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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

US AIRWAYS, INC.,

Plaintiff,

v.

DON ADDINGTON, JOHN BOSTIC, MARK BURMAN, AFSHIN IRANPOUR, ROGER VELEZ, and STEVE WARGOCKI, and

US AIRLINE PILOTS ASSOCIATION,

Defendants.

Case No. 2:10-cv-1570-PHX-ROS

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT USAPA'S MOTION TO DROP THE ADDINGTON DEFENDANTS PURSUANT TO RULE 21

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules & Statutes

Treatises & Other Authority

Defendant, US Airline Pilots Association ("USAPA"), submits this memorandum in reply to the opposition filed by defendants Addington, Bostic, Burman, Iranpour, Velez and Wargocki ("*Addington* defendants" or "defendants") to USAPA's motion to drop the *Addington* defendants as parties to this action.

I. SUMMARY

The *Addington* defendants' response starts with a false premise, that in order for the requested relief to be granted, "USAPA must show misjoinder." (Doc. # 48 at 1). That is not the law. Federal Rule of Civil Procedure 21 ("Rule 21") has not been interpreted so narrowly. Next, the defendants misstate controlling law as it relates to a hybrid duty of fair representation claim in an effort to confuse the Court's analysis. Lastly, the arguments made by the defendants serve only to reinforce the inadequacy of any coercive claim they allege to have in this lawsuit. In this way they merely highlight why their cross-claim is subject to dismissal for lack of subject matter jurisdiction and for failure to state a claim.[1]

II. ARGUMENT

1) Application of Rule 21 Is Not Limited to Remedying Misjoinder or Nonjoinder, Hence the Response Is Misplaced.

The *Addington* defendants mistakenly argue, without citing any case law in support thereof, that Rule 21 "is merely a mechanism for remedying either the misjoinder or nonjoinder of parties," and therefore to obtain relief under the Rule, "USAPA must show misjoinder." (Doc. # 48 at 1). This is an incorrect statement of law. Rule 21 has *not* been interpreted in the restrictive manner suggested by the defendants – in fact, recent

[1] *See* Motion to Dismiss the *Addington* defendants' cross-claim. (Doc. # 50).

case law expressly holds otherwise:

> Rule 21 of the Federal Rules of Civil Procedure provides that, "on motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against any party." Similarly, a district court has broad discretion in deciding whether to sever a party or claim pursuant to Rule 21. Although Rule 21 is most commonly invoked to sever parties improperly joined under Rule 20, "**the Rule may also be invoked to prevent prejudice or promote judicial efficiency**."

Gary v. Albino, 2010 U.S. Dist. LEXIS 61380, at * 8 (D.N.J. June 21, 2010) (citations omitted) (emphasis added). *See also Robinson v. Swedish Health Serv.*, 2010 U.S. Dist. LEXIS 29047, at *11 (W.D. Wash. Mar. 4, 2010) (*citing* Wright, Miller & Kane, *Federal Practice & Procedure* § 1682 (3d ed.)) ("The application of Rule 21 has not been limited to cases in which parties were erroneously omitted from the action or technically misjoined contrary to one of the party joinder provisions in the federal rules."); *Rohr v. Metro. Ins. & Cas. Co.*, 2007 U.S. Dist. LEXIS 3612, at *4 (E.D. La. Jan. 17, 2007) (*citing United States v. O'Neil*, 709 F.2d 361, 368 (5th Cir. 1983)) (a "district court is not limited under Rule 21 to remedying misjoinder; its discretion 'is not so limited.'").

Based on the false premise that Rule 21 is limited solely to remedying misjoinder or nonjoinder, the defendants limited their response to arguing that they are properly joined under Rules 19 and 20, and therefore the Rule 21 relief requested by USAPA is not warranted. However, as set forth in the case law cited above, Rule 21 is also properly "invoked to prevent prejudice or promote judicial efficiency."

