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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 MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' DAMAGE CLAIMS (Doc. # 487)**
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

I. SUMMARY

Plaintiffs are grasping at straws in an effort to survive summary judgment with respect to damages. In so doing, they have chosen to dodge the straightforward causation issue presented in USAPA's summary judgment motion and instead concoct a brand new theory of joint and several liability in an effort to divert attention from the obvious causation problem that threaten the viability of their damage claims.

USAPA filed a motion for summary judgment on the simple basis that there is no genuine issue as to any material fact that a *causal connection does not exist* between the Jury's finding that USAPA breached its duty of fair representation and Plaintiffs' alleged damages. This is so because there is *no* evidence whatsoever that Plaintiffs would have been in a better position today *even if* USAPA had included the Nicolau Award in its collective bargaining negotiations with US Airways.

"To withstand summary judgment, the non-moving party (1) must make a showing sufficient to establish a genuine issue of fact with respect to any element for which it bears the burden of proof; (2) must show that there is an issue that may reasonably be resolved in favor of either party; and (3) must come forward with more persuasive evidence than would otherwise be necessary when the factual context makes the non-moving party's claim implausible." *British Motor Car Distributors, Ltd. v. San Francisco Automotive Industries Welfare Fund*, 882 F.2d 371, 374 (9th Cir. 1989) (*citing California Arch. Bldg. Prod. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988)). Plaintiffs have failed to demonstrate any of the factors listed by the Ninth Circuit that would entitle them to

survive the current summary judgment motion. Instead, in recognition of the fatal causation issue facing their damage claims, Plaintiffs have chosen, once again, to reformulate their case theory, this time by improperly reviving their dismissed state lawsuit in an attempt to hold USAPA "jointly and severally" liable with non-party individuals. This argument is nonsensical. It is at odds with applicable DFR case law. And because Plaintiffs have failed to point to *any* facts in the record that would demonstrate a genuine issue of material fact beyond that of mere conjecture, USAPA's motion for summary judgment should be granted and Plaintiffs' claim for damages dismissed.

II. ARGUMENT

A. There Are No Genuine Issues Of Fact With Respect To Whether USAPA Has Delayed Negotiations For A Single Collective Bargaining Agreement.

Part of the basis for USAPA's summary judgment motion is the undisputed fact that USAPA has not delayed in negotiating a single CBA. (Defendant's Statement of Facts, ¶ 12). This is undisputed in part because Plaintiffs' counsel admitted in open court that "We're not saying that they delayed any section" (Pre-Trial Tr. 42:8), and when asked by this Court, repeatedly affirmed that they were not pursuing such an argument. Here is Plaintiffs' lead attorney to the Court, on the record:

> THE COURT: Were you saying – I thought you were saying – that you are not making an issue in this trial about the substance or the pace of the bargaining on other substantive issues apart from the –
>
> MR. HARPER: Absolutely correct, Your Honor.
>
> THE COURT: His anxiety about having to rebut an argument or contention that there was inappropriate delay or retrograde bargaining on

> other issues, are you telling the Court that you do not intend to make such an argument or suggestion?
>
> MR. HARPER: Correct. …

(Tr. 1562:24-1563:3; 1563:9-1563:14).

Plaintiffs are bound by their counsel's admissions as a matter of law.[1] In an attempt to avoid these admissions, Plaintiffs claim that delay was caused not by USAPA, but by "Mr. Bradford and other East Pilots." According to Plaintiffs, "[t]here is ample evidence for a jury to find that Mr. Bradford and other East Pilots acted in concert to stop this negotiation." (Doc. # 507 at 2:4-6). However, the Jury in the liability trial did not make this finding, nor will the Jury in the damages trial will not be asked to make this finding. The only question is whether damages should be awarded in favor of the Plaintiffs and against USAPA. Plaintiffs can succeed *only* if they can establish that USAPA caused Plaintiffs' damages. *Acri v. Int'l Ass'n of Machinists*, 781 F.2d 1393, 1397 (9th Cir. 1986). However, Plaintiffs cannot establish causation because they have failed to make a showing sufficient to establish a genuine issue of fact with respect to USAPA's evidence that a single CBA would not have been negotiated, signed, and ratified by today *even if* the Nicolau Award had been included in USAPA's negotiating position on seniority. *See id*. ("causation would be established by proof that (1) the vote to ratify would have been different had the misrepresentations not been made; and (2) that the company would have acceded to union demands had the vote been different") (citations omitted).

[1] *See* USAPA's Memorandum of Law in Support of its Summary Judgment Motion, Doc. # 488, at 5:8-14.

