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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Don ADDINGTON, *et al.*,

Plaintiffs,

vs.

US AIRLINE PILOTS ASSN., *et al.*,

Defendants.

Don ADDINGTON, *et al.*,

Plaintiffs,

vs.

Steven H. BRADFORD, *et al.*,

Defendants.

CASE NOS.
2:08-CV-1633-PHX-NVW
2:08-CV-1728-PHX-NVW

(Consolidated)

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO USAPA'S MOTION TO DISMISS SECOND AMENDED COMPLAINT (Doc. # 620).

Plaintiffs ADDINGTON, BOSTIC, BURMAN, IRANPOUR, VELEZ, and WARGOCKI file this memorandum of points and authorities in opposition to US Airline Pilots Association's (USAPA's) Rule 12(c) *Motion to Dismiss the Second Amended Complaint*. (Doc. # 620.)[1] The Court should deny USAPA's motion because the specific factual allegations in the Second Amended Complaint ("SAC") plausibly suggest an entitlement to relief and because acting in concert is a cognizable legal theory in the DFR context.

[1] Technically, this is a Rule 12(c) motion because USAPA filed an Answer (doc. # 616). *See Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 954 (9th Cir. 2004).

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Overview of Material Allegations

In August 2007, the East MEC withdrew its representatives from the Joint Negotiating Committee ("JNC") and all negotiation of a new CBA necessarily ceased. SAC at ¶ 144 (doc. # 612). Had the East MEC not done so, the JNC would have completed negotiation of a single CBA well-before October 2008 and that CBA would have been a CBA that used the Nicolau Award seniority list ("Nicolau CBA") *Id.* at ¶ 153; *see also Plts.' SOF* at ¶ 23 (Jun. 1, 2009) (doc. # 508).[2] A Nicolau CBA would likely have had substantial improvements in pay for the East Pilots. *Id.* at ¶¶ 28-29. It is quite plausible, therefore, that a Nicolau CBA would have been timely ratified and put into effect, integrating operations on or before October 2008. SAC at ¶ 153. If so, Plaintiffs would not have been furloughed or lost Captain opportunities. *See Order*, 10:3 to 10:4 (Jul. 17, 2009) (doc. # 593). Withdrawal of the East JNC representatives, therefore, was a substantial part of the but-for cause of Plaintiffs' injuries. SAC at ¶¶ 154, 155.

In 2007, East Pilots formed USAPA for the purpose of preventing the Airline from integrating operations using a Nicolau CBA. SAC at ¶ 67(b). Prior to April 18, 2008, members of the East MEC and other East Pilot rank-and-file solicited support for USAPA with the intention of preventing the Airline from integrating operations using a Nicolau CBA. *Id.* at ¶¶ 142-44, 150-51. After April 18, 2008, USAPA breached its DFR with the intention to

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[2] The Court has discretion to consider material outside the pleadings when deciding a Rule 12(c) motion. *Yang v. Dar Al-Handash Consultants*, 250 Fed. Appx. 771, 772, 2007 WL 1492877, *1 (9th Cir. 2007). For example, it may "take judicial notice of matters in the public record, such as filings in other courts." *Langone v. Miller*, 631 F. Supp. 2d 1067, 1070 (N.D. Ill. 2009). It logically follows that it may take judicial notice of matters filed in this case. Such matters are part of the "context" considered in *Twombly-Iqbal* plausibility determinations.

prevent the Airline from integrating operations using a Nicolau CBA. *Id.* at ¶¶ 115, 157; *see also Order*, 46:21 to 46:22, 49:17 (Jul. 17, 2009) (doc. # 593).

USAPA was integrally involved in the actions taken by members of the East MEC and East Pilot rank-and-file prior to April 18, 2008. SAC at ¶¶ 134-143, 146-151. USAPA shared a common objective with those actors when it breached its DFR after April 18, 2008. *Id.* at ¶ 157. USAPA and those actors, therefore, acted in concert. *Id.* at ¶ 156. Having acted in concert when it breached its DFR, USAPA is liable for all damages caused by those also acting in concert. *Id.* at 160. This includes damages caused by the East MEC's refusal to participate in the JNC.

