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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  
13 vs.  
14 US AIRLINE PILOTS ASSN., and  
US AIRWAYS, INC.,  
15 *Defendants.*

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

**PLAINTIFFS' RESPONSE TO  
DEFENDANT USAPA'S MOTION TO  
DISMISS PLAINTIFFS' DUES  
RESTITUTION CLAIM**

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

21 Plaintiffs Don ADDINGTON, John BOSTIC, Mark BURMAN, Afshin  
22 IRANPOUR, Roger VELEZ, and Steve WARGOCKI, on behalf of the West  
23 Pilot Class, file *Plaintiffs' Response to Defendant USAPA's Motion to Dismiss*  
24 *Plaintiffs' Dues Restitution Claim* (doc. 272). The Court should deny  
25 USAPA's motion because it is contrary to Rule 54(c) and is contradicted by  
26 long-established Supreme Court law.<sup>1</sup> This response is supported by the  
27 Memorandum of Points and Authorities that follows.

28  
<sup>1</sup> References to "Rule" are to the Federal Rules of Civil Procedure.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. OVERVIEW

3 The central flaw to USAPA’s motion is its mischaracterization that  
4 Plaintiffs made a “restitution claim” against USAPA. To the contrary,  
5 Plaintiffs have only made an unfair representation claim against USAPA. As  
6 part of that claim, however, Plaintiffs intend to prove that the West Pilot  
7 class is entitled to restitution of fees and dues, paid or payable, as part of the  
8 remedy.

9 According to Rule 54(c), the Court’s “final judgment” on Plaintiffs’ unfair  
10 representation claim “should grant the relief to which [they are] entitled,  
11 even if [they have] not demanded that relief in [their] pleadings.” Fed. R.  
12 Civ. P. 54(c). “The only exception to this rule is if plaintiff’s failure to  
13 demand the appropriate relief has prejudiced his adversary.” Wright &  
14 Miller, *Fed. Prac. & Pro.*, § 2664. This exception does not apply here.

15 An adversary is not prejudiced “even if the party has not demanded  
16 [certain] relief in his pleadings, ... [i]f the complaint alleges conduct that  
17 would support [such] a claim.” *Scutieri v. Paige*, 808 F.2d 785, 792 (11th Cir.  
18 1987) (addressing punitive damages). Indeed, allegation of conduct alone is  
19 so sufficient that “if evidence is presented creating a jury question on such  
20 relief, the judge commits reversible error in not instructing the jury on that  
21 issue.” *Id. see also Guillen v. Kuykendall*, 470 F.2d 745, 748 (5th Cir. 1972)  
22 (same).

23 In addition, an adversary is not prejudiced if the plaintiff seeks a remedy,  
24 not expressly demanded in the complaint, if the plaintiff gave notice of its  
25 intention to seek that remedy in some other filing—even one filed right before  
26 trial. *See Bowles v. Osmose Utils. Servs.*, 443 F.3d 671, 675 (8th Cir. 2006)  
27 (affirming the trial court's award of punitive damages pursuant to Rule 54(c)  
28 despite the fact the complaint did not call for punitive damages because the

1 defendant had notice of the plaintiff's intent to seek punitive damages prior  
2 to trial by virtue of the fact that the plaintiff filed a document three weeks  
3 before trial notifying the defendant of his intent to seek punitive damages).

4 In this instance, Plaintiffs alleged conduct that could support a restitution  
5 remedy and they provided notice of their intention to seek such remedy in  
6 their motion for class certification.

7 The only question here, therefore, is whether a restitution remedy could  
8 ever be available against a union. Plaintiffs demonstrate below that, as a  
9 matter of law, it can. The Court must, therefore, deny USAPA's motion.  
10 Indeed, if the evidence presented at trial creates a jury question on such  
11 relief, it must instruct the jury on the issue. *See Scutieri*, 808 F.2d at 792.

## 12 II. LEGAL ARGUMENT

### 13 A. Plaintiffs Are Entitled to Remedies that Were Not Expressly 14 Demanded in the Complaint.

15 The cardinal rule of notice pleading is that a plaintiff need only "set forth  
16 in his complaint claims for relief, not causes of action, statutes or legal  
17 theories." *Alvarez v. Hill*, 518 F.3d 1152, 1157 (9th Cir. 2008).  
18 "Consequently, the prayer for relief does not determine what relief ultimately  
19 will be awarded." Wright & Miller § 2664.

20 The prayer, may be looked to help determine the relief to which the  
21 appellant is entitled, but it is not controlling. The question is not  
22 whether the Plaintiff has asked for the proper remedy but whether  
23 under his pleadings he is entitled to any remedy.

