**No. 22-16280**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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KEVIN E. BYEBEE; et al.,

*Plaintiffs-Appellants*,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, a labor organization; et al.,

*Defendants-Appellees*.

On Appeal from the United States District Court
for the Northern District of California
No. 18-cv-06632-JD
Honorable James Donato

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# PETITION FOR REHEARING AND REHEARING EN BANC

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## INTRODUCTION AND RULE 35B STATEMENT

In counsel's judgment, the Panel's decision departs from settled precedents contravening controlling Supreme Court precedents and overlooks the material facts in the record. Rehearing and rehearing en banc of the Court's November 8, 2023 panel decision affirming the district court should be granted.

The Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 et seq, is a landmark federal statute governing labor relations in the railroad and airline industries to facilitate the important work of keeping the economy of the many states operating without fear of strikes over worker strife. Congress, in enacting this statute, sought to substitute bargaining and arbitration for strikes in handling labor disputes. Yet, Congress was clear that the statutory scheme was not intended to deprive those RLA-workers falling under its commands to surrender all other legal protections of law afforded but to them. Instead, the RLA sought alternative dispute resolution to further its main goal of efficient dispute resolution so as to not interrupt the levers of the national economy. While this mandatory remedial process is not without its weaknesses, the United States Supreme Court, in two seminal cases, Glover and Vaca v. Sipes, instructs RLA-workers just how to protect those preserved rights when failures from within threaten to deprive them of the RLA's protections. That guidance, along with the Ninth Circuit's own, provides a federal forum when the intended dispute resolution process has been repudiated or rendered futile or when

the union representation breaches its duty. The Panel's decision, if left in place, will reverse course, nullifying the RLA intentional reservation of individual RLA-worker rights to guard against conduct from their bargaining representative that is violative of their duty of fair representation and conduct from their employer in direct violation of the RLA statutory dictates. The Panel's decision also threatens the RLA remedial process as a whole. If RLA-workers can no longer wait for, or rely on, final decisions or completion of the CBA grievance process before they must make a decision to sue, not only will the arbitral forums be overloaded but so will the courts. And, if the Panel decision stands, the court will have effectively foreclosed any forum for these workers to access independently, rendering them powerless, by deciding these rights can be ignored, are in fact not enforceable, so long as the union and the employer deem it so. This deprivation is untenable in light of the RLA goals and the jurisprudence of courts, as well as principles of predictability, fairness, and efficiency. Because the Panel's decision will have deep impacts and consequences for all RLA-employees nationwide invoking protected statutory rights, this Court should grant the petition. This decision now sends a message to the hundreds of thousands of RLA-workers that those rights the RLA so carefully crafted its statutory scheme to protect will now be denied in favor of prioritizing the self-serving interests of the employer and the union to the workers detriment.

Perhaps even more untenable is the apparent heightened pleading standard the Panel's decision now imposes on a plaintiff filing a complaint. A complaint must now include allegations anticipating the defendants' affirmative defenses, allegations to defend against such defenses, and an appreciation (and preparation) for the pre-trial discovery processes to be rendered unavailable and disregarded without basis or recourse. The Panel's interpretation of the pleading and procedural processes of accrual, tolling, and timeliness cause several, far-reaching harms by upending broadly understood rules that a claim does not accrue until one knows or reasonably knew of an injury that is certain to cause harm. The Court should grant the petition for rehearing and reconsider this matter en banc.

## ARGUMENT

One of the principal purposes of the RLA is "to encourage the use of the non-judicial processes of negotiation, mediation and arbitration for the adjustment of labor disputes." Aircraft Serv. Int'l, Inc. v. Int'l Bhd. of Teamsters, 779 F.3d 1069, 1079 (9th Cir. 2015) (quotation omitted). On the Panel's reading, if an RLA-worker uses the RLA-statutorily required collective bargaining agreement ("CBA") grievance procedures, individually or with union representation, the statute of limitations for any possible claim related to defects in that process begins to run before the process has been completed or is even necessary. This misinterpretation and misapplication of the accrual of a claim and the running of a limitations period

under this circuit's precedents cannot stand. Additionally, in the Ninth Circuit, as a general rule, a court should not dismiss a complaint on limitations grounds unless a court can "determine with certainty" the limitations has run and "it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim." Supermail Cargo, Inc., v. United States, 68 F.3d 1204, 1207 (9th Cir. 1995). Accordingly, accrual of a claim is a question of material fact inappropriate for decision at the motion to dismiss stage. Kirchhof v. Hawaii Ass'n. of Union Agents, 187 F.Supp.3d 1181 (2016) (the exact timing of the accrual of the claims cannot be decided without factual development of the record). This framework should have guided the Panel's decision. But it did not.