II. Legal Argument

A. Overview

Under the *Twombly-Iqbal* "plausibility" standard, the allegations of liability must be reasonably plausible in the specific context of the case when considered in light of the court's "judicial experience and common sense." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (same). Liability here is predicated on three propositions (two factual, one legal): (1) East MEC refusal to participate in the JNC was a substantial part of the but-for cause for the Airline not having integrated operations using a Nicolau CBA, on or before October 2008; (2) when USAPA breached its DFR it acted in concert with those who contributed to causing the East MEC to refuse to participate in the JNC; and (3) USAPA is liable under acting in concert theory for the harm caused by the East MEC's refusal to participate in the JNC.

The first part of the first proposition set out above is inherently plausible. This is because refusal to negotiate a contract makes it impossible to implement a contract. The second part of the first proposition, that

negotiation and ratification would have been completed by October 2008, is reasonably inferred from specific plausible allegations (and proven facts). The second proposition (acting in concert) is plausible under analogous established *Twombly-Iqbal* analysis. The validity of the third proposition (liability theory) is a question of law, supported by substantial persuasive and controlling authority.

A matter can be dismissed for failure to state a valid claim if the complaint has either of two defects: " 'the lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.' " *Mitchell v. EMC Mortg. Corp.*, 2009 WL 3274407, *1 (D. Ariz. 2009) (*quoting Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)). The validity of the third proposition (liability theory) equates with there being a cognizable legal theory. The plausibility of the first two propositions equates with allegation of sufficient facts to support that theory. The Court, therefore, should deny USAPA's motion.

B. There is a plausible factual predicate to liability.

1. Specific allegations must make the factual predicate to liability plausible.

Although *Twonbly*, and more recently *Iqbal*, made important clarifications of pleading requirements, these decisions "should not be read as effecting a sea change in the law of pleadings." *Moss v. U.S. Secret Service*, 572 F.3d 962, 968 (9th Cir. 2009). Rather, these decisions clarify that Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 129 S. Ct. at 1949 (internal quotation marks omitted). A complaint must contain "sufficient factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In other words, inferences must be reasonable and allegations must be "plausible." *See id.*

The analysis of whether inferences are reasonable and allegations are plausible is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 1950. Not every element of a claim is subject to this analysis. Rather, the extent to which a court should require "a non-speculative, 'plausible basis' for relief in the complaint allegations … must be tailored to the theories of liability at issue in the case." *Ames v. Department of Marine Resources Com'r*, 2008 WL 5050159, *4 (D. Me. 2008).

A complaint need not allege every fact necessary to prove the claim. Rather, courts reject pleadings where there is a total absence of plausible allegations, not where there is an "insufficiency" of such allegations. *See, e.g.*, *Rodriguez*, 285 Fed. Appx. at 759 (RICO); *K Consulting, Inc. v. MMLA Psomas, Inc.*, 2009 WL 2450490, *6 (D. Ariz. 2009) (vicarious liability); *Fahie v. Rivera*, 2009 WL 2780144, *2 (S.D.N.Y. 2009) (acting in concert). The Tenth Circuit explains this as follows:

> If a complaint… omits some necessary facts, however, it may still suffice so long as the court can plausibly infer the necessary unarticulated assumptions. But if the complaint is sufficiently devoid of facts necessary to establish liability that it encompasses a wide swath of conduct, much of it innocent, a court must conclude that plaintiffs have not nudged their claims across the line from conceivable to plausible.

Bryson v. Gonzales, 534 F.3d 1282, 1286 (10th Cir. 2008) (omitting quotation and alteration marks and citations).

2. Specific allegations do make the factual predicate to liability plausible.

(a) Integrated operations by October 2008 is plausible.

