No. 22-16280

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

APPELLANT'S REPLY BRIEF

Jane C. Mariani, SBN 313666
LAW OFFICE OF JANE C. MARIANI
584 Castro Street, #687
San Francisco, CA 94114
Telephone: (415) 203-2453
Email: jcm@marianiadvocacy.com

Attorney for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes

Federal Rules of Civil Procedure

Miscellaneous

ARGUMENT

I. Appellees Fail to Overcome the Foman Presumption Denying Amendment Without Justification Is An Abuse Of Discretion.

The Ninth Circuit has "repeatedly stressed the court must remain guided by 'the underlying purpose of Rule 15 ... to facilitate decision on the merits, rather than on the pleadings or technicalities.' " Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (cleaned up). While pleading rules are necessary steps for efficiency, economy, and avoidance of abusive or meritless lawsuits, the rules are not intended to deprive litigants of basic access to the courts to remedy a wrong, to privately enforce public policies, by depriving a party to amend as provided for in Rule 15.

A. Appellees Fail to Present Any Argument Justifying or Supporting the District Court's Denial Appellants' Request to Amend.

Appellees do not offer justification or support for the district court's decision denying Appellants' request to amend. United Appellees suggest having amended once with the Court's permission is a sufficient basis.[1] Union Appellees similarly argue two amendments is sufficient.[2] Neither of these contentions explains why the district court was not required to provide at least some analysis under Foman v. Davis, 371 U.S. 178, 182 (1962), as Appellants argued in their opening brief, as to

[1] There have only been two amendments – once by right and once with the district court's permission.

[2] Each cured deficiencies – the first corrected a typographical error; and the second added many new facts but did so without benefit of discovery or disclosures.

why "outright refusal to grant the leave without any justifying reason appearing for the denial" is not an abuse of discretion. Foman, 371 U.S. at 182. Therefore, this is a sufficient basis to find the district court abused its discretion.

B. Appellees Fail to Point to Any Evidence or Argument the Foman Factors Justify Denying Amendment.

Appellees agree the Foman factors control the analysis; however, Appellees analysis of these factors as a basis to deny amendment are unconvincing and cannot overcome the presumption in favor of resolving disputes on the merits. "[D]enying leave to amend is reversible error 'where the district court d[oes] not provide a contemporaneous specific finding of prejudice to the opposing party, bad faith by the moving party, or futility of the amendment." Bowles v. Reade, 198 F.3d 752, 758 (9th Cir. 1999).

1. United Appellees Contend Prejudice Exists Due to the Elapsed Time of the Litigation. This Contention Does Not Satisfy Foman Prejudice Factor Analysis.

"Prejudice to the opposing party is the most important factor" in determining whether denying leave to amend is appropriate. Jackson v. Bank of Haw., 902 F.2d 1385, 1387 (9th Cir. 1990) (internal quotation omitted); *see also* Foman. United Appellees argue permitting amendment would cause prejudice; however, United Appellees' arguments are not supported by the record below or the legal standard. Bare allegations of injury, or prejudice, unsupported by any factual evidence fails to meet the burden to deny amendment under Foman. Both Appellees must do

more. Further, it is not enough United Appellees desire for "litigation to end." If that were the legal showing required, any litigant, without offering any factual or legal basis, could frustrate the usual course of litigation in every case by arguing time is up. United Appellees use of Delacruz v. State Bar, 2018 WL 3077750 (N.D. Cal. Mar. 12, 2018), is inapposite. In that case, the plaintiff filed multiple lawsuits over almost twenty years, was permitted years of discovery, and extensive motion practice, including several discovery disputes, before the court denied amendment. These are not our facts. More importantly, the district court in that case, in denying amendment, did not base its denial on any finding specifically referencing the elapsed time of the litigation.

Nor have Appellees argued any defense would be substantially altered or impacted if amendment is granted, which is generally the prejudice standard. As is evident from the docket, there have been no substantive motions scheduled, no scheduling order entered, no discovery conducted or even commenced. All of these facts mitigate against finding prejudice. Because the district court did not find, and Appellees cannot point to, any evidence of the kind of prejudice sufficient to deny amendment, the district court should be reversed and amendment granted.

2. Appellees Assertion Amendment Is Futile Is Not Supported By The Record Below.

The district court did not specify whether it would be futile to amend one or all of Appellants' claims or provide a specific basis for deciding amendment would

be futile. Nor do Appellees state what exactly dooms Appellants' claims as futile. while the district court found the complaint "unclear" and "meandering," such failures to be clear is not clear failure or futility.