## I. The Panel's Decision Misreads and Overlooks Material Facts and Fails to Apply This Circuit's Law.

Under federal law a cause of action accrues when the plaintiff is aware of the wrong and can successfully bring a cause of action. Archer v. Airline Pilots Ass'n Int'l, 609 F.2d 934, 937 (9th Cir.1979) (citations omitted). In the specific context of a breach of the duty of fair representation claim ("DFR") claim, "a cause of action does not accrue at the time plaintiff becomes aware of a wrong if, at that time, the plaintiff's damages are not certain to occur or too speculative to be proven." Acri v. Int'l Ass'n of Machinists, 781 F. 2d 1393, 1396 (9th Cir. 1986); *see also* Allen v. United Food & Commercial Workers Int'l Union, AFL-CIO, CLC, 43 F.3d 424, 428 (9th Cir. 1994) (an employee's DFR damage claim accrues when the employee

learns not only that there was a DFR breach but also that this breach is certain to cause him damages.). In a hybrid action, accrual begins on the date of the last action by the union or on the date damages become fixed and relatively certain. Archer v. Airline Pilots Ass'n., 609 F.2d 934 (9th Cir. 1979) (procedural history omitted). Final action is the point at which the grievance procedure was exhausted or otherwise broke down to the employee's disadvantage. The limitations period can start to run, however, before the completion of the CBA grievance process if an employer "makes it clear" it refuses to arbitrate. Local Joint Exec. Bd. v. Exber, Inc., 994 F.2d 674, 675-76 (9th Cir.1993) (to start a limitations period running, an "unequivocal, express rejection" of a request to arbitrate must be communicated; constructive notice is not sufficient.). In the grievance context, this circuit holds the "disposition of an employee's grievance becomes final at whatever stage of grievance procedure the union *and* the employer resolve the grievance or terminate further consideration of it." McNaughton v. Dillingham Corp., 707 F.2d 1042, 1046 (9th Cir. 1983). The Panel decision misapplied this scheme and the facts in the record to find Plaintiffs' claims time barred. They are not.

### A. The Panel's Decision No Grievances Were Filed In 2010 or 2011 Overlooks Key Facts In The Record and Departs From Circuit Precedents.

The Panel decision pins Appellants CBA grievance process to Article 19 of the CBA, which requires filing a grievance "within (30) days after the employee *or*

his representative could reasonably have knowledge of the incident upon which the complaint is based." [9-ER-990]. Yet, the Panel overlooks material facts crucial that show whether or not it is beyond certain a grievance was filed within statute of limitations period, that the limitations period has run, to warrant dismissal at this stage of the litigation. A grievance was filed in 2010, and certainly by 2011. The record below reflects the Union Appellees initiated such a grievance with United in on Appellant's behalf, United responded, and the Appellees continued to negotiate its resolution until at least August of 2016. [4-ER-254, 264-65, 270-74, 292-93, 309-310.] The record expressly reflects statements by the Union Appellees of a live grievance. [4-ER-271]. Likewise, the record reflects United acknowledging this and negotiating with the Union appellees for its resolution. [4-ER-274]. The Panel decision must have overlooked these facts. Additionally, these are the type of facts that if uncertain or unclear, because they are material to the determination of the claim, should permit amendment.

The Panel decision equally ignores the settled accrual and tolling rules this circuit's precedents provide on this same point. The years long grievance resolution and negotiation efforts by the Appellees, as required by the RLA, is completely out of the hands or control of the Appellants; however, such efforts are sufficient to toll accrual of a claim until full completion of that RLA-required process. Moreover, because dismissing with prejudice on a limitations basis is so widely disfavored at

the motion to dismiss stage, because these are disputed material facts, Appellants should have been permitted to offer facts and evidence so as to defend against an affirmative defense of the running of the limitations period to avoid complete dismissal. A plaintiff is not required to plead around a possible affirmative defense offered by a defendant. Fed. R. Civ. Proc. Rule 8(d). If allowed to stand, the Panel's decision would create confusion and uncertainty in the rules of civil procedure in requiring such in anticipation of pleading to guard against defenses not yet raised. The Panel decision also ignores the law in this circuit that accrual is a finding of material fact and as such was inappropriately decided by the district court at the motion to dismiss stage. The Panel should reconsider its decision.