Two steps were needed to integrate operations in time to avoid the West furloughs—timely negotiation of, and timely ratification of, a Nicolau CBA. Plaintiffs' allegations reasonably imply that both steps would have been

completed by October, 2008, had there been no wrongdoing by East Pilots. For example, Plaintiffs allege: "Had there been no wrongful actions … [i]ntegration using the Nicolau Award would have occurred before October 2008." SAC at ¶ 153. Negotiation and ratification are reasonably implied because they had to occur before there could be integration. Plaintiffs' specific factual allegations, and facts already established, make this allegation entirely plausible.

CBA negotiation

Plaintiffs specifically allege that the East MEC refused to participate in the JNC. SAC at ¶¶ 144, 145. It is entirely plausible that there would have been timely negotiation of a Nicolau CBA if the East MEC had not done so. Evidence in the record shows that it should have taken no more than two to three years to integrate pilot operations in this merger. For example, the Airline's expert in such matters testified that "on September 23rd, 2005, … the company's expectation was that it would take two to three years to fully integrate the carriers." Plts.' SOF at ¶ 23 (doc. # 508). Because October 2008 was three years later, negotiation should have been completed well before then. It is quite plausible, therefore, that a Nicolau CBA would have been timely negotiated if the East MEC had not wrongfully refused to participate in the JNC.

CBA ratification

It is entirely plausible that, had they been given the opportunity, the East Pilots would have ratified a Nicolau CBA. Evidence that, after the wrongdoing began, the East Pilots resolved that they would vote down a Nicolau CBA does not prove otherwise. Multiple wrongful acts contributed to and encouraged the East Pilots to resolve to vote down a Nicolau CBA. SAC at ¶¶ 50, 58, 63. It is entirely plausible that East Pilots would not have had

such resolve and would have ratified a Nicolau CBA had none of these wrongful acts occurred. Indeed, it is entirely plausible that, even with these wrongful acts, if given the opportunity to vote on a Nicolau CBA a majority of East Pilots would have voted in favor so that they could obtain the better pay and benefits that would come with it. It is common sense that workers would vote for better wages and benefits.

In May 2005, the Airline proposed that the new CBA would have "a pay increase for East Pilots worth $108 million per year." *Order* at 6:5 to 6:10 (doc. # 593). Divided among 5,000 East Pilots, $108 million translates, on average, to $21,000 per pilot per year. It is surely plausible that East Pilots would regard that favorably.[3] It is plausible, therefore, that the East Pilots would have timely ratified a Nicolau CBA if they had been given the opportunity to do so.

(b) Action in concert is plausible.

Plaintiffs allege that USAPA's intention when it breached its DFR was to "further the goal of preventing … [i]ntegration using" a Nicolau CBA. SAC at ¶ 157. Plaintiffs also allege that in so doing, USAPA "acted in concert with the East [Pilot] [w]rongdoers." *Id.* An allegation of acting in concert is plausible if there are specific factual allegations that allow the inference of a tacit agreement to work together toward a common wrongful goal. In the context of antitrust, there must be plausible inference of prior agreement to work toward that goal, "not merely parallel conduct that could just as well be independent action." *Twombly*, 550 U.S. at 557. In the context of RICO,

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[3] Because the RLA disfavors negotiating with a "take-it-or-leave-it" approach, the final CBA terms likely would have been better than this. *See REA Exp., Inc. v. Brotherhood of Ry., Airline & S. S. Clerks,* 358 F. Supp. 760, 772 (S.D.N.Y. 1973). Ratification, therefore, is even more plausible than indicated by this offer.

there must plausible inference of "'unity of purpose' or a 'meeting of the minds." *Rodriguez v. Editor in Chief*, 285 Fed. Appx. 756, 759, 2008 WL 2661993, *2 (C.A.D.C. 2008). In the context of § 1983 concerted action, there must be plausible inference of "common purpose." *Ruttenberg v. Jones*, 283 Fed. Appx. 121, 132, 2008 WL 2436157, *8 (4th Cir. 2008). In the context of civil conspiracy, there must be plausible inference of "a preceding agreement." *Patton v. West*, 276 Fed. Appx. 756, 758, 2008 WL 1844078, *2 (10th Cir. 2008).

