IN 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,	)	
	)	
v.	)	**MEMORANDUM AND RECOMMENDATION AND ORDER**
	)	
	)	
	)	
ROGER VELEZ, on behalf of himself and all similarly situated former America West Pilots, and LEONIDAS, LLC,	)	
	)	
	)	
Defendants.	)	
	)	

THIS MATTER IS BEFORE THE COURT on "Defendant Roger Velez's Motion To Dismiss For Lack Of Personal Jurisdiction" (Document No. 7); "Defendant Leonidas' Motion To Dismiss For Lack Of Personal Jurisdiction And For Failure To State A Claim Upon Which Relief Can Be Granted" (Document No. 8); "Plaintiff's Motion To Remand" (Document No. 19); "Plaintiff's Motion For Jurisdictional Discovery As To Defendants Velez And Leonidas" (Document No. 24); "Plaintiff's Motion For Leave To Amend The Complaint, Or In the Alternative, To Supplement The Complaint" (Document No. 33); and Plaintiff's "Request For Hearing On Pending Motions" (Document No. 34).

These motions have been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b), and immediate review is appropriate. Having carefully considered the motions, the record, and applicable authority, the undersigned will: grant Plaintiff's requests to conduct jurisdictional discovery and to file an Amended Complaint; deny the requests to remand and for

a hearing without prejudice to re-file; and will respectfully recommend that the motions to dismiss be denied without prejudice to re-file.

BACKGROUND

Plaintiff US Airline Pilots Association ("Plaintiff" or "USAPA") filed its original "Complaint For Declaratory Judgment" (Document No. 1-1) against Defendants Roger Velez ("Velez") and Leonidas, LLC ("Leonidas") (together, "Defendants") on September 16, 2014, in the Superior Court of Mecklenburg County, North Carolina. On October 16, 2014, Defendants filed their "Notice Of Removal" (Document No. 1) with this Court. The "Notice Of Removal" asserts that this Court "has original jurisdiction over this action pursuant to 28 U.S.C. § 1332(a)" and "original federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331." (Document No. 1, pp.2-3). A week later, on October 23, 2014, Defendant Velez moved to dismiss for lack of personal jurisdiction pursuant to Fed.R.Civ.P. 12(b)(2), and Defendant Leonidas moved to dismiss for lack of jurisdiction pursuant to Fed.R.Civ.P. 12(b)(2) and failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6). (Document Nos. 7 and 8).

On November 17, 2014, "Plaintiff's Motion To Remand" (Document No. 19) was filed, asserting that this Court lacks subject matter jurisdiction and federal question jurisdiction. Plaintiff then filed its "…Motion For Jurisdictional Discovery…" (Document No. 24) on December 1, 2014. Most recently, on February 11, 2015, Plaintiff filed requests for leave to amend the Complaint and for a hearing on all the pending motions. (Document Nos. 33 and 34). The pending motions are now ripe for review and disposition.

The undersigned further notes that Defendant Velez filed a "Notice Of Related Action" (Document No. 37) informing the Court that Bollmeier v. Hummel, 3:15cv111-RJC-DCK, was

deemed filed as of February 23, 2015, and that "the newly filed action relates to this case, including but not limited to the issue of federal question jurisdiction."

STANDARDS OF REVIEW

A party invoking federal court jurisdiction has the burden of establishing that personal jurisdiction exists over the defendant. New Wellington Fin. Corp. v. Flagship Resort Dev. Corp., 416 F.3d 290, 294 (4th Cir. 2005); Combs v. Bakker, 886 F.2d 673, 676 (4th Cir. 1989).

> When a court's personal jurisdiction is properly challenged by a Rule 12(b)(2) motion, the jurisdictional question thus raised is one for the judge, with the burden on the plaintiff ultimately to prove the existence of a ground for jurisdiction by a preponderance of evidence. . . . [W]hen, as here, the court addresses the question on the basis only of motion papers, supporting legal memoranda and the relevant allegations of a complaint, the burden on the plaintiff is simply to make a prima facie showing of a sufficient jurisdictional basis in order to survive the jurisdictional challenge. In considering a challenge on such a record, the court must construe all relevant pleading allegations in the light most favorable to the plaintiff, assume credibility, and draw the most favorable inferences for the existence of jurisdiction.