### B. The Panel's Decision All of The Claims Are Untimely, Ignores The Record and Departs From This Circuit Precedents.

The Panel decision similarly passes over the material facts in the record, and this circuit's entire schema of accrual, limitations periods, and tolling jurisprudence in deciding the grievances filed by Appellants for the abandonment by United Appellees of LOA 05-03M in 2016. First, the record clearly reflects material significant allegations that a claim under LOA 05-03M can be brought at any time. [4-ER-263]. This is also undisputed and as such, there could be no limitation run for a grievance filed to enforce the dictates of LOA 05-03M. The Panel's decision incorrectly identifies the remedy for the grievance itself, which the record reflects was for the elective vote. The Panel also overlooks that the grievances are all

different. While they do all pertain to LOA 05-03M, some are directed at the diluted profit-sharing monies, a violation not discovered until 2016. [9-ER-958, 1009-1013, 1018-26]. The Panel's decision does not reflect any consideration of the Ninth Circuit accrual and tolling practices despite citing to a precedent in this circuit, Galindo v. Stoody Co., 793 F.2d 1502 (9th Cir. 1986), which holds a DFR claim not based on an arbitration is tolled while good faith attempts are made to resolve it through the grievance process. Id. at 1509-10.

In Galindo, the plaintiff presented two distinct DFR claims. One of these claims involved the union's handling of the plaintiff's contractual grievance; the other arose out of the union's alleged failure to notify the plaintiff's employer that he was entitled to seniority in the event of layoffs. Id. The court assessed each claim's accrual date separately. It found that the grievance-related claim accrued once the panel reached its decision. Id. at 1509. By contrast, the non-grievance claim accrued when the plaintiff knew about the breach. Id. The limitations period on that claim, however, was tolled until the arbitration process ended. Id. The court summarized its holding that "a fair representation claim based on how a grievance is presented to an arbitrator accrues when the employee learns of the arbitrator's decision. A fair representation claim not based on how a grievance is presented to an arbitrator is tolled while good faith attempts are made to resolve that claim through grievance procedures. And, a good-faith attempt to resolve a claim through

grievance procedures will prevent a hybrid cause of action from accruing. Id. at 1509-11. Under the Panel's decision, the limitations period started running upon filing the grievance. This is wrong. Appellants could not maintain an action in federal court at that time. And, this position is in direct conflict with the law in this circuit governing the accrual of hybrid actions that a hybrid claim accrues when the plaintiff knew, or should have known, of the defendant's wrongdoing and can successfully maintain a suit in the district court." Allen v. United Food & Commercial Workers Int'l., 43 F.3d 424, 427 (9th Cir.1994) (emphasis added). Appellants could not successfully maintain an action until they had had the express rejections or obtained a written, final decision of the board.

The Panel decision also appears to reflect acceptance of the unsubstantiated claim and testimony by United Appellees at oral argument that if a single grievance is filed anywhere in United's global airline system, then any other filed grievance is negated. This is wrong not only under this circuit's precedents but the material facts in the record clearly show under the CBA, and Union Appellees' governing documents, each individual worker has the right to file a grievance and it is to be independently heard. Union Appellees misled the Panel on this point and into believing the local unions are not independent or have the power to decide the grievances of their individual members as each local sees fit. Because the Union

Appellees counsel was unable to argue at oral argument, this assertion could not be challenged or tested by the Panel.

The Panel also overlooked material facts in the record that at least one Appellant, the ORD Appellant Dill, was given express confirmation by her local official routinely that her grievance was scheduled for arbitration and merely awaiting a date to be heard. [4-ER-248, 301, 312-14]. Having waited almost two years for any resolution, as she was required to do, Dill's claim was tolled and, in addition to keeping her grievance open, joined this lawsuit. [4-ER-]. The Panel's decision must be reconsidered in order to account for all of these overlooked facts and apply this circuit's accrual and tolling rules. To not do so will create chaos in that every RLA grievant will think they must abandon the required RLA process and run to the courthouse lest they risk waiving any right to complain when the grievance process is faulty or unavailable. This decision cannot stand.

