THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION NO.: 3:14-CV-577-RJC-DCK

US AIRLINE PILOTS ASSOCIATION, Plaintiff, vs. ROGER VELEZ, on behalf of himself and all similarly situated former America West Pilots, and LEONIDAS, LLC, Defendants.	)	**REPLY BRIEF WITH RESPECT TO USAPA'S CROSS MOTION FOR JURISDICTIONAL DISCOVERY**

Pursuant to Local Rule 7.1(c), plaintiff US Airline Pilots Association ("USAPA" or "the Association") submits this Reply Brief in reply to Defendants' Brief in Opposition to USAPA's Cross Motion for Jurisdictional Discovery (Doc. 27).

INTRODUCTION

As the adage goes, the litigant with neither facts nor law in its favor pounds the table. This adage is apposite with respect to defendants' response to the cross motion for jurisdictional discovery: in the absence of persuasive factual and legal arguments to oppose the application, defendants instead "pound the table", interjecting matters in response to USAPA's application – including references to years-old lawsuits concerning seniority -- including two cases that were initiated by the pilots Mr. Velez purports to represent and which were directed and supported financially by Leonidas that they lost -- that are wholly irrelevant to the question at bar. Moreover, there can be no doubt that this vociferation is intended to deflect attention from a critical inconsistency in their argument – railing that jurisdictional discovery is a waste of time

and money when it results from their decisions to contest jurisdiction by moving to dismiss the complaint in the first instance. As shown in detail below, these tactics must fail.

I. Plaintiff's proffer of facts relating to defendants' contacts is sufficient basis for the Court to allow discovery of additional facts related to the jurisdictional questions raised by defendants in their motions to dismiss

In keeping with a decided pattern of argument, in reaching to find a basis to object to jurisdictional discovery, defendants attempt to have things both ways. On the one hand they contest the Court's exercise of personal jurisdiction over them, but supplied no competent information (by way of affidavit or declaration) supporting their positions that they lack sufficient contacts with North Carolina. On the other hand, when plaintiff adduced facts based on the limited information within its control, defendants deride this showing as "*ad nauseum*" (Doc. 27, at 3), but go on to suggest that plaintiff has failed to make a sufficient *prima facie* showing of jurisdiction such that courts look to when ordering discovery to adduce additional facts bearing on the jurisdictional questions.[1] *See, e.g.*, *FrenchPorte IP, LLC v. Martin Door Mfg., Inc.,* 2014 WL 4094265 (D. Md. Aug. 14, 2014). Discovery should be allowed here since USAPA has shown through Mr. Streble's November 24, 2014 declaration ("the bulk" of which defendants do not dispute) that assertion of personal jurisdiction is not plainly frivolous, and because there may be additional facts that would enable the Court to resolve the personal jurisdiction question.

Nor is there any merit to defendants' argument that plaintiff is in possession of all the facts concerning defendants' contacts with North Carolina or has equal access to such facts.

[1] See, e.g. Doc. 7-1, Memorandum of Law in Support of Roger Velez's Motion to Dismiss, at 5, characterizing Velez's contact with North Carolina as "isolated"; Doc. 8-1, Memorandum In Support of Leonidas' Motion to Dismiss, at 7, arguing Leonidas lacks sufficient contacts with North Carolina to support general jurisdiction.

Plaintiff adduced numerous facts concerning defendants' contacts with North Carolina (Doc. 21-1, Declaration of Rob Streble), but has made no assertion that these are *all* of the facts that exist relevant to Mr. Velez's contacts with the State. For example, while plaintiff's Secretary-Treasurer, by review and reference to relevant records, has ascertained instances when Mr. Velez was present in North Carolina in connection with official USAPA business (see Doc. 21-1, ¶11), plaintiff has no knowledge as to whether Mr. Velez was present in North Carolina relating to USAPA matters but did not enter an official appearance on the record of proceedings. Thus, even with respect to the basis for specific jurisdiction over Mr. Velez, there is simply no merit to the argument that USAPA's official records necessarily contain all of the material facts.[2]

The holding of *FrenchPorte IP* applies with equal, if not greater, force with respect to Leonidas. In its memorandum in support of the motion to dismiss, Leonidas makes the unsupported assertion that "at no time has it ever done business in North Carolina." Doc. 8-1, at 7. In opposing Leonidas's motion to dismiss, USAPA put forth information contradicting this assertion, notably that it made solicitations for financial support from US Airways pilots who reside in North Carolina. Leonidas has not denied making these solicitations, choosing instead to attack USAPA's basis for this allegation. Doc. 30, at 7.