Specific factual allegations here surely allow the inference of a tacit agreement among a group of East Pilots to work together toward a common wrongful goal of preventing Airline integration using a Nicolau CBA. SAC at ¶¶ 140-151. A variety of actions in concert are alleged, including: promoting USAPA in the NMB election, *id.* at ¶¶ 140-142; advocating action to prevent negotiation of a single CBA, *id.* at ¶¶ 143-145; and dual unionism, *id.* at ¶¶ 146-151. There is just too much communication among the actors here to see this only as parallel, rather than concerted action.

The allegations, therefore, make quite plausible that there was a tacit agreement among a group of East Pilots to work toward the common goal of preventing the Airline from integrating operations using a Nicolau CBA. Prior to April 18, 2008, therefore, the opposition to the Nicolau Award was concerted action. This concerted action is referred to below as the "East Pilot Enterprise."

The next question, then, is whether USAPA itself acted in concert with the East Pilot Enterprise when it breached its DFR. A defendant's concerted action can "be inferred from circumstantial evidence of the defendant's status in the enterprise or knowledge of the wrongdoing." *First Interregional Advisors Corp. v. Wolff*, 956 F.Supp. 480, 488 (S.D.N.Y. 1997). "Only a slight

connection is necessary to support … knowing participation" in concerted action. *United States v. Tran*, 568 F.3d 1156, 1164 (9th Cir. 2009) (criminal context). Acting in concert can be established by evidence of "encouragement and/or ratification" of wrongdoing. *Restatement (Second) of Torts* § 876 (1979).

Although the conduct for encouragement and ratification is similar, the time frames are different. "Encouragement" would have occured while the East Pilot Enterprise was acting wrongfully. "Ratification" would occur after the East Pilot Enterprise acted, once USAPA became the bargaining representative. Both require evidence that USAPA had knowledge of the wrongfulness of the East Pilot Enterprise yet communicated its approval. Allegations here make both plausible.

USAPA's knowledge of, and approval of, the East Pilot Enterprise is reasonably inferred from plausible allegations of its "status"—allegations that some of the same individuals who played key roles in the East Pilot Enterprise also played key roles in USAPA. These allegations establish that participants in the East Pilot Enterprise: (1) formed USAPA; (2) threatened to replace ALPA with USAPA; (3) and promised, if USAPA was elected, that it would disregard the Nicolau Award. *Id.* at ¶¶ 66-67, 72, 142-143, 146, 148. The allegations also identify East Pilots involved in the East Pilot Enterprise who later were in control of USAPA. *Id.* at ¶¶ 150-151. *See also id.* at ¶¶ 134-139 (identifying six East Pilots actively involved in USAPA after April 18, 2008, who were, at the time of JNC withdrawal, actively involved in East MEC governance).

A line of cases supports imputing the knowledge and intention of an organization's leaders to the organization itself. For example, common knowledge and intention is imputed to two different entities where the same

persons having such motives have substantial responsibility in both entities. *See Tunis Bros. Co., Inc. v. Ford Motor Co.*, 763 F.2d 1482, 1497 (3d Cir. 1985) (vacated for reconsideration on unrelated basis); *St. Jude Medical, Inc. v. Intermedics, Inc.*, 623 F. Supp. 1294, 1299-300 (D.C. Minn. 1985) (same). The theory here is that, "[b]ecause a [union] operates through individuals, the privity and knowledge of individuals at a certain level of responsibility must be deemed the privity and knowledge of the organization." *Continental Oil Co. v. Bonanza Corp.*, 706 F.2d 1365, 1376 (5th Cir. 1983) (applying analogous rule to corporations). Hence, when USAPA encouraged the East Pilot Enterprise prior to April 18, and when it breached its DFR after April 18, it acted with the privity and knowledge of persons involved in the East Pilot Enterprise.