### C. The Panel Decision of No Timely Grievance So No Live Grievance To Arbitrate Must Be Reconsidered.

Because the Panel decided no grievance was timely, the Panel decision concludes there can be no statutory deprivation of access to the board or breach of the duty of fair representation. This is wrong in light of the material misapplication of the facts in the record, as well as this circuit's rules for accrual and tolling. The Panel's decision should be reconsidered. The Panel decision appears to decide this asserted RLA-statutory violation, a claim not covered by the CBA, as if it were a

claim for the breach of the duty of fair representation. This claim was alleged against all Defendants as each deprived Appellants of enforcing the RLA statutory dictates. The United Appellees are not judged on a breach of the duty of fair representation standard nor can this independent statutory claim be judged on that standard. The Ninth Circuit holds not only is a statutory claim not a recycled DFR claim but a district court has jurisdiction over such claim. Fennessy v. S.W. Airlines, 91 F.3d 1359 (9th Cir. 1996) (statutory claims not grounded in the CBA).

## II. The Panel Decision No Basis For Jurisdiction Is In Conflict With Ninth Circuit Precedents and United States Supreme Court Holdings.

The Panel decision upends foundational holdings by the Supreme Court, in Vaca v. Sipes, 185 U.S. 181 91967) and Glover v. St. Louis–S.F. Ry. Co., 393 U.S. 324 (1969), in which the Supreme Court found that despite the preferred forum of arbitration to resolve minor disputes, the RLA prioritizes protecting the rights of RLA-workers over no forum for dispute resolution. In Vaca, several situations were identified justifying not only a failure to exhaust the RLA-process but for providing a court forum. 386 U.S. 181, 185-86. Employer repudiation of the CBA grievance procedure will justify direct resort to the courts, as will a breach by the union of its duty of fair representation in the handling of a grievance, including wrongfully withholds, refuses, or prevents processing a grievance. Id. The RLA grants to its workers the right to participate at every stage of the dispute process and to process his grievance independently of his union. Id; *see also* Elgin, J. & E.

Ry. v. Burley, 325 733, 740 n.39 (1945) (these rights are statutory and may not be abrogated by agreement between the employer and the union.). In Glover, applying the holdings of Vaca, the failure of any form of relief, meaningful or otherwise, of a CBA claim required providing a court forum. In Glover, the employer and the union were both implicated in depriving the RLA-fireman access to CBA-arbitral forum. The same underlying policies of these cases is at play in the present case, and evidenced in the record, which the Panel decision fails to account for. By their own admissions, the Appellees together, and in concert, agreed to subvert the CBA, and the RLA, required dispute process, including decades long past practices that provided access to the CBA-process when requested by an RLA-worker, without the union. [5-ER-524-28, 531-32]. Courts are permitted to exercise jurisdiction when these two claims are joined in a single action as long as the employee properly alleges "the union and the employer 'acted in concert' so that arbitration before a panel of employer and union representatives would be 'absolutely futile.'" Beckington v. Amer. Airlines, Inc., 926 F.3d 595, 606-607 (9th Cir. 2019).

In Dean v. Trans World Airlines, the Ninth Circuit held repeated, unheeded complaints, wholly controlled grievance processes by the airline and the union, and a plaintiff's unsuccessful attempts to pursue CBA remedies, warrant judicial forum. 924 F.2d 805, 811 (9th Cir. 1991). The Panel's decision overlooks these same facts in this record in finding there has been no showing to invoke the exception. [4-ER-

297-315]. This also amounted to repudiation of the grievance procedures by their conduct and exhaustion of those procedures was excused. An employer who by its conduct refuses to arbitrate a grievance under the CBA repudiates the grievance process, which in turn requires providing a federal forum. Sidhu v. Flecto Co., Inc., 279 F.3d 896, 897 (9th Cir.2002). There are facts in the record of the same kind of open hostility to Appellants. [4-ER-297-315]. The Appellees together decided to block review or permit any investigation into Appellants' legitimate claims.

The Panel decision should be reconsidered. The Panel decision misapplied the timeliness analysis and important Supreme Court precedents. If the Panels' decision is left to stand, the RLA clear preference for arbitration of minor disputes will not be furthered if it can be so easily be subverted by concerted action of the parties against which the claims are being made. Otherwise, the Panel decision stands for completely extinguishing meritorious unheard claims.