Here, like in *FrenchPorte IP*, USAPA has met its burden of showing these is a non-frivolous basis to assert jurisdiction over Leonidas and due to defendants' gamesmanship in its demand to have it all ways -- by denying the sufficiency of contacts but failing to provide the

[2] Here too, defendants argue inconsistent positions; on the one hand arguing plaintiff is in possession of all of the facts that bear on jurisdiction and on the other hand, stating "the bulk of the jurisdictional facts alleged by plaintiffs are not in dispute" (Doc. 27, at 4), meaning, of course, they dispute some of the facts plaintiff has alleged. To be sure, Mr. Velez's ready acceptance of some of the facts relating to his contacts to North Carolina put forth by plaintiff (even while having failed to put forward any jurisdictional information on his own), strongly suggests he is acceding to a sub-set of facts to avoid disclosure of other information, more damaging to his position.

Court with any facts in support of its position – jurisdictional discovery is the only means to develop the facts to resolve the jurisdictional question that defendants initiated. For example, USAPA avers Leonidas has engaged in a systematic course of solicitation of contributions from US Airways pilots residing in North Carolina and discovery of email and mail contacts with pilots residing in North Carolina would certainly be relevant to the jurisdictional question. Similarly, as alleged in the complaint (Doc. 21-1, ¶¶14, 77), given Leonidas's support for the two prior lawsuits initiated by the group of pilots Mr. Velez purports to represent, it is highly probable that Leonidas has provided and/or will provide support for the actions threatened in Mr. Velez's September 12, 2014 letter, which lie at the heart of this action.[3]

The bottom line is defendants' desire to avoid discovery at all costs (even allowing the Court to rely on an undefined portion of the facts put forth by plaintiff while apparently disputing another undefined portion of the Plaintiff's factual presentation) is not the same as plaintiff or the Court having *all* the facts that bear on the jurisdictional defense that they raised. Nor is there any reason to accept at face value defendants' argument that they are concerned about the expense involved: after all, they are the ones who raised the jurisdictional defenses in the first instance. Not only do the facts put forward by plaintiff meet the minimal threshold ("non-frivolous") to adduce additional facts relating to jurisdiction, given defendants' contradictory positions (including raising the jurisdictional defense in the first instance), they should be estopped to assert there is no need for discovery.

[3] Mr. Velez's September 12, 2014 letter was followed by a "litigation hold" letter dated September 16, 2014, issued by present counsel for defendants for litigation related to the demands contained said September 12, 2014 letter.

II. Defendants have failed to rebut plaintiff's legal authorities.

Defendants expend considerable energy attacking plaintiff's citation to *Rich v. KIS Cal., Inc.,* 121 F.R.D. 254 (M.D.N.C. 1988), and attempt to distinguish *Rich* on the facts. Defendants have failed to do so.

Plaintiff quoted *Rich* for the proposition that, "[w]hen plaintiff can show that discovery is necessary in order to meet defendant's challenge to personal jurisdiction, a court should ordinarily permit discovery on that issue unless plaintiff's claim appears to be clearly frivolous." *Id.*, at 259. The court in *Rich* found a basis existed to allow discovery as to a corporate defendant (KIS France) but did not permit discovery as to an individual defendant, Serge Crasnianski. Wholly unlike the case at bar, as to Mr. Crasnianski, the court found that plaintiffs had not identified any basis for concluding the court had personal jurisdiction over him, noting that Mr. Crasnianski stated he had never been in North Carolina, nor did he have any contacts, business or personal with the State. *Id.*, at 259. Accordingly, plaintiffs had not made even a preliminary prima facie showing with respect to jurisdiction.