According to Plaintiffs, pilot integration should have occurred within three years of the merger. Really? Plaintiffs base this on the slim evidence of (i) Hemenway's testimony that when the Transition Agreement was executed on September 23, 2005, "the company's expectation was that it would take two to three years to fully integrate the carriers"; (ii) an ALPA US Airways Merger Committee Update authored by Mike Cleary and Randy Mowrey in May 2001 regarding the proposed merger between US Airways and United Airlines, in which they stated that "the interval from the transaction date to operational integration could be two or three years, depending on many variables";[2] and (iii) a USAPA arbitration post-hearing brief that is not in the record in this case and mere comments on the parties' expectations. (Doc. # 508 ¶ 23). Thus, Plaintiffs' evidence is based only on statements that amount to *speculation and conjecture*. Such evidence is insufficient to defeat summary judgment. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts").

Despite the company's "expectation" of a two to three year integration period, the fact is that US Airways' Vice-President of Labor Relations, E. Allen Hemenway, *testified* that USAPA and the company remain a *substantial* distance apart in negotiating

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[2] Plaintiffs' straw grasping continues. Here they rely on statements made in an ALPA US Airways Merger Committee publication *seven years before* the certification of USAPA that addressed potential timelines under ALPA Merger Policy in the context of a completely different proposed (and failed) merger between United Airlines and US Airways.

a single CBA on a multitude of issues *other than* seniority integration. (Tr. 887:6-10). This is present day fact, not conjecture.

With respect to wages, the Company's proposal – the Kirby Proposal – is still on the table in current negotiations (Hemenway Trial Tr. 862:2-11), and Plaintiffs' witness, Russell Payne, testified that he recalled that West MEC Chairman McIlvenna (and the East MEC chairman) considered the Kirby Proposal for pay to be "woefully inadequate." (Tr. 644:15-19). Plaintiffs dispute this fact on the grounds that this evidence is inadmissible hearsay. (Doc. # 508 ¶ 21). However, Plaintiffs did *not* make a hearsay objection, or any objection, when Mr. Payne was asked about his recollection of the "woefully inadequate" comment. Further, Plaintiffs' objection now (that "[t]his cannot be used to prove the truth of the matter asserted – that, in fact, the Kirby proposal was inadequate," Doc. # 508 ¶ 21) has no merit in any event because Defendant was *not trying to prove* that the Kirby Proposal was in fact inadequate but rather that the West MEC chairman *regarded* the proposal as inadequate. Based on the fact that the East and West MEC's were not prepared to accept the Kirby Proposal, Mr. Payne agreed that "we can't sit here and prognosticate when it would have been TA'd." (Tr. 644:23-25). And when asked, "[t]herefore we can't prognosticate as to when a final contract altogether would have been TA'd, correct?" Mr. Payne responded, "Not with any certainty, no." (Tr. 645:1-3).

Based on the fact that USAPA and US Airways remain a substantial distance apart in negotiating a single CBA, there is no basis for the Court to conclude that "a CBA using the Nicolau Award would have been negotiated and ratified long before October

2008," as Plaintiffs speculate. (Doc # 507 at 2:8-9). The Company's "expectation" of the duration of the integration period is immaterial because it was only an expectation, and did not take into account the election of USAPA three years later, which resulted in the re-opening of some of the TA'd sections of the contract.[3] As *this Court* recognized, the re-opening of TA'd sections is also *immaterial*:

> THE COURT: The previous union had – you know, this reference to TA sounds to me not at all different from what negotiation goes on in every business context. And there were a variety of things that were, quote, TA'd by the previous union. The new union got in on a campaign with dissatisfaction of the old union, and they went back to the table on a variety of things. How does this matter?

(Tr. 1558:23 – 1559:4). The Court did not "see any independent issue here about whether [USAPA] negotiated regressively or whether there's anything wrong with that." (Tr. 1559:18-20). There isn't any.

Contract negotiations under the RLA do not observe any concrete rules as to duration, as a matter of law. *Int'l Ass'n of Machinists v. NMB*, 425 F.2d 527, 537 (D.C. Cir. 1970) ("a … characteristic of the Act is the lack of any time span as a limit on the processes primarily relied on for settlement of differences – negotiation between the parties; mediation; arbitration (where agreed)"). In fact, RLA negotiations have been described by the Supreme Court as an "*almost interminable*" process. *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union ("Shore Line")*, 396 U.S. 142, 149 (1969). "The procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the

[3] And choosing union representation is a right expressly granted by the RLA (45 USC § 152, Fourth) and not, per se, any issue in this case.

dispute." *Brotherhood of Railway & Steamship Clerks v. Florida E.C.R. Co*., 384 U.S. 238, 246 (1966). The RLA subjects all railway and airline disputes to "*virtually endless*" negotiation, mediation, voluntary arbitration, and conciliation.[4] *Burlington Northern R.R. Co. v. BMWE*, 481 U.S. 429, 444 (1987) (*citing Shore Line*, 396 U.S. at 148-149). Since USAPA and US Airways have only recently entered the mediation stage, it is impossible to conclude that a signed and ratified[5] contract could have been achieved in 2008.[6]

While negotiations continue, the Transition Agreement requires that separate operations must be maintained. No objection to separate operations has ever been made. As found by Arbitrator Bloch in TA No. 9 arbitration, "the Company has fully implemented the standard Separate Operation approach, including separate East and West seniority lists, with no objection from the Association at any time prior to the furloughs." (Opinion at 11; *See*, Declaration of Catherine McHale).