## III. The Panel's Decision Ignores Precedent Munro v. Univ. S. Cal. For ERISA Plan Wide Relief Claims.

The Panel's decision that any ERISA claim must be forced into the RLA-arbitral process upends Ninth Circuit precedent with respect to preemption. The Panel decision does not appear to appreciate these claims seek plan wide relief not claims for individual benefits. Such claims belong to the plan, not to the individual participant, and because the plan is not an employee subject to the RLA nor has the plan consented to such arbitration, these claims must be heard in federal court as

dictated by the statute. This is the Ninth Circuit holding in Munro v. Univ. of S. Cal., 896 F.3d 1088 (9th Cir. 2018) ("Munro"). In Munro, employees brought claims for plan wide relief for fiduciary breach of two separate ERISA plans. All parties to the litigation had previously entered into arbitration agreements to, in pertinent part, arbitrate all claims against the other party related to the ERISA plans, including violations of federal laws. Affirming the district court, the Ninth Circuit determined the arbitration agreements did not bind the plans because the plans did not themselves consent to arbitration of the claims. The Panel decision in the present case does not account for this precedent.

The Panel decision reliance on Long v. Flying Tiger Line, Inc. Fixed Pension Plan for Pilots, 994 F.2d 692 (1993) ("Long") is inapposite to appellants claims. In Long, the RLA plaintiffs sought interpretation and application of a Summary Plan Description ("SPD") of an ERISA plan. They did not allege claims for plan wide relief. Because the SPD was a part of the CBA, the court found it was an arbitrable minor dispute. These are not the facts in the record. Moreover, the Panel decision ignores Schurke v. Alaska Airlines, 898 F.3d 904 (9th Cir. 2018), which holds if the independent statutory claim is not dependent upon any interpretation of the CBA, then it is not preempted. Id. at 920-21. But, when the claim cannot be decided by the CBA, it is not preempted. Id. Here, there is no term in the CBA to interpret or apply for the fiduciary duty standard by which the plan wide relief claims for an

ERISA plan fiduciary's breach of duty is to be judged. Claims are not simply CBA disputes by another name if they just refer to a CBA-defined right, rely in part on a CBA's terms of employment, run parallel to a CBA violation, or invite use of the CBA as a defense. Schurke, at 920-21 (footnotes and internal citations omitted). The "distinguishing feature" of a preempted dispute "is that the dispute may be conclusively resolved by interpreting the existing [CBA]." Consol. Rail Corp. v. Ry. Labor Executives' Ass'n, 491 U.S. 299, 305 (1989). Therefore, it is Munro that should control not Long.

The Panel decision overlooks the material facts in the record, including the Plans as parties and claim brought on behalf of the plan for plan wide relief. [4-ER-249-50, 335-344]. Appellants alleged the claims for breach of fiduciary duty are brought on behalf of the Plan and its participants. This is not the case as in Long where they sought claims for specific parties. The relief here is for the Plans and the recovery is to the Plans. Alternatively, by not allowing the claim for the Plans, the Panel would prevent plan participants from seeking plan-wide remedies conferred by the ERISA statute that cannot be waived by agreement. This circuit has reserved plan wide relief claims for the courts and this should be honored. The Panel decision fails to account for the fact that ERISA's policies and dictates exist without referencing any CBA. Hypothetically, if the same claim was made but the CBA did not exist, Appellants could still pursue this claim which itself proves the

claims is not inextricably intertwined. The Panel decision overlooks the allegation in the Complaint where Appellants allege the profit-sharing plan was an ERISA plan. [4-ER-250]. Moreover, if this was not clear, the Panel should have ordered amendment not dismissal particularly in light of the open disclosures and discovery disputes which severely hampered the Appellants.