There are direct allegations that USAPA communicated approval of the East Pilot Enterprise. For example, prior to April 18, USAPA promised to abrogate the Nicolau Award if elected. *See id.* at ¶¶ 68, 72, 117. Indeed, the Court found that USAPA "communicated a clear message to East Pilots that its seniority policy would be more favorable to them than the Nicolau Award. USAPA promised that, as certified bargaining representative, it would negotiate for a date-of-hire seniority integration rather than the Nicolau Award." *Order* at 7:14 to 7:16 (doc. # 593). After April 18, USAPA continued to communicate approval by stating its intention was to "not implement integrated operations" and "not adopt the Nicolau List." SAC at ¶ 75. These allegations are made plausible by specific allegations that USAPA "re-affirmed" its date-of-hire seniority policy "without making any effort to give due consideration to West Pilot interests." *Id.* at ¶ 76.

In short, specific factual allegations establish that USAPA was involved at almost every stage of the wrongful acts that prevented timely integration

of the Airline using a Nicolau CBA. USAPA was fully aware of the purpose for these wrongful acts. It overtly ratified these acts when it committed its DFR. It is controlled by persons who committed those wrongful acts. It is surely plausible, therefore, that USAPA acted in concert when it breached its DFR.

C. Acting in concert is a cognizable legal theory.

USAPA would have it that a union can act in concert with impunity because it is liable only for harm it directly causes. That is wrong. There is no valid reason why a union that willfully breaches its DFR, with knowledge and intention to act in concert, should not be jointly liable for all harm—even harm that was not directly caused by the DFR breach. Having joined a plan, ratified prior wrongdoing, and violated its DFR in furtherance of that plan, a union cannot assert lack of but-for causation as a defense. Any rule that would allow such a defense would: (1) lead to unintended, undesired consequences; (2) be inconsistent with established federal labor law; and (3) be inconsistent with general tort doctrine.

1. Acting in concert liability prevents unintended consequences.

The Court should not presume that "Congress intended an absurd result." *In re Pacific-Atlantic Trading Co.*, 64 F.3d 1292, 1303 (9th Cir. 1995). "Legislative enactments should never be construed as establishing statutory schemes that are illogical, unjust, or capricious." *Bechtel Constr., Inc. v. United Bhd. of Carpenters*, 812 F.2d 1220, 1225 (9th Cir. 1987). The Court, therefore, should not construe the RLA as establishing a statutory scheme that empowers a bargaining unit majority to arbitrarily manipulate union entities to evade liability for oppressive misconduct directed against a bargaining unit minority.

Members of a bargaining unit are insulated from personal liability. *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 416 (1981). DFR doctrine ensures that, despite this insulation from liability, an aggrieved member of a bargaining unit has a remedy when a union majority acts oppressively. That remedy is a claim against the union for breach of the DFR. USAPA advocates a rule that would create a loop-hole in DFR law that would allow the majority to oppress with impunity. Surely, this was not the intent behind the RLA.

If USAPA's rule were right, a bargaining unit majority could oppress with impunity by using the artifice of creating a successor union. This is demonstrated by considering a hypothetical situation involving two union entities, "Union A" and "Union B." At the start, Union A is the certified representative. Union A, in breach of its DFR, negotiates and ratifies an illegal, oppressive CBA. Until such CBA is put into effect, damages would not accrue. Before damages accrue, the majority dissolves Union A and substitutes Union B as the certified representative. Union B, for illegitimate reasons, refuses to remedy the illegal CBA. That is a DFR breach but is not the direct cause of the illegal CBA. Hence, it is not the but-for cause of the damages.

In other words, there is no but-for causation link between Union B and the harm flowing from the illegal CBA. There is such a link between Union A and the harm, but Union A cannot assess dues to pay any damages. With this artifice of substituting Union B for Union A, therefore, the oppressed minority would have no practical remedy, no means of obtaining damages. Without this artifice, it would have a practical remedy.

As a matter of policy, none of this should make a practical difference. Surely, the result should not be different merely because an oppressive

majority has the "wits" to replace the union entity at the right time. That result is absurd, illogical, unjust, and/or capricious. With acting in concert liability the result would not be different because Union B would be charged with liability for harm directly caused by Union A. To avoid absurd, illogical, unjust, and/or capricious results, the RLA must allow application of acting in concert liability against unions in the DFR context. Then, whether an oppressive majority substitutes a new union or leaves the old union in place, the result is the same. The current union representing the bargaining unit would be liable and the union majority would share paying damages, as it should, through dues assessment.