B. Rule 54(C) Does Not Create A Right To Relief On Legal Theories Not Presented In The Pleadings And It Is Improper To Advance These Theories For The First Time In Response To A Summary Judgment Motion.

Now, for the very first time and in an attempt to escape the causation issue on

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[4] The RLA procedures for resolving a dispute over the formation of a contract – negotiation, mediation, arbitration, and conciliation – are summarized in *Trainmen v. Jacksonville Terminal Co*., 394 U.S. 369, 378 (1969).

[5] Plaintiffs' argument that the East Pilots would have ratified the CBA (Plaintiffs' Memorandum at 7-8) is contradicted by their own Statement of Facts. Paragraph 32 of Plaintiffs' Statement of Facts recites the undisputed, material fact that "a majority of US Airways pilots … made it abundantly clear that no Negotiated Single Agreement that allows [the Nicolau Award] to take effect will ever be ratified by the US Airways pilots…"

[6] A conclusion that negotiation and mediation should have already ended is *outside this Court's jurisdiction*. Except in "rare and unusual" cases, courts do not have jurisdiction to terminate RLA-covered mediation. *Int'l Ass'n of Machinists v. NMB*, 425 F.2d at 542-43.

motion for summary judgment, Plaintiffs allege that USAPA is jointly and severally liable for the harm flowing from concerted actions of individual East Pilots. (Doc. # 507). Plaintiffs acknowledge that they *failed to plead* this theory of liability in their complaint, but claim that they may pursue it nonetheless because Fed. R. Civ. P. 54(c) entitles them to do so. Clearly, Rule 54(c) cannot bear the weight of this argument because it provides no such entitlement:

> Fed.R.Civ.P. 54(c) requires that the judgment entered shall grant the relief to which a party is entitled, even when such relief was not demanded in the pleadings. …
>
> This does not mean, however, that there are no restrictions on the relief that may be granted under Fed.R.Civ.P. 54(c). What a court may do ultimately is limited by fundamental notions of due process and fair play. *Sylvan Beach, Inc. v. Koch*, 140 F.2d 852, 861-862 (8th Cir. 1944). Fed.R.Civ.P. 54(c) permits relief based on a particular theory of relief only if that theory was squarely presented and litigated by the parties at some stage or other of the proceedings. *Cioffe v. Morris*, 676 F.2d 539, 541 (11th Cir. 1982). Put another way, **relief may be based on a theory of recovery only if that theory was presented in the pleadings** or tried with the express or implied consent of the parties. *Monod v. Futura, Inc*., 415 F.2d 1170, 1174 (10th Cir. 1969).

Evans Prod. Co. & Home Builders Mortgage Corp. v. West Am. Ins. Co., 736 F.2d 920, 923-24 (3d Cir. 1984) (emphasis added); *Rodriguez v. Doral Mortgage Corp*., 57 F.3d 1168, 1173 (1st Cir. 1995) ("Rule 54(c)'s concern for appropriate relief does not include relief which a plaintiff has foregone because of failures in the pleadings or in the proof.").

Simply put, Rule 54(c) does not provide Plaintiffs carte blanche to advance an eleventh hour theory of liability that was never presented in the pleadings or during the liability trial. *Petrello v. White Investment Realty, L.P.*, 2007 U.S. Dist. LEXIS 57489,

at *34 (E.D.N.Y. Aug. 7, 2007) ("an argument based on hindsight regarding how a movant would have preferred to have argued its case does not provide grounds for Rule 54(c) relief"). Allowing Plaintiffs to proceed on a new theory of liability, *after* the liability trial has been completed, would undermine "fundamental notions of due process and fair play," by denying USAPA a "fair opportunity to defend and to offer additional evidence on [this] different theory [of liability]." *Evans Prod. Co.*, 736 F.2d at 923-924.[7]

It is too late in this litigation to allow Plaintiffs to advance yet another theory of their case – especially considering the liability trial has concluded without one single mention of "joint and several liability" in the pleadings, pre-trial order or trial transcripts. *Eagle v. American Telephone & Telegraph Co.*, 769 F.2d 541, 548 (9th Cir. 1985) (it is "unfair to the defendant to permit the plaintiff to change strategies at that late stage of litigation").

It is especially improper for Plaintiffs to attempt to smuggle an amendment to their complaint and theory of liability in the context of a summary judgment response.