## IV. The Panel Misapplies Rule 15(a) Amendment Directives.

The Panel decision no allegations that could be pled belies its own findings on Appellants claims in its order. For example, as just discussed, a missing fact the profit-sharing plan is a plan covered by ERISA is readily cured by amending. The pleading requirements are not designed to trap the unwary, as evidenced by Rule 15(b), which permits conforming pleadings even after judgment. Fed. R. Civ. P. Rule 15(b). The Panel's decision to gauge futility of amendment for all claims in Appellants complaint against Kendall v. VISA, Inc., 518 F.3d 1042 (9th Cir. 2008), a securities fraud and anti-trust claims case, where "the district court then allowed appellants to conduct discovery so they would have the facts they needed to plead [a claim] in their amended complaint," despite anti-trust plaintiffs generally *not* statutorily permitted such plausibility discovery no matter how limited the request. Id. at 1046, is too far afield and should be reconsidered. The Panel decision again overlooks the record to hold Appellants to a heightened pleading standard not found in the rules. The record reflects no disclosures or discovery to which the

Appellants were entitled versus litigants given full and robust opportunity to use all of the litigation tools available. The Panel decision should be reconsidered bearing in mind a failure to be clear is not clear failure or futility. Mere vagueness or lack of detail should not justify dismissal. Clarity serves the interests of justice.

## CONCLUSION

This Court should grant reconsideration and rehearing.

Dated: November 22, 2023

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## CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2023, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

Dated: November 22, 2023

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 35 and 9th Cir. R. 35-4 and 40-1, I hereby certify that:

1. I am the attorney of record.

2. This petition for rehearing and petition for hearing en banc complies with the type-volume limitations of 9th Cir. R. 35-4 or 40-1 because this petition contains 4,181 words.

3. The attached petition is prepared in a format, typeface, and type style complying with Fed. R. App. P. 32(a)(4)-(6) and is prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman typeface.

Dated: November 22, 2023

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# ADDENDUM

# (PANEL OPINION)

**NOT FOR PUBLICATION**

FILED

NOV 8 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEVIN E. BYBEE, JOHN R. SCHOLZ, VICTOR H. DRUMHELLER, and SALLY A. DILL, as individuals and plan participants in The Continental Retirement Plan, on behalf of themselves and all others similarly situated and on behalf of The Continental Retirement Plan,

Plaintiffs-Appellants,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS; JAMES P. HOFFA, in his official capacity as the General President of the International Brotherhood of Teamsters; PETER FINN, in his official capacity as Principal Officer of Teamsters Local 210; and UNITED AIRLINES, INC., a Delaware corporation,

Defendants-Appellees.

No. 22-16280

D.C. No. 3:18-cv-06632-JD

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
James Donato, District Judge, Presiding

Argued and Submitted October 18, 2023
San Francisco, California

Before: BEA, CHRISTEN, and JOHNSTONE, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Plaintiffs Kevin Bybee, John Scholz, Victor Drumheller, and Sally Dill appeal the district court's order dismissing Plaintiffs' Second Amended Complaint ("SAC") with prejudice. Because the parties are familiar with the facts, we do not recount them here. We have jurisdiction under 28 U.S.C. § 1291, we review de novo, *Arrington v. Wong*, 237 F.3d 1066, 1069 (9th Cir. 2001), and we affirm.

1. Article 19 of Plaintiffs' 2010 collective bargaining agreement ("2010 CBA") requires aggrieved employees to present complaints to their supervisor "within (30) days after the employee or his representative could reasonably have knowledge of the incident upon which the complaint is based." The SAC indicates that, since at least 2011, Plaintiffs believed they were entitled to an elective vote to enroll in the Continental Airlines Retirement Plan ("CARP") based on the "me-too" provision in Letter of Agreement 05-03M ("LOA 05-03M").

The first grievance alleging a breach of the 2010 CBA, and specifically LOA 05-03M, was filed with a United supervisor on September 1, 2016. This grievance, like Plaintiffs' later-filed grievances, alleged that the 2010 merger of United Air Lines, Inc. and Continental Airlines, Inc. triggered United's obligations under LOA 05-03M to provide an elective vote for enrollment in CARP. As a remedy for United's failure to provide an elective vote at the time of the merger, the grievances sought Plaintiffs' retroactive enrollment in CARP from either October 2010 or November 2011. In support of their purported entitlement to this remedy,

the SAC alleges that IBT had promised Plaintiffs "year after year" that any pension decision would be made retroactive to the date of the merger.

The alleged promises that Plaintiffs would be allowed to join CARP retroactively, however, were made by IBT, not United, and were not part of the collective bargaining agreements or LOA 05-03M. Accordingly, regardless of whether the failure to make CARP enrollment retroactive could serve as the basis of a breach of duty of fair representation ("DFR") claim against IBT, it cannot support a claim against United for breach of the 2010 CBA.

