedy is punitive and will interfere in the union’s performance of its legally required
4 functions. In *Gilpin v. American Federation of State, County, and Municipal Employees*,
5 875 F.2d 1310 (7th Cir. 1989), *cert. denied*, 493 U.S. 917 (1989), plaintiffs brought an
6 action against their union to challenge the agency fee charged to non-members in 1985
7 and 1986. Plaintiffs sought restitution of the fees that were deducted from their wages in
8 those two years.² The Seventh Circuit held that the restitution remedy was “a severely
9 punitive remedy ... not one properly described as restitution at all.” *Id.* at 1315.
10

11 The Ninth Circuit has taken the same view of restitution in *Hudson* cases.
12 *Prescott v. County of El Dorado*, 177 F.3d 1102 (9th Cir. 1999) (“In our opinion, the
13 Seventh Circuit [in *Gilpin*] got it just right when it said that a demand for full restitution
14 was punitive insofar as it sought to deprive the union of fees to which it was, doubtlessly,
15 entitled”), *vacated and remanded on other grounds*, 528 U.S. 1111, *reinstated in relevant*
16

17 ¹ In *Hudson*, the Supreme Court held that “the constitutional requirements for the Union’s
18 collection of agency fees include an adequate explanation of the basis for the fee, a
19 reasonably prompt opportunity to challenge the amount of the fee before an impartial
20 decisionmaker, and an escrow for the amounts reasonably in dispute while such
21 challenges are pending.” *Hudson*, 475 U.S. at 310.

22 ² Plaintiffs also sought class certification, which was denied because the court found a
23 potentially serious conflict of interest between two types of non-member: first, “the
employee who is hostile to unions on political or ideological grounds,” and second, “the
employee who is happy to be represented by a union but won’t pay any more for that
representation than he is forced to.” *Gilpin*, 875 F.2d at 1313. The court also held that
the “National Right to Work Foundation is not an adequate litigation representative”
because the restitution remedy was only consistent with the aims of the first type of
employee. *Id.*

1 part, 204 F.3d 984 (9th Cir. 2000); *Wagner v. Professional Engineers*, 354 F.3d 1036
2 (9th Cir. 2004) (holding that “the proper remedy for a defective [*Hudson*] notice is
3 issuance of a proper notice with a renewed opportunity for objection).

4 **VI. Punitive Damages Are Not Permitted in DFR Cases.**

5 Because general labor policy disfavors punishment, and the adverse consequences
6 of punitive damages awards could be substantial, the Supreme Court has held that
7 punitive damages may not be assessed against a union that breaches its duty of fair
8 representation. *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42
9 (1979). The court was concerned that punitive damage awards could:

10
11 ...deplete union treasuries, thereby impairing the effectiveness of unions as
12 collective-bargaining agents. Inflicting this risk on employees, whose
13 welfare depends upon the strength of their union, is simply too great a price
14 for whatever deterrent effect punitive damages may have.

15 *Id.* at 50-51.³

16 Based on the *Hudson* cases discussed above, USAPA submits that plaintiffs’ claim
17 for dues restitution in this case is a request for punitive damages, which is a remedy to
18 which plaintiffs are not entitled in this case.

19
20
21 ³ A number of Circuits have interpreted *Foust* as stating a *per se* rule against punitive
22 damages in all DFR actions. *See Peterson v. Air Line Pilots Ass’n*, 759 F.2d 1161, 1167
23 (4th Cir. 1985); *Lewis v. Local Union No. 100*, 750 F.2d 1368, 1382 (7th Cir. 1984);
Quinn v. Digiulian, 739 F.2d 637, 647 (D.C. Cir. 1984); *Dependahl v. Falstaff Brewing
Corp.*, 653 F.2d 1208, 1216 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981); *Wells v.
Southern Airways, Inc.*, 616 F.2d 107, 109 (5th Cir.), *cert. denied*, 449 U.S. 862 (1980).

1 **CONCLUSION**

2 Dismissal of plaintiffs' dues restitution claim is warranted on four grounds. First,
3 plaintiffs have failed to adequately allege such a claim, as required by Fed. R. Civ. P.
4 8(a)(2). Second, plaintiffs are not entitled to what they have characterized as injunctive
5 relief. Third, plaintiffs cannot cite any legal authority supporting their claim for
6 restitution of dues in this DFR case, and neither this Court nor USAPA has found any
7 such authority. Fourth, USAPA submits that plaintiffs' claim for restitution of dues is
8 punitive, and is not permitted under the Supreme Court's ruling in *Foust*.
9

10 Pursuant to Rule 12(c), plaintiffs' claim for restitution of dues should be dismissed
11 as a matter of law.
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1 Respectfully Submitted,

2 Dated: March 20, 2009

By:

/s/ Stanley J. Silverstone

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1 **CERTIFICATE OF SERVICE**

2 This is to certify that on the date indicated herein below a true and accurate copy
3 of the foregoing pleading, *to wit*,

- 4 • Defendant USAPA’S Notice of Motion, Motion, and Memorandum in Support of
5 Motion to Dismiss Plaintiffs’ Dues Restitution Claim;
• Certificate of Service

6 were electronically filed with the Clerk of Court using the CM/ECF system, which will
7 send notification of such filing to the following:

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18 Who are admitted counsel for Defendant US Airways, Inc. in this matter.

19 And further that paper hard copies were provided to The Honorable Neil V. Wake,
20 District Court Judge, 401 W. Washington Street, SPC 52, Phoenix, AZ 85003.
21

1 On March 20, 2009, by:

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