Combs, 886 F.2d at 676. (internal citations omitted). "Mere allegations of in personam jurisdiction are sufficient for a party to make a prima facie showing." Barclays Leasing, Inc. v. National Business Systems, Inc., 750 F.Supp. 184, 186 (W.D.N.C. 1990). The plaintiff, however, "may not rest on mere allegations where the defendant has countered those allegations with evidence that the requisite minimum contacts do not exist." IMO Industries, Inc. v. Seim S.R.L., 3:05-CV-420-MU, 2006 WL 3780422 at *1 (W.D.N.C. December 20, 2006). "Rather, in such a case, the plaintiff must come forward with affidavits or other evidence to counter that of the defendant . . . factual conflicts must be resolved in favor of the party asserting jurisdiction...." Id.

Rule 26 of the Federal Rules of Civil Procedure provides that:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense--including the

> existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Fed.R.Civ.P. 26(b)(1). The rules of discovery are to be accorded broad and liberal construction. See Herbert v. Lando, 441 U.S. 153, 177 (1979); and Hickman v. Taylor, 329 U.S. 495, 507 (1947). However, a court may "issue an order to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense." Fed.R.Civ.P. 26(c)(1).

Federal Rule of Civil Procedure 15 applies to the amendment of pleadings and allows a party to amend once as a matter of course within 21 days after serving, or "if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." Fed.R.Civ.P. 15(a)(1). Rule 15 further provides:

> **(2) Other Amendments.** In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

Fed.R.Civ.P. 15(a)(2).

Under Rule 15, a "motion to amend should be denied only where it would be prejudicial, there has been bad faith, or the amendment would be futile." Nourison Rug Corporation v. Parvizian, 535 F.3d 295, 298 (4th Cir. 2008) (citing HCMF Corp. v. Allen, 238 F.3d 273, 276-77 (4th Cir. 2001); see also, Foman v. Davis, 371 U.S. 178, 182 (1962). However, "the grant or denial of an opportunity to amend is within the discretion of the District Court." Pittston Co. v. U.S., 199 F.3d 694, 705 (4th Cir. 1999) (quoting Foman, 371 U.S. at 182).

DISCUSSION

After careful consideration of the motions and the record, the undersigned finds good cause to allow some jurisdictional discovery, and then to allow Plaintiff to file an Amended Complaint. Although this matter has been pending for several months, it is still in the earliest stages of litigation. There has been no initial attorney's conference, apparently no discovery has taken place, and Plaintiff has not sought to amend its Complaint since it was originally filed in state court. The undersigned is not persuaded that there is sufficient evidence of prejudice, bad faith, or futility to outweigh the policy favoring granting leave to amend. In addition, it appears to be in the best interests of efficiency in this litigation, as well as judicial economy, to allow limited discovery and then amendment of the Complaint.

In determining that discovery is appropriate here, the undersigned has been guided by the standard cited above calling for "broad and liberal construction" of the discovery rules. In addition, the undersigned finds the following caselaw instructive: Mylan Laboratories, Inc. v. Akzo, N.V., 2 F.3d 56, 64 (4th Cir.1993) (quoting In re Multi–Piece Rim Prods. Liab. Litig., 653 F.2d 671, 679 (D.C.Cir. 1981) ("district courts 'have broad discretion in [their] resolution of discovery problems that arise in cases pending before [them]' . . . limited discovery may be warranted to explore jurisdictional facts in some cases"); Rich v. KIS California, Inc., 121 F.R.D. 254, 259 (M.D.N.C. 1988) ("When 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"); Celgard, LLC v. SK Innovation Co., Ltd., 3:13cv254-MOC, 2013 WL 7088637, at *6 (W.D.N.C. Nov. 26, 2013) ("Plaintiff is entitled to conduct limited jurisdictional discovery"); and Title Trading Services USA, Inc. v.

Kundu, 3:14cv225-RJC, Document No. 91 (W.D.N.C March 30, 2015) (allowing jurisdictional discovery limited to personal jurisdiction issues).

Because the undersigned will order Plaintiff to file an Amended Complaint which will supersede the original Complaint, the undersigned will respectfully recommend that Defendants' motions to dismiss (Document Nos. 7 and 8) be denied as moot. This recommendation is without prejudice to Defendants filing renewed motions to dismiss the Amended Complaint, if appropriate.