Because Plaintiffs had knowledge that they were not provided an elective vote when that right was allegedly triggered on either October 1, 2010 or November 30, 2011, Plaintiffs' grievances filed with United approximately four to five years later were untimely under the grievance procedure of the 2010 CBA.

A. Because the grievances were untimely filed, we conclude that IBT's exercise of judgment and reliance on the Gleason Memo—which also concluded, *inter alia*, that the grievances were time-barred—were not "arbitrary, discriminatory, or in bad faith." *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44 (1998). Accordingly, the district court properly ruled that IBT did not breach its duty of fair representation when it withdrew Plaintiffs' grievances.

B. The district court also properly concluded that Plaintiffs' breach of DFR claim regarding IBT's alleged failure to safeguard Plaintiffs' rights during

negotiations with United was time-barred under the six-month statute of limitations applicable to claims arising under the Railway Labor Act ("RLA"). Although Plaintiffs acknowledge that they became aware of IBT's abandonment of LOA 05-03M in 2016, the present action was not initiated until October 31, 2018—more than two years after Plaintiffs knew of the alleged breach of the DFR. *See Galindo v. Stoody Co.*, 793 F.2d 1502, 1509 (9th Cir. 1986).

C. The breach of contract claim alleged in the SAC is a "minor" dispute because it arises from the terms of the CBA. The district court thus correctly concluded it did not have jurisdiction over this claim. Plaintiffs did not plausibly plead that United "colluded" with IBT to discriminate against them or that it repudiated the grievance process once IBT withdrew the grievances. Plaintiffs also did not plausibly plead that IBT wrongfully refused to process their grievance, given IBT's reliance on the Gleason Memo and our conclusion that the grievances were untimely when they were filed. Accordingly, no exception to the jurisdictional bar on adjudicating minor contractual disputes exists in this case. *See Vaca v. Sipes*, 386 U.S. 171, 185 (1967); *Glover v. St. Louis-S.F. Ry. Co.*, 393 U.S. 324, 331 (1969).

D. Assuming without deciding that Plaintiffs had the right to arbitrate their grievances without union representation under section 184 of the RLA, their ability to do so would be subject to the grievance process specified in the 2010 CBA. *See*

*Int'l Bhd. of Teamsters, Airlines Div. v. Allegiant Air, LLC*, 788 F.3d 1080, 1086 (9th Cir. 2015) ("[T]he RLA requires employees and carriers first to exhaust the grievance procedure specified in a collective bargaining agreement."); *see also* 45 U.S.C. § 184 (requiring disputes to "be handled in the *usual manner*") (emphasis added). Because Plaintiffs' grievances had not been timely filed, Plaintiffs had no live grievance to arbitrate before the board of adjustment. Accordingly, the section 184 claim was properly dismissed.

E. The district court also properly dismissed Plaintiffs' claim for breach of fiduciary duty under section 501 of the Labor-Management Reporting and Disclosure Act. Plaintiffs have not alleged that they satisfied the conditions precedent to raise this claim by making a demand on IBT, submitting a verified application, or receiving leave to file this complaint. *See Cowger v. Rohrbach*, 868 F.2d 1064, 1066 (9th Cir. 1989) (citing 29 U.S.C. § 501(b)). On the merits, the allegations of breach of the union officials' individual duties are speculative and would separately fail for that reason.

F. The district court properly dismissed Counts V–X alleging violations of ERISA because CARP itself does not include a provision that entitles Plaintiffs to be enrolled in the plan. At best, Plaintiffs' claim arises from the CBA, not CARP, and because the claim depends solely on the interpretation of the CBA, it is a "minor" dispute over which this court lacks jurisdiction. *See Long v. Flying Tiger*

*Line, Inc. Fixed Pension Plan for Pilots*, 994 F.2d 692, 694 (9th Cir. 1993) ("An employee pension plan falls within the scope of the Railway Labor Act and is subject to its mandatory arbitration procedures."). Plaintiffs do not allege that the Profit-Sharing Plan is subject to ERISA, so the PSP claim also lacks merit.

2. Finally, the district court did not abuse its discretion in dismissing the SAC with prejudice. Because there are no additional facts that could be pleaded that would save any of the dismissed claims, amendment would clearly be futile. *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1052 (9th Cir. 2008).

**AFFIRMED.**