In addition to USAPA's arguments that the defendants have been misjoined,[2] USAPA detailed, in its Rule 21 motion, why the presence of the defendants is "inappropriate, problematic and prejudicial to USAPA," regardless of whether they were misjoined or not. (Doc. # 35 at 7-9). However, by erroneously limiting their analysis of Rule 21 solely to the issue of misjoinder, the defendants chose not to respond to, and therefore have waived any opposition to USAPA's arguments that prejudice and judicial efficiency, standing alone, warrant Rule 21 relief in these circumstances.

Moreover, with the frivolous filing of an unripe cross-claim, the defendants have substantiated USAPA's prediction, made in its Rule 21 motion, that the unnecessary presence of these defendants in this litigation would serve as an improper opportunity "to re-litigate their unripe DFR claim that was recently dismissed by the Ninth Circuit." (Doc. # 35 at 7). If allowed to remain in this litigation, the defendants will continue to burden this Court with improper attempts to revivify a claim, which the Ninth Circuit has dismissed as unripe. This conduct contravenes the entire concept of binding precedent,[3] and in so doing, undermines any semblance of judicial efficiency. *Fidelity Nat'l Fin., Inc. v. Friedman*, 2008 U.S. Dist. LEXIS 58533, at *21 (D. Ariz. Aug. 1, 2008) (*quoting* B. Cardozo, *The Nature of the Judicial Process* 149 (1921)) ("As Justice Cardozo so eloquently put it: 'The labor of judges would be increased almost to the

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[2] *See* Doc. # 35 at pp. 4-6.

[3] "The binding precedent rule, that lower courts must follow the holdings of their court of appeals and the Supreme Court, affords a lower court no discretion where a higher court has already decided the issue before it." *Troff v. State of Utah*, 329 B.R. 85, 100 (D. Utah 2005) (*citing Johnson v. DeSoto County Bd. of Comm'rs*, 72 F.3d 1556, 1559 n.2 (11th Cir. 1996)).

breaking point if every past decision could be reopened in every case …"). Therefore, this Court is well within its broad discretion under Rule 21 to drop the *Addington* defendants from this litigation based on these prudential concerns – whether the defendants were misjoined or not.

2) **The Response Invents a Legally Non-Existent "DFR-Cooperation Claim" in Order to Avoid Application of the Actual Hybrid DFR Standard, Which Requires Collusion.**

The *Addington* defendants assert that a court has jurisdiction over a coercive claim, which they refer to as a "DFR-Cooperation Claim." They go on to declare that Counts II and III "assume or test the DFR-Cooperation theory of liability" (doc. # 48 at 3), and from this they reason that they are "properly named" because they have "standing to bring a coercive DFR-Cooperation claim against US Airways." (Doc. # 48 at 5). The defendants misstate the law of hybrid DFR liability:

First, no court has ever approved of a "DFR-Cooperation claim," nor is any such claim referenced in the two cases cited by the defendants. (Doc. # 48 at 3). *Collusion* is the standard, not mere cooperation. The *American Postal Workers* case[4] cited by defendants, in fact, affirmed *dismissal* of all DFR claims; the only claim upheld concerned a union LMRDA violation arising from improper denial of a ratification vote. The court in *American Postal Workers* found no employer liability. There is no mention of a "cooperative" DFR claim. The quote from the case upon which defendants rely (Doc. # 48 at 4) is not only incorrectly cited,[5] it is misleading because it was taken

[4] *Am. Postal Workers Union v. Transamerica Airlines, Inc.*, 817 F.2d 510 (D.C. Cir. 1981).
[5] The quote is mis-cited, the actual language is found on 665 F.2d 1109 (not 1104 n. 18).