Union Appellees argue their version of material facts renders amending the complaint futile. This is not the Foman standard of futility for a case in this posture. The district court only found Appellants' claims lacked specificity. More importantly, Appellees have had a stranglehold on virtually all relevant information which would provide any lacking specificity. furthermore, Appellees' failure to cooperate with, and the district court's staying discovery, is a large factor in any failure of specificity.

United Appellees argue Appellants' request to amend, pled in the alternative in their opposition to the Appellees' many motions to dismiss, was so inadequate so as to bar amendment. This argument directly contradicts the Federal Rules of Civil Procedure ("FRCP") and is not a basis to uphold the district court's amendment denial. *See* Fed.R.Civ.P. Rule 8(d)(2),(3) and (e). In support of its legal position, United Appellees argue that Kendall v. Visa USA, Inc., 518 F.3d 1042 (9th Cir. 2008) is controlling; however, upon careful reading, this case supports Appellants' arguments. In Kendall, the appellant was not only provided guidance as to how and what was needed to satisfy the pleading standards, the court ordered appellant to conduct discovery so "they would have the facts they needed to plead" in their

amended complaint. Here, the lack of any discovery or direction regarding the complaint's deficiencies weighs in favor of permitting amendment not denying it.

3. Appellees Agree Bad Faith or Undue Delay Is Not Basis For Denying Amendment.

No Appellee argues the district court found, or there is evidence to support, Appellants' request to amend is made in bad faith or for a dilatory motive. By failing to raise any arguments in their briefs, or point to anything in the record below, all Appellees concede Appellants did not request amendment in bad faith or to cause undue delay. Accordingly, these factors do not weigh against amendment.

4. Appellants Have, and Can, Cure Deficiencies as the Record Below Demonstrates.

Appellees' suggestion this case must be dismissed because Appellants have amended before defies the federal rules as amendment is not predicated on a purely numerical basis as to the number of amendments. More importantly, the authorities cited by United Appellees are unpersuasive as all are decided on markedly different procedural postures. For example, in Fid. Fin. Corp. v. Fed. Home Loan Bank of S.F., 792 F.2d 1432, 1438 (9th Cir. 1986), decided on summary judgment, a fourth amendment was disallowed after 2-years of discovery. In Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 1007 (9th Cir. 2009) after several amendments, the court denied further amendment after extensive discovery and explicit instructions regarding problems with the complaint. In Dutciuc v. Meritage Homes of Arizona,

Inc., 462 F. App'x 658 (9th Cir. 2011), the court dismissed the third amended complaint because plaintiffs failed to cure deficiencies, waited a long time to amend, and were permitted extensive discovery between amendments. Lastly, in Kay v. Likins, 160 F. App'x 605, 608 (9th Cir. 2005), amendment was denied where the complaint contained legal deficiencies such as not being persons covered within the meaning of the statute and qualified immunity thereby concluding such overwhelming black letter law obstacles made amendment futile. These are not the facts in the present case.

C. The District Court's Failure to Follow the FRCP Requirements, And Its Issuance of Stay of Discovery, Has Prejudiced Appellants And Supports Permitting Amendment.

Appellees do not challenge, or refute, Appellants' argument that the district court's failure to issue the FRCP Rule 16 Scheduling Order following the parties' initial case management conference has disadvantaged and hampered Appellants' ability to discover the additional facts the district court believes are necessary to survive a motion to dismiss. FRCP is "as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard [FRCP] mandate than they do to disregard constitutional or statutory provisions." Bank of Nova Scotia v. United States, 487 U.S. 250, 255 (1988). The district court, therefore, while it does have the inherent power to control its docket, cannot exercise that power so as to nullify the procedural choices reserved to parties under the federal

rules. Moravian School Advisory Board of St. Thomas v. Rawlins, 70 F.3d 270, 274 (3d Cir. 1995) (federal court may not exercise its inherent authority in a manner inconsistent with a rule or statute); *see also* G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 652 (7th Cir. 1989) (en banc) (inherent powers should be exercised in a manner that is in harmony with the FRCP). The idea the district courts may not contravene the FRCP is well-established. For example, a district court may not follow local rules which are inconsistent with the federal rules. *See* Henry v. Gill Industries, Inc., 983 F.2d 943, 949-50 (9th Cir. 1993). Because there is no opposition on this point, this should support amendment.