24 *Kansas City, St. L. & C.R. Co. v. Alton R. Co.*, 124 F.2d 780 (7th Cir. 1941)  
25 (internal quotation marks omitted). "The question [under Rule 12(b)(6) or  
26 Rule 12(c)] is not whether plaintiff has asked for the proper remedy but  
27 whether plaintiff is entitled to any remedy." Wright & Miller § 2664. If so,  
28 they are ultimately entitled to whatever remedy is appropriate.

For example, with the merger of law and equity, specific or  
injunctive relief may be awarded even though damages were prayed  
for and vice-versa. By the same token, a party may be awarded

1 declaratory relief, even though the party has not demanded it and,  
2 conversely, coercive relief or damages may be given in a suit  
3 seeking a declaratory judgment.

4 *Id.* (footnotes omitted). *See also Reynolds v. Slaughter*, 541 F.2d 254, 255-56  
5 (10th Cir. 1976) (affirming district court's grant of restitution consistent with  
6 the proof under Rule 54(c)).

7 It is even proper for a court to suggest an appropriate non-demanded  
8 remedy:

9 [T]he appellants urge that it was improper for the court to invite  
10 the plaintiff, at the close of all the evidence, to amend the complaint  
11 to seek an order fixing his seniority date. We see nothing improper  
12 in the trial court's conduct. To the contrary, it is within the spirit of  
13 Federal Rule of Civil Procedure 54(c):

14 (E)very final judgment shall grant the relief to which the party in  
15 whose favor it is rendered is entitled, even if the party has not  
16 demanded such relief in his pleadings.

17 It was within the court's discretion to decide that equitable relief  
18 was more appropriate than an award of damages requiring  
19 speculation about future lost earnings.

20 *Butler v. Local Union 823, Intern. Bhd. of Teamsters, Chauffeurs,*  
21 *Warehousemen & Helpers of America*, 514 F.2d 442, 454 -456 (6th Cir. 1975)  
22 (overruled, on unrelated grounds, by *United Parcel Service, Inc. v. Mitchell*,  
23 451 U.S. 56 (1981)) (citations omitted).

24 USAPA's argument takes none of this into account.

25 **B. Restitution of Fees and Dues Paid or Payable is an Available**  
26 **Remedy for Bad Faith Unfair Representation.**

27 1. Plaintiffs Allege Bad Faith Unfair Representation.

28 Plaintiffs allege that USAPA (East Pilots):

formed a union whose constituted purpose was to impose a date of  
hire scheme on the minority membership in disregard of an  
arbitrated compromise both sides agreed to and deemed fair in  
advance. The Plaintiff West Pilots allege that USAPA has followed  
through on that aim without any corresponding benefit to the pilots  
as a whole.

1 (Order 11:12-18 (Nov. 20, 2008) (doc. 84).) Plaintiffs also allege that USAPA  
2 abridged their seniority “rights after a merger solely for the sake of political  
3 expediency,” and that it “renounced any good faith effort to reconcile the  
4 interests of both pilot groups.” (Order at 9:23-26; *id.* at 10:16-17.) Proof of  
5 these allegations will show that USAPA failed to act with “complete good  
6 faith and honesty of purpose.” *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

7 2. USAPA Owed Plaintiffs a Fiduciary's Utmost Good Faith and  
8 Loyalty.

9 The Supreme Court has explained, in detail, that the duty of fair  
10 representation is a fiduciary duty:

11 The duty of fair representation is thus akin to the duty owed by  
12 other fiduciaries to their beneficiaries. For example, some Members  
13 of the Court have analogized [it] to the duty a trustee owes to trust  
14 beneficiaries. Others have likened the relationship between union  
15 and employee to that between attorney and client. The fair  
16 representation duty also parallels the responsibilities of corporate  
17 officers and directors toward shareholders. Just as these fiduciaries  
18 owe their beneficiaries a duty of care as well as a duty of loyalty, a  
19 union owes employees a duty to represent them adequately as well  
20 as honestly and in good faith.

21 *Air Line Pilots Assn., Intern. v. O'Neill*, 499 U.S. 65, 74 (1991).

22 3. Disgorgement of Fees is Generally Available to Remedy  
23 Breach of Fiduciary Loyalty.

24 Disgorgement of fees paid is available as a remedy for the breach of  
25 fiduciary loyalty.

26 The Restatement supports the district court's award of  
27 disgorgement as a remedy for breach of the duty of loyalty. It  
28 provides, “If an agent receives anything as a result of his violation  
of a duty of loyalty to the principal, he is subject to a liability to  
deliver it, its value, or its proceeds, to the principal.” *Restatement*  
*(Second) of Agency* § 403.

*Eckard Brandes, Inc. v. Riley*, 338 F.3d 1082, 1086-87 (9th Cir. 2003). “An  
agent's breach of fiduciary duty is a basis on which the agent may be required  
to forfeit ... compensation paid or payable to the agent during the period of

1 the agent's disloyalty.” *Restatement (Third) Of Agency* § 8.01, cmt. (d)(2)  
2 (2006).