2. Acting in concert should be analogized from related areas of RLA.

(a) Federal courts fashion common law to further RLA intent.

It is well-recognized that courts formulate common law rules to effect the goals of federal labor policy. Hence, it is said that the RLA "authorized the federal courts to develop a federal common law regarding enforcement of collective bargaining agreements." *Hendricks v. Airline Pilots Ass'n Int'l*, 696 F.2d 673, 676 (9th Cir. 1983). *Hendricks* explained as follows:

> The federal courts were not left at large to devise any rules they might consider desirable. Rather, the federal common law must be "fashion[ed] from the policy of our national labor laws." Where, as here, no express statutory provision is applicable, the problem "will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." Congress sought to encourage the making of collective agreements and to promote industrial peace.

Id. at 676 (quoting *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957)).

(b) Federal courts analogize common law from one RLA context to another.

Courts extend the "application of the principles enunciated in" one labor context to other related contexts. *Legutko v. Local 816, Intern. Broth. of*

Teamsters, 853 F.2d 1046, 1051 (2d Cir. 1988); *see also Crowley v. Grand Int'l. Bdh. of Locomotive Engineer*s, 12 Ariz. App. 495, 497-98, 472 P.2d 106, 108-09 (1970) (viewing formulation of federal common law as comparable for hybrid and DFR claims). Courts, for example, extend rules applied in the unfair labor practice context to the DFR context because there is an "undeniable resemblance and substantial overlap between unfair labor practices and breaches of the duty of fair representation." *Eatz v. DME Unit of Loc. Union No. 3 of the Int'l Bhd. of Electrical Workers*, 794 F.2d 29, 33 (2d Cir. 1986). *See*, *e.g.*, *Truck Drivers, Loc. Union 568 v. NLRB*, 379 F.2d 137, 142-43 (D.C. Cir. 1967) (affirming imposition of unfair labor practice liability with reference to standards of fair representation). In all labor contexts, federal courts fashion common law guided by a policy favoring "consensual processes" in the "formation of the collective bargaining agreement and the private settlement of disputes under it." *Legutko*, 853 F.2d at 1051. That policy interest is implicated in the DFR context because "the adequacy of [a union's] representation of the members' interests … may directly affect the bargaining relationship with the employer." *Id.*

(c) Acting in concert is recognized in non-DFR RLA contexts.

Acting in concert liability is recognized in the RLA contexts of hybrid claims and unfair labor practices. *Lewis v. Tuscan Dairy Farms, Inc.*, 25 F.3d 1138, 1146 (2d Cir. 1994) (relying on *Vaca v. Sipes*, 386 U.S. 171, 197 n. 18 (1967)); *Allied Int'l v. Int'l Longshoremen's Ass'n*, 814 F.2d 32, 40-41 (1st Cir. 1987). *See Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1015 (9th Cir. 1990) ("Courts have frequently looked to other labor law in construing analogous provisions of the RLA."); *Bdh. of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383-84 (1969) (same). Because the DFR context

invokes analogous policy considerations, *Legutko*, 853 F.2d at 1051, acting in concert liability should be applied to the DFR context by analogy.

Unfair labor practices

Joint liability based on acting in concert is recognized in the unfair labor practice context, such as secondary boycotts. In *Allied Int'l*, defendant Local 799 was liable under acting in concert doctrine for damages that another union entity, referred to as the "ILA," directly caused. 814 F.2d at 40-41. The First Circuit affirmed the award of joint and several damages against Local 799 because it "was plainly acting in concert with the ILA." *Id.* at 40. "Having elected to become an active player in a national boycott game, Local 799" is liable for nationwide damages; it "cannot retreat into its small corner of New England when the score is tallied." *Id.* at 41. The court explained:

> [Local 799] associated itself with the outlawed activity as a willing participant. It was, in short, a joint tortfeasor. Local 799 thereby became liable for the entire amount of the boycott-related damages, even if the amount directly attributable to the Local's conduct was but a fraction of the whole. A conspiracy is like a train. When a party knowingly steps aboard, he is part of the crew, and assumes conspirator's responsibility for the existing freight.