The district court's decision to find jurisdictional discovery necessary, only to declare it moot, nor rule on the discovery disputes, was an abuse of discretion. A court may permit discovery, even in the face of dismissal, to satisfy pleading standards where, as here, relevant evidence is solely within the province of the Appellees. Jones v. AIG Risk Management, Inc., 726 F. Supp. 2d 1049 (N.D. Cal. 2010). The district court should have granted amendment and lifted the stay on discovery because the claims warranted at least reasonable, tailored discovery on the issues before being dismissed in their entirety.

Lastly, United Appellees argue because the litigation began in October 2018 and is still ongoing, to continue the litigation would be prejudicial to United. The district court took almost an entire year to decide the first motion to dismiss, and

18-months to decide the most recent motion to dismiss, which accounts for a majority of the elapsed time. The recent pandemic, which began approximately a year into this lawsuit, and the corresponding court disruptions, have accounted for some of the time as well. While Appellants also wish this case would move along at a quicker pace, Appellants should not be denied a fair and reasonable chance to bring their claims because of delays beyond their control.

II. Union Appellees Fail to Show It Is Beyond Certain From the Face of the Complaint All Claims for All Appellants Are Untimely or That There Are No Set of Facts To Establish the Timeliness of These Claims.

A. All Claims for All Appellants Are Timely.

Pursuant to the FRCP, Appellants are not required to plead facts tending to rebut an affirmative defense in their complaint; FRCP Rule 8 only requires notice of the claims. Fed.R.Civ.P. Rule 8. In determining whether the complaint provided proper notice of the claims, the district court was required to construe all facts in the complaint as true, and construe those facts most favorably to Appellants, in determining whether: (i) it is *beyond doubt* Appellants can prove no set of facts to establish the timeliness of the claim; and (ii) in the context of a DFR claim, accrual of that claim begins not at the time the Appellants become aware of a wrong if, at that time, damages are not certain to occur or too speculative to be proven. See e.g., Bowen v. City of New York, 476 U.S. 467 (1986) (though plaintiffs knew of

loss of benefits, statute of limitations tolled by defendants' concealment of facts revealing the loss constituted a violation).

Despite the clear mandate of FRCP Rule 8, the district court's order found the allegations in the complaint made "it clear," that *all* Appellants' claims were untimely. The district court provided no further reasoning behind its ruling other than to cite to two dates provided in the complaint for non-dispositive facts. In so deciding, the district court failed to apply the correct standard of review in part because concealing the actionability of a known injury is sufficient to toll the statute of limitations and the district court found that to be "meritless." (1-ER-8).

The district court appears to have applied a standard more akin to summary judgment standard in ruling May 4, 2018, the date Appellants assert damages were fixed and certain by the final action by Appellee United, should be discounted in its entirety. This is not the correct standard of review for a motion to dismiss because these facts are disputed and resolution is more appropriately resolved by an evidentiary hearing, summary judgment motion, or at trial.

Nevertheless, the complaint contains allegations clearly demonstrating there are a set of facts that could prove the claims are timely. Even more importantly, the district court's objective was "not whether [Appellants] will ultimately prevail but whether [Appellants are] entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (procedural history omitted). Here, the district

court disregarded the reviewing standard because, when the facts are read with the required liberality, the district court should not, and could not, have found, it was beyond certain the DFR claim was untimely at this stage of the proceedings. "The statute of limitations is an affirmative defense; a plaintiff is not required to negate an affirmative defense in his complaint." Fed.R.Civ.P. Rule 8(d); Betz v. Trainer Wortham & Co., 519 F.3d 863 (9th Cir. 2007).

The Union Appellees contend, without support or legal authority, March 31, 2017, starts the accrual clock because March 31, 2017, is when Appellants Scholz and Bybee ("SFO Appellants") first received the Gleason memo. Simple receipt of the memo by the SFO Appellants is not sufficient to begin accrual of any claim, least not a DFR claim, because mere receipt is not indicative of its import or consequences. This date should not have been dispositive.

The complaint also contains sufficient facts, when construed properly, that show accrual had not begun for Appellant Dill, a mechanic employed at United's O'Hare facility, at the time she joined the lawsuit in 2019. (4-ER-247-48, 301, 312-314). She had not exhausted the grievance process, certainly not to her detriment, and her Local Union reassured her routinely her grievance was open and waiting for a date for arbitration. "The disposition of an employee's grievance becomes final at whatever stage of the 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). There are no facts in the record contradicting or refuting these allegations, in fact, Union Appellees confirm this was the case. (2-ER-005-59). Thus, because Appellant Dill's DFR claim had not even begun to accrue at the time she filed this action, dismissal with prejudice by the district court of *all* of her claims as untimely was error.