wholly out of context. Nothing in that quote or its context states or implies that merely signing a contract knowing a union member will sue over it creates joint liability. What the court said after the quoted language was, "None of these cases aid appellant's cause [i.e., employer liability]." 665 F.2d 1109. What the court said before it was that, "in all such cases [where employers shared liability with the union], however, the employer *somehow acted improperly* and infringed the rights of the individual aggrieved employees..." *Id*. Even the language cherry-picked by defendants requires more than an employer's knowing acquiescence; rather the employer must be guilty of "discriminatory action." *Id*. Indeed, *American Postal Workers* stands for the proposition that even where a bargaining employer *knew* the union did not intend to provide a ratification vote – the basis for a DFR suit and finding of union liability in that case – the employer not only had no liability, it had no duty. 665 F.2d at 1109 n. 25.[6]

The *Davenport* case[7] involved another suit over whether the union had to provide a ratification vote. Neither union nor employer was found liable. There is no mention, or discussion of, a "cooperative" DFR claim. Although the plaintiffs in *Davenport* had argued that the employer could be liable merely for signing an agreement knowing that some members insisted on a ratification vote, the district court rejected that argument as insufficient to subject the employer to liability. 166 F.3d at 364 (liability was not "obvious" enough even though the employer had been advised of a "colorable claim" in

[6] This Court may also take note of the *American Postal Workers* court's comment in rejecting the DFR claim, *apropos* of the *Addington* cross-claim, that mere "dissatisfaction with the outcome [of bargaining], though unfortunate, does not by itself suggest inadequacy in the union's performance ..." 665 F.2d at 1107.

[7] *Davenport v. Int'l Bhd. of Teamsters*, 166 F.3d 356 (D.C. Cir. 1999).

the making). On appeal, the *Davenport* court did not rule on that issue, but it affirmed the district court's ruling and in dicta cast strong doubt on plaintiffs' theory. 166 F.3d at 361-5. Moreover, it went further, noting:

> [E]ven assuming that an employer can be implicated in a union's breach of the duty of fair representation merely by implementing an agreement with knowledge of that breach, we cannot find clearly erroneous the district court's conclusion that Northwest had no such knowledge.

166 F.3d at 364. Here, the most 'knowledge' that US Airways could have is the law of this case, which is that any Nicolau CBA "would undoubtedly be rejected by [USAPA] membership," and that "USAPA's final proposal may yet be one that does not work the disadvantages [the West pilots] fear, even if that proposal is not the Nicolau Award." *Addington*, 606 F.3d at 1180-81. Thus, there is no legal authority for the proposition that merely signing a contract knowing some union members might sue over it makes the employer subject to a hybrid DFR claim – particularly where the *Addington* defendants have waived their right to proceed before the System Board, which has exclusive jurisdiction over their contract based claims.[8]

Second, what the courts *have* recognized are a species of DFR hybrid suits based on "collusion" between union and employer. *See e.g.*, *Hodges. v. Atchison, Topeka & Santa Fe Ry. Co.*, 728 F.2d 414 (10th Cir.), *cert. denied*, 469 U.S. 822 (1984); *Steffens v BRAC*, 797 F.2d 442, 445 (7th Cir. 1986); *Masy v. New Jersey Transit Rail, Inc.*, 790 F.2d 322 (3d Cir. 1986). Under this standard, there must be something more than mere participation in collective bargaining to make an employer jointly liable for a union's

[8] *See infra* at 9-10. *See also* Doc. # 49 at 8-9; Doc. # 50 at 11-13.