It is well settled that a timely-filed amended pleading supersedes the original pleading, and that motions directed at superseded pleadings may be denied as moot. Young v. City of Mount Ranier, 238 F. 3d 567, 573 (4th Cir. 2001) ("The general rule ... is that an amended pleading supersedes the original pleading, rendering the original pleading of no effect."); see also, Colin v. Marconi Commerce Systems Employees' Retirement Plan, 335 F.Supp.2d 590, 614 (M.D.N.C. 2004) ("Earlier motions made by Defendants were filed prior to and have been rendered moot by Plaintiffs' filing of the Second Amended Complaint"); Turner v. Kight, 192 F.Supp. 2d 391, 397 (D.Md. 2002) (quoting 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1476 (2d ed. 1990) ("A pleading that has been amended ... supersedes the pleading it modifies .... Once an amended pleading is interposed, the original pleading no longer performs any function in the case."); Brown v. Sikora and Associates, Inc., 311 Fed.Appx. 568, 572 (4th Cir. Apr. 16, 2008); and Atlantic Skanska, Inc. v. City of Charlotte, 3:07-CV-266-FDW, 2007 WL 3224985 at *4 (W.D.N.C. Oct. 30, 2007).

ORDER AND RECOMMENDATION

IT IS, THEREFORE, ORDERED that "Plaintiff's Motion To Remand" (Document No. 19) is **DENIED WITHOUT PREJUDICE**.

IT IS FURTHER ORDERED that the "Plaintiff's Motion For Jurisdictional Discovery As To Defendants Velez And Leonidas" (Document No. 24) is **GRANTED**. Plaintiff may submit up to ten (10) interrogatories and five (5) requests for production of documents to each Defendant, and a total of two (2) notices of deposition, all related to personal jurisdiction in this matter, on or before **April 17, 2015**. This limited jurisdictional discovery shall be completed on or before **May 29, 2015**.

IT IS FURTHER ORDERED that "Plaintiff's Motion For Leave To Amend The Complaint, Or In the Alternative, To Supplement The Complaint" (Document No. 33) is **GRANTED**, **with modification**. Plaintiff shall file an Amended Complaint ***after*** the completion of jurisdictional discovery, but no later than **June 10, 2015**.

IT IS FURTHER ORDERED that Plaintiff's "Request For Hearing On Pending Motions" (Document No. 34) is **DENIED AS MOOT**.

IT IS RESPECTULLY RECOMMENDED that "Defendant Roger Velez's Motion To Dismiss For Lack Of Personal Jurisdiction" (Document No. 7) and "Defendant Leonidas' Motion To Dismiss For Lack Of Personal Jurisdiction And For Failure To State A Claim Upon Which Relief Can Be Granted" (Document No. 8) be **DENIED AS MOOT**, **without prejudice** to re-filing such motions, if appropriate, after the Amended Complaint is filed.

TIME FOR OBJECTIONS

The parties are hereby advised that pursuant to 28 U.S.C. § 636(b)(1)(C), and Rule 72 of the Federal Rules of Civil Procedure, written objections to the proposed findings of fact, conclusions of law, and recommendation contained herein may be filed within **fourteen (14) days** of service of same. Responses to objections may be filed within fourteen (14) days after service of the objections. Fed.R.Civ.P. 72(b)(2). Failure to file objections to this Memorandum and

Recommendation with the District Court constitutes a waiver of the right to *de novo* review by the District Court. Diamond v. Colonial Life, 416 F.3d 310, 315-16 (4th Cir. 2005). Moreover, failure to file timely objections will preclude the parties from raising such objections on appeal. Diamond, 416 F.3d at 316; Page v. Lee, 337 F.3d 411, 416 n.3 (4th Cir. 2003); Snyder v. Ridenhour, 889 F.2d 1363, 1365 (4th Cir. 1989); Thomas v. Arn, 474 U.S. 140, 147-48 (1985), reh'g denied, 474 U.S. 1111 (1986).

IT IS SO ORDERED AND RECOMMENDED.

Signed: April 2, 2015

David C. Keesler
United States Magistrate Judge