Those facts stand in stark contrast with respect to the preliminary *prima facie* showing of contacts of both Mr. Velez and Leonidas with North Carolina. It was significant to the court in *Rich* that Mr. Crasnianski has never set foot in North Carolina. Not so Mr. Velez. The court noted Mr. Crasnianski had no contacts with the State, business or personal. Not so Mr. Velez (e.g., attendance at BPR meetings as a member or designated representative to transact business of the association, September 12, 2014 demand letter implicating money and activities located in North Carolina), nor Leonidas (e.g., systematic solicitation of money to individuals residing in North Carolina, presence of managers in North Carolina). The very facts (i.e. lack of contacts)

that the court in *Rich* relied upon to deny discovery are present here (the "bulk" of which are not disputed). Accordingly, defendants have failed to rebut plaintiff's reliance on *Rich* that a prima facie basis has been shown for the court to exercise jurisdiction over defendants such that discovery is appropriate to enable plaintiff to meet defendants' challenge to personal jurisdiction.

Defendants take a different, but equally unavailing, approach with respect to other authorities cited by plaintiff -- mischaracterization of the rulings. For example, defendants argue that "other" cases cited by plaintiff "reiterate the principle that the need for jurisdictional discovery must be substantial" (Doc. 27, at 7), citing *Penn Va. Operating Co., LLC v. Equitable Prod. Co.,* 466 F. Supp. 2d 718 (W.D. Va. 2006), *Mylan Labs., Inc. v. Akzo, N.V.,* 2 F.3d 56 (4th Cir. 1993), *Erdmann v. Preferred Research, Inc. of Ga.,* 852 F.2d 788 (4th Cir. 1988) and *McLaughlin v. McPhail*, 707 F.2d 800 (4th Cir. 1983). *Id.*

In fact, none of the cited cases stands for the proposition that the need for jurisdictional discovery must be *substantial*. And while jurisdictional discovery was not allowed in all cases, those cases, by contrast with the facts of the case at bar, demonstrate discovery is warranted here as plaintiff has made the necessary prima facie showing that both defendants have substantial contacts with North Carolina. *See, e.g. Carefirst of Maryland Inc. v. Carefirst Pregnancy Centers Inc.*, 334 F.3d 390, 403 (4th Cir. 2003)(cited by *Penn Va. Operating Co., LLC v. Equitable Prod. Co.*), where the court affirmed denial of jurisdictional discovery because plaintiff made only "bare allegations in the face of specific denials made by defendants". By contrast here, not only has plaintiff made a showing of defendants' significant contacts with North Carolina, defendants have not denied such contacts (recall defendants do not dispute the "bulk of" these facts) as did the defendant in *Carefirst*.

Finally, there is simply no merit to defendants' contention that jurisdictional discovery is *a priori* limited to what they call "complex" matters, such as products liability cases. Doc. 27, at 7-8. It is sufficient, as here, that defendant has contested jurisdiction and further, as here, that plaintiff has made a prima facie showing that the assertion of jurisdiction is not frivolous and additional facts may be useful in the Court's determination of the jurisdictional question. As all of those factors are present here, jurisdictional discovery is appropriate.

CONCLUSION

For the reasons set forth above, defendants have failed to rebut the showing that USAPA is entitled to jurisdictional discovery with respect to their motions to dismiss for lack of personal jurisdiction. USAPA's cross-motion for jurisdictional discovery should be granted.

This the 2nd day of January 2015.

TIN FULTON WALKER & OWEN
s/ John Gresham
John Gresham
N.C. State Bar No. 6647
301 East Park Avenue
Charlotte, NC 28203
(704) 338-1220

O'DWYER & BERNSTIEN, LLP
Brian O'Dwyer (admitted *pro hac vice*)
Gary Silverman (admitted *pro hac vice*)
Joy K. Mele (admitted *pro hac vice*)
Zachary Harkin (admitted *pro hac vice*)
52 Duane Street, 5th Floor
New York, NY 10007
(212) 571-7100

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing BRIEF IN OPPOSITION TO DEFENDANTS ROGER VELEZ'S AND LEONIDAS' MOTIONS TO DISMISS AND IN SUPPORT OF USAPA'S CROSS-MOTION FOR JURISDICTIONAL DISCOVERY with the Clerk of the Court using the CM/ECF system, and that notification pursuant to the CM/ECF system will be sent to:

C. Grainger Pierce, Jr.
NEXSEN PRUET, PLLC
227 West Trade Street, Suite 1550
Charlotte, NC 28202

This the 29th day of December, 2014.

s/ John W. Gresham
John W. Gresham, N.C. Bar No. 6647
301 East Park Avenue
Charlotte, NC 28203
(704) 338-1220