3 4. Only Punitive Damages Are Excluded Against a Union.

4 In matters of federal question jurisdiction (such as here), “[u]nless  
5 otherwise provided by statute, all the inherent equitable powers of the  
6 District Court are available for the proper and complete exercise of that  
7 jurisdiction.” *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 [ ] (1946).  
8 Because the RLA is silent on the issue of disgorgement, it is available to the  
9 Court.

10 When first discussing remedies against a union, the Supreme Court did  
11 not exclude any alternative forms of remedy:

12 We conclude that the duty which the statute imposes on a union  
13 representative of a craft to represent the interests of all its  
14 members stands on no different footing and that the statute  
15 contemplates resort to the usual judicial remedies of injunction and  
16 award of damages when appropriate for breach of that duty.

17 *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 208 (1944). The  
18 Supreme Court also “emphasized that relief in each case should be fashioned  
19 to make the injured employee whole. ... damages and equitable relief could be  
20 awarded when necessary to ensure full compensation.” *Intl. Bhd. of Elec.*  
21 *Workers v. Foust*, 442 U.S. 42, 48-49 (1979) (citations omitted). It excluded  
22 only purely punitive damages, explaining, that “[s]uch awards could deplete  
23 union treasuries, thereby impairing the effectiveness of unions as collective-  
24 bargaining agents. *Id.* at 50.

25 5. Restitution of Dues (and Agency Fees) Paid or Payable is an  
26 Available Remedy.

27 In contrast to punitive damages, the Supreme Court has long recognized  
28 that restitution of dues (and agency fees) paid or payable is available against  
a union. *See Intl. Assn. of Machinists v. Street*, 367 U.S. 740, 775 (1961)  
(noting that, for an employee whose dues were spent over objection for

1 political purposes, an acceptable remedy “would be restitution ... of that  
2 portion of his money”). The Supreme Court applies the same rule under the  
3 RLA:

4 [A]mong the permissible remedies for dissenting employees were  
5 'an injunction against expenditure for political causes opposed by  
6 each complaining employee of a sum, from those moneys to be spent  
7 by the union for political purposes, which is so much of the moneys  
8 exacted from him as is the proportion of the union's total  
9 expenditures made for such political activities to the union's total  
10 budget,' and restitution of such a sum already exacted from the  
11 complainant and expended by the union over his objection.

12 *Bhd of Ry. & S. S. Clerks, Freight Handlers, Exp. & Station Emp. v. Allen*,  
13 373 U.S. 113, 120-21 (1963); *see also Dean v. Trans World Airlines, Inc.*, 708  
14 F.2d 486, 488 (9th Cir. 1983) (noting that “it would have been appropriate for  
15 Dean to seek judicial relief by way of ... a rebate” of dues improperly spent).

16 It does not matter that the cases cited above, unlike the present matter,  
17 addressed the remedy for improper political expenditure. They are offered to  
18 show that, under the right circumstances, restitution of dues is available  
19 against a union. Prior to hearing the evidence, therefore, it is premature for  
20 the Court to decide whether USAPA’s unfair representation was sufficiently  
21 egregious to justify restitution. Rather, the Court should find that with  
22 sufficient violation of its duty, USAPA could be subject to the same remedies  
23 that would be available against other fiduciaries.

24 6. Restitution of Dues (and Fees) Paid or Payable is an  
25 Available Remedy Here.

26 Because USAPA’s motion was made under Rule 12, the question is  
27 whether the allegations, taken in the most favorable light, could support  
28 Restitution (in whole or part) of the dues (and fees) paid or payable by West  
Pilots to USAPA. Surely the allegations made, if proven, will show overt and  
intentional disregard of the duty of good faith. To remedy such conduct,  
*Steele* and *Foust* make available the full panoply of legal and equitable

1 remedies. The *Restatement*, as recognized by *Eckard Brandes*, provides that  
2 restitution of fees is potentially available to remedy overt breach of fiduciary  
3 duties such as the duty of fair representation. *Street, Allen and Dean* show  
4 that such remedy (unlike punitive damages) can be applied against a union.  
5 Plaintiffs, therefore, ought not to be foreclosed prior to trial from trying to  
6 obtain such a remedy.

7 **III. CONCLUSION**

8 Because Plaintiffs pled bad faith breach of fiduciary duty and because  
9 restitution of dues (and fees), unlike punitive damages, is an allowable  
10 remedy against a union, the Court should deny USAPA's motion.

11 Dated this 23d day of March, 2009.

12 **Polsinelli Shughart, P.C.**

13 */s/ Andrew S. Jacob*  
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18 **CERTIFICATE OF SERVICE**

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

22 s/ Andrew S. Jacob