breach, more than mere 'knowing acquiescence' to state a hybrid DFR collusion claim. Instead, there must be *some element of employer misconduct* such as conspiracy, collusion, hostility, bad faith, or intent to harm. *See e.g.*, *Crusos v. United Transp. Union, Local 1201*, 786 F.2d 970, 973 (9th Cir. 1986), *cert. denied*, 479 U.S. 934 (1986) ("appellant's allegations are merely conclusory, as they fail to allege any act demonstrating a conspiracy between the Union and the Railroad"); *United Indep. Flight Officers v. United Airlines*, 572 F. Supp. 1494, 1509 (N.D. Ill. 1983), *aff'd*, 756 F.2d 1274 (7th Cir. 1985) (without showing conspiracy or collusion, an airline's "mere participation in collective bargaining negotiations with [the pilots union], in which plaintiffs' proposal were not realized, is not sufficient to hold [airline] liable" under hybrid DFR theory); *Masy*, 790 F.2d at 327 (rejecting collusion claim on bare "conclusory" allegation of "community of purpose"); *Raus v. Brotherhood Ry. Carmen*, 663 F.2d 791, 797-98 (8th Cir. 1981) ("we hold that where there are good faith allegations and facts supporting those allegations indicating collusion or otherwise tying the railroad and the union together in allegedly arbitrary, discriminatory or bad faith conduct amounting to a breach of the duty of fair representation, the district court has jurisdiction over the union on the fair representation claim and over the railroad on the contract violation claim"); *Rakestraw v. United Airlines, Inc.*, 765 F. Supp. 474, 493-94 (N.D. Ill. 1991), *aff'd in relevant part and rev'd in relevant part on other grounds*, 981 F.2d 1524 (7th Cir. 1992) (employer not liable for collusion with union in DFR claim for agreeing to union's seniority term, because employer was acting in response to union and not out of hostility to minority of pilot plaintiffs – even where union desired to

"punish" strike-breakers).

Third, there is no claim that US Airways even knows that there is, or will ever be, a breach of USAPA's duty. Indeed, accepting the Company's pleadings at face value, it does *not* know that, nor does it take a position. Rather, the Company alleges neutrality. Even if the Company's declaratory judgment action is dismissed, all it can ever know for sure is that disgruntled union members say they will sue. But a reasonable reading of the law of this case, as well as the law in the Ninth Circuit and beyond, is that date-of-hire is not only reasonable, it has been repeatedly upheld under challenge as the standard by which all other methods of seniority integration are to be judged.[9] Moreover, the type of DFR claim advanced by the *Addington* defendants has been repeatedly rejected. *See Hardcastle v. Western Greyhound Lines*, 303 F.2d 182, 187 (9th Cir. 1962); *Merritt v. IAM*, 613 F.3d 609, 188 L.R.R.M. 3227, *20 (6th Cir. July 22, 2010) ("mere fact that a seniority system in a collective bargaining agreement favors one group more than another does not in itself constitute a breach of the union's duty").

Fourth, the defendants have invented the "cooperation" standard in tacit recognition of the fact that they cannot satisfy the collusion standard actually applied by the federal courts. Under defendants' invented cooperation standard, US Airways would be liable merely for its "knowing acquiescence" – or in plainer terms, for signing a contract that it knew did not contain the Nicolau list – rather than the "overt employer collusion" required under federal law. The invented cooperation standard, if adopted,

[9] *Laturner v. Burlington N., Inc.*, 501 F.2d 59, 599 (9th Cir. 1974), *cert denied*, 419 U.S. 1109 (1975) (*citing Humphrey v. Moore*, 375 U.S. 335, 347 (1964)); *Truck Drivers & Helpers, Local Union 568 v. NLRB*, 379 F.2d 137,143 n. 10 (D.C. Cir. 1967)).

would allow any disgruntled union member to hold collective bargaining hostage, allowing frivolous lawsuits, or the mere threat of them, to alter the outcome of bargaining.

3) **The Addington Defendants' Rule 21 Arguments Highlight Why They Have No Colorable Coercive Claim and Therefore Why They Should Be Dropped from this Action.**

The *Addington* defendants correctly note that jurisdiction for declaratory relief exists "only 'if the declaratory judgment defendant could have brought a coercive action in federal court to enforce its rights.'" (Doc. # 48 at 2) (citing cases). However, the arguments set forth in defendants' Rule 21 response actually serve to highlight exactly why there are no colorable coercive claims underlying the present request for declaratory relief – especially as it relates to the *Addington* defendants:

First, the defendants assert that the Company's claims seek to determine Company liability, not USAPA's liability, as did the defendants' dismissed, unripe DFR claim and as does their cross-claim. This misreads the plain allegations of the Complaint. Counts I and II expressly seek a declaration by this Court as to whether USAPA is violating its duty of fair representation solely by omission or inclusion of the Nicolau list, exactly the heart of the *Addington* suits. (Doc. # 1, at ¶¶ 39, 48). Beyond that, the Company merely seeks advice on whether, depending on *USAPA's DFR liability*, the Company would be "prohibited from accepting or implementing a non-Nicolua list" (*Id*. ¶ 39). There can be no question of the Company's contract liability because that claim has already been litigated before this Court, which dismissed the claim as a "minor dispute" over which the System Board had exclusive jurisdiction.

Addington v. US Airline Pilots Ass'n, 588 F. Supp. 2d 1051, 1063 (D. Ariz. 2008). The *Addington* defendants subsequently waived this claim by declining to proceed with the duly scheduled System Board arbitration.[10] Count III improperly seeks judicial immunity – and expressly demands as much without *either* Count I or II (claims over which this Court has no jurisdiction) being decided. (*Id*. ¶ 59).

Second, the defendants admit that they "and US Airways both assert claims that arise out of the same event—USAPA's *adoption* and *promotion* of a date-of-hire seniority scheme" (Doc. # 48 at 8) (emphasis added). But this is *exactly* the claim that the Ninth Circuit considered and rejected as unripe. The mere adoption and promotion of a seniority proposal does not create a ripe claim. Rather, complete negotiation and membership ratification are required. *Addington*, 606 F.3d at 1180 ("these contingencies make the claim speculative."). In fact, the Ninth Circuit expressly rejected the argument that the mere *promotion* of a seniority proposal created a ripe controversy and does so *in this case*:

> Although we do not hold that a DFR claim based on a union's promotion of a policy is never ripe until that policy is effectuated, we conclude that, in this case, there is too much uncertainty standing in the way of effectuation of [the West pilots' alleged] harm to warrant judicial intervention at this stage.

Id. at 1181. By describing their claim and the Company's claim as arising from "USAPA's adoption and promotion of a date-of-hire seniority list," the defendants invite this Court to ignore the Ninth Circuit's holding that a DFR "claim can be brought only after negotiations are complete and a 'final product' has been reached." *Id*. at 1182.

[10] *See* Doc. # 33 at pp. 5-8 (waiver of arbitration). *See also* Doc. # 50 at pp. 11-13.

Third, defendants mistakenly claim that USAPA engaged in bad faith DFR conduct by "cast[ing] aside the Nicolau Award and adopt[ing] and promot[ing] its date-of-hire seniority list (Doc. # 48 at 8). However, such allegation of bad faith fails as a matter of law, because "[t]o establish that the union's exercise of judgment was in bad faith, the plaintiff must show substantial evidence of fraud, deceitful action or dishonest conduct." *Beck v. United Food & Commercial Workers Union*, 506 F.3d 874, 880 (9th Cir. 2007); *Spellacy v. Airline Pilots Ass'n-Int'l*, 156 F.3d 120, 126 (2d Cir. 1998); *Int'l Union of Electronic Workers v. NLRB*, 41 F.3d 1532, 1537 (D.C. Cir. 1994). No such allegations of fraud, deceitful action or dishonesty exist here.

IV. CONCLUSION

USAPA respectfully requests that this Court grant its motion and order that the *Addington* defendants be dropped from this action.

Respectfully Submitted,

Dated: September 30, 2010

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

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CERTIFICATE OF SERVICE

Case No. 2:10-CV-01570-PHX-ROS

I hereby certify that on this day of September 30, 2010, I electronically transmitted the foregoing document and all its attachments to the U.S District Court Clerk's Office using the ECF System for filing and transmittal.

By: ***/s/ Lucas K. Middlebrook, Esq.***