> "**There must be a point at which a plaintiff makes a commitment to the theory of its case**." *Sanders v. Venture Stores, Inc.*, 56 F.3d 771, 774 (7th Cir. 1995) (*quoting Johnson v. Methodist Med. Ctr.*, 10 F.3d 1300, 1304 (7th Cir. 1993), *cert. denied*, 511 U.S. 1107 (1994)). Even the liberal pleading requirements of the federal rules do not permit plaintiffs to wait until the last minute to ascertain and refine theories on which they intend to build their case. … *Evans v. McDonald's Corp.*, 936 F.2d 1087, 1091 (10th Cir. 1991). Consistently with this reasoning, **courts have refused to consider theories that a plaintiff asserts in response to a defendant's**

[7] Even if Plaintiffs were allowed, such a theory is not sustainable because, as a matter of law, it is well settled that individuals cannot be liable for violation of the duty of fair representation (*See*, in dismissed State claim case Doc. # 17 at 21).

> **motion for summary judgment when the plaintiff failed to assert those theories first in its complaint**. *See id*. (citing cases).

Colovos v. Owens-Corning Fiberglas Corp., 1995 U.S. Dist. LEXIS, at *22-23 (N.D. Ill. Oct. 13, 1995) (emphasis added); *Speer v. Rand McNally & Co*., 123 F.3d 658, 665 (7th Cir. 1997) ("A plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment."); *Keenan v. Allan*, 889 F. Supp. 1320, 1359 (E.D. Wash. 1995) (*citing ACRI v. International Ass'n of Machinists*, 781 F.2d 1393, 1398 (9th Cir. 1986), *cert. denied*, 479 U.S. 816 (1986) ("The Court does not condone or permit . . . eleventh-hour amendment to [a plaintiff's] complaint through briefing").

Enough is enough. Plaintiffs' newly concocted theory of joint and several liability should be seen for what it is – nothing more than an attempt to divert the Court's attention from Plaintiffs' failure to point to any facts in the record that would demonstrate a "direct nexus" between the breach of the duty of fair representation and the damages alleged. *See Deboles v. Trans World Airlines, Inc*., 552 F.2d 1005, 1018 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977). Without a showing of this direct nexus – under well-settled DFR case law – USAPA cannot be liable for damages. *See* (Doc. # 488 at 11-12 (citing cases)).

C. The System Board Is The Proper Forum For Plaintiffs' Damage Claims.

Plaintiffs do not challenge USAPA's argument that the System Board is the proper forum in which to pursue their damages remedy.[8] As noted in USAPA's initial

[8] In fact, Plaintiff Wargocki testified in his deposition that he was not claiming damages in the

memorandum in support of summary judgment, Plaintiffs requested a postponement of the May 28-29 arbitration hearing. Arbitrator Bloch granted this request, despite the fact that both the company and the union were willing and ready to proceed. He then ordered the Plaintiffs to notify Arbitrator Bloch, the Company and USAPA "on or before the Close of Business on Friday, June 19, 2009, as to whether they wish to schedule additional hearing dates" – or risk waiving their grievance altogehter. (*See*, Declaration of Theresa Murphy).

III. CONCLUSION

Plaintiffs have failed to make a showing sufficient to establish a genuine issue of fact with respect to their burden to prove causation. As the Second Circuit sated in *Ramey vs. Dist. 141, IAM*, 378 F.3d 269, 280 n. 5 (2nd Cir. 2004), "there must be some likelihood that harm will result ... [O]therwise such claims would be unduly speculative." Accordingly, USAPA's motion for summary judgment as to Plaintiffs' damage claims should be granted. In addition, given that Plaintiffs have no response to the motion besides their request for this Court to find non-parties liable, oral argument would be a waste of this Court's and the parties' time.

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lawsuit because his damages claim is "just part of the arbitrations that are going to be heard in May." (Wargocki Tr. 58:7-8, attached as Exhibit Pages 1-2 to Jacob Declaration). Plaintiffs omit any reference to this sentence when they refer to the prior sentence ("No, it's not abandoned") in their Statement of Facts at ¶ 15.

Dated: June 10, 2009

By: ***/s/ Nicholas P. Granath, Esq.***

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CERTIFICATE OF SERVICE

This is to certify that on the date indicated herein below true and accurate copies of the foregoing documents and their attachments, *to wit*,

- DEFENDANT USAPA'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' DAMAGE CLAIMS (Doc. # 487)
- Certificate of Service

were electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all admitted counsel who have registered with the ECF system, including but not limited, to:

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Further, I certify that paper hard copies shall be provided to The Honorable Neil V. Wake, District Court Judge, 401 W. Washington Street, SPC 52, Phoenix, AZ 85003.

On June 10, 2009, by:

/s/ Nicholas P. Granath, Esq.