Id. at 40-41 (citations, quotations and alteration marks omitted). "It is no defense to the Local to say that it should only be held accountable for the damages" it directly caused. *Id.* at 40.

Hybrid claims

Joint liability based on acting in concert is recognized in the hybrid claim context, regardless that there is a preference to apportion damages between the union and the employer. *See Bowen v. United States Postal Service*, 459 U.S. 212, 223 n.11 (1983); *Aguinaga v. United Food & Commercial Workers Int'l*, 720 F. Supp. 862, 869 (D.C. Kan. 1989) (apportioned on "a percentage fault basis"). Federal courts need *not*

apportion damages where the union and the employer overtly acted in concert. *Dushaw v. Roadway Exp., Inc.*, 816 F. Supp. 1226, 1228 (N.D. Ohio 1992) (no apportionment where union and employer "conspired … closely"). They also need not apportion damages where to do so would reduce the employee's actual recovery. *See Bowen*, 459 U.S. at 223 n.12 (holding that if the plaintiff is unable to collect against the union, the employer "remains secondarily liable for the full loss of back pay").

(d) Acting in concert should be analogized to DFR RLA contexts.

As a matter of RLA policy, a union should be held accountable when it causes harm that interferes with "consensual processes" in the "formation of the collective bargaining agreement." *Legutko*, 853 F.2d at 1051. As another matter of policy, a union should not escape liability for harm caused by others where it acts in concert with those others. *Allied Int'l*, 814 F.2d at 41; *Dushaw*, 816 F. Supp. at 1228. Those same interests apply in the DFR context. *Legutko*, 853 F.2d at 1051; *Eatz*, 794 F.2d at 33. Because federal courts apply common law rules by analogy from one labor context to another, *Legutko*, 853 F.2d at 1051, acting in concert should be as cognizable in the DFR context as it is in unfair labor practice and hybrid claim contexts. It should, therefore, be cognizable here.

3. Acting in concert liability is tort common law.

In ordinary tort law, acting in concert joint liability is based on "a legal fiction whereby all those engaged in a concerted activity can, under certain circumstances, be found to be the cause in fact of a plaintiff's injury although only one person actually caused the injury." *Holliday v. McKeiver*, 401 N.W.2d 278, 279 (Mich. App. 1986). Where there is acting in concert, "[e]ven if a particular defendant caused no harm himself, that defendant is liable for the harm caused by the others because all acted jointly." *Id.* at 280. A joint

tortfeasor cannot "escape from liability by claiming … that [it] did not [itself] cause … [P]laintiff[s'] injury." *Restatement (Third) of Torts: Apportionment Liab.* § 15 Rptr. n. cmt. (a) (2000); *see also Restatement (Second) of Torts* § 876 (encouragement and/or ratification). Indeed, a joint tortfeasors can be liable even if "the conduct of the other was … blameless." *Restatement (Second) of Torts* § 879 cmt (a).

D. USAPA is liable for acting in concert.

There is no rule that labor unions cannot be subject to acting in concert liability in the DFR context. Such a rule, at times, could deny an aggrieved party any remedy at all. Such a rule would be contrary to doctrine followed in the contexts of hybrid claims and unfair labor practices. Such a rule would be contrary to common law tort doctrine. No recognized federal policy would be served by such a rule. Hence, there is no reasoned basis to not recognize acting in concert doctrine in the DFR context. This Court, therefore, should hold that acting in concert doctrine is a cognizable liability theory in this matter.

E. Damages for lost Captain opportunities are implicit.

Each aircraft has two seats—one Captain, one First Officer. There are, therefore, approximately equal numbers of Captains and First Officers. To keep this equal, for every two First Officers that are furloughed, one pilot who would have held a Captain position is shifted down to First Officer. Hence, allegations of furlough injury to a number of First Officers logically support the inference of allegations of injury to half that number of Captains.

F. Additional issues raised by USAPA are of no consequence.

1. It does not matter whether all wrongdoers were joined as parties.

The Supreme Court has held that "joint tortfeasors … [a]re not indispensable parties." *Lawlor v. Nat'l Screen Service Corp.*, 349 U.S. 322,

330 (1955). "A joint tortfeasor is not a 'necessary' party within the meaning of Rule 19." *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1552 (N.D. Cal. 1987) (citing Advisory Committee Notes to Fed. R. Civ. P. 19). "[O]ne joint tortfeasor cannot escape suit because his fellow joint tortfeasor has not been named as a defendant in the same litigation." *Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co.*, 365 F.2d 802, 819-20 (3d Cir. 1966). It does not matter here, therefore, whether all wrongdoers were joined as parties.

2. It would not matter if individual East Pilots have defenses.

A tortfeasor's liability, where acting in concert, is not reduced by any defenses that another, also acting in concert, might have to its liability. Indeed, the first tortfeasor can be liable even if "the conduct of the other was … blameless." *Restatement (Second) of Torts* § 879 cmt (a). USAPA's joint liability, for example, would not be affected if the statute of limitations ran on claims that might be made against others who acted in concert. *See Def.'s Memo.* at 12:18 to 13:10. It would not matter, therefore, if individual East Pilots have defenses to direct liability. This would matter if USAPA's liability was vicarious liability—but it is not. *See Restatement (Third) of Torts* § 13 cmt. (f) ("The vicariously liable party is liable only … [where] the tortious actor is held liable."). Acting in concert is not vicarious liability. Vicarious liability is not at issue.

3. It would not matter if all factual elements were not expressly alleged.

A Plaintiff need not plead every factual element of its claim. The Ninth Circuit explains:

> But *Twombly* and *Iqbal* do not require that the complaint include all facts necessary to carry the plaintiff's burden. "Asking for plausible grounds to infer" the existence of a claim for relief "does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" to prove that claim.

Al-Kidd v. Ashcroft, 580 F.3d 949, 977 (9th Cir. 2009) (quoting *Twombly*, 550 U.S. at 556). USAPA's criticism of minor omissions from the allegations, therefore, has no import. *See Def.'s Memo.* at 15:3 to 18:6. What does matter is that the SAC provides ample notice of the nature of the claim and shows that the claim is plausible.

4. USAPA's §§ III(3) to III(8) arguments seek reconsideration.

"Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *School Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). "Motions for reconsideration should be granted only in rare circumstances." *Fabricius v. Maricopa County*, 2007 WL 1526763, *1 (D. Ariz. 2007). Such motions should not be used for the purpose of asking a court to "rethink what the court had already thought through—rightly or wrongly." *Defenders of Wildlife v. Browner*, 909 F. Supp. 1342, 1351 (D. Ariz. 1995). In §§ III(3) to III(8) of its memorandum, *Def.'s Memo.* at 18:7 to 21:2, USAPA argues failure to exhaust contractual remedies, lack of subject matter jurisdiction, lack of personal jurisdiction, and improper venue. This Court earlier rejected such arguments. *See Order*, 17:17 to 22:15 (Nov. 20, 2008) (doc. # 84); *Order*, 2:6 to 4:28 (Dec. 24, 2008) (doc. # 118). That makes these issues matters of reconsideration. USAPA, however, fails to comply with the local rule on motions for reconsideration. L.R. Civ. 7.2(g)(1). Moreover, no response to these arguments is required (or allowed) unless ordered by the Court. L.R. Civ. 7.2(g)(2). Plaintiffs, therefore, offer no response here.

III. Conclusion

The allegations make plausible that Plaintiffs injuries—furloughs and lost Captain opportunities—were caused by others who acted in concert with USAPA's DFR breach. Fundamental principles of federal labor law would be offended if unions violating the DFR were not subject to joint liability when acting in concert with others. USAPA's motion to dismiss, therefore, should be denied. Plaintiffs respectfully ask the Court to do so.

DATED, November 6, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 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 to CM/ECF registrants.

/s/ Andrew S. Jacob