The same analysis is applicable, and should have been applied, to the district court's determination on the timeliness of Appellant Drumheller's DFR claim. Appellant Drumheller, a mechanic at United's Dulles facility, also had an open grievance, not processed to finality by Appellee United, when he joined the litigation, as the complaint's uncontested facts assert. (4-ER-248,304,314). Thus, dismissing his claims at this stage of the proceedings was also error because it is not beyond certain from the face of the complaint that there are no set of facts to prove his claim was not time barred so as to justify dismissal by the district court of all of his claims with prejudice.

Most importantly, Appellant Dill did not see this memo until February 25, 2019, two weeks after she filed her lawsuit; Appellant Drumheller was never provided the memo. (4-ER-248). Thus, March 31, 2017, the date the memo was provided to the SFO Appellants, does not prove beyond certainty that there can be no set of facts to prove the claims are timely and thus, the district court erred in dismissing all of Appellants claims on this basis.

Union Appellees make no effort to square these facts with the finding these claims are time barred or with the rest of the actual allegations in the complaint. Indeed, Union Appellees appear to ignore the many other facts in the complaint that support a reasonable finding the soonest any Appellants claims accrued was May 4, 2018, as argued in Appellants opening brief. Neither the district court, nor the Union Appellees, offer any explanation as to why all the other allegations in the complaint are disregarded from this analysis.

Moreover, the limitations period for a DFR claim is not jurisdictional but is just a claims processing requirement because the RLA does not clearly state it is. Wilkins et al. v. United States, 143 S. Ct. 870 (2023) (limitations period is not jurisdictional unless it is clearly stated in the statutory scheme.); United States v. Wong, 575 U. S. 402, 410 (2015) (traditional tools of statutory construction must plainly show Congress imbued a procedural bar with jurisdictional consequence.") Therefore, dismissal *sua sponte*, without any offer of proof by the Appellants, or evidentiary hearing, demands reversal.

In sum, the SFO Appellants believe their claim arose on May 4, 2018, when the grievance process was exhausted to their detriment by Appellee United. Only then did any violation by the Appellee Union become actionable so as to permit Appellants to resort to federal court for a remedy. Appellants cannot seek a federal forum on a suspicion of an injury; Appellants need actual injury. A DFR claim not

based on how a grievance is presented to an arbitrator is tolled while good faith attempts are made to resolve it through grievance procedures. Galindo v. Stoody Co., 793 F.2d 1502 (9th Cir. 1986). "The evidence of events within the limitations period, considered apart from other, earlier evidence which may help explain the events in question, need not be conclusive; significant or considerable evidence a violation has occurred within the limitations period will suffice." Association of Flight Attendants, AFL–CIO v. Horizon Air Indus., Inc., 976 F.2d 541, 547–48 (9th Cir.1992) (internal citations and quotation marks omitted). The United Reardon letter dated May 1, 2018, and received May 4, 2018, confirms Appellee Union's failure to perform the required ministerial task and United's repudiation of the grievance procedures by not adhering to its own independent duties regarding the grievance process and instead acting in concert with the Union Appellees to block Appellants' access to be heard. (9-ER-0968). SFO Appellants filed their complaint on October 31, 2018, which is within six-months of receiving the letter, and within six-months of the failed ministerial task by the Union. The district court does not appear to have considered these facts at all and certainly has not construed them in favor of the SFO Appellants or with the required liberality. Had United initiated the grievance process as it has always done, and as the Appellee Union always instructs them to do in a "no fund" case, this likely would have remedied any past attributable breach by Appellee Union, particularly because the gravamen of

Appellants' complaint is Appellee United egregiously violated the CBA, and LOA 05-03M, causing Appellants' damages. Indeed, had SFO Appellants been able to remedy the cause of their dissatisfaction through the grievance process, this would have almost certainly obviated the need for a judicial remedy. This district court's decision all Appellants' claims are untimely must be reversed.

B. All Appellees Agree ERISA Has Its Own Limitations Periods.

No Appellee argues ERISA claims have a six-month statute of limitations. Union Appellees only argument is the ERISA claims are DFR claims therefore the DFR claim six-month statute of limitations applies. As argued below in Section III. B. in greater detail, this is not so and these claims are not time barred either.

C. LOA 05-03M Waived the Non-Jurisdictional Limitations Period.

A statute of limitations can be waived unless such period is jurisdictional, which is already established that it is not. The district court, however, erroneously found the parties did not waive the statute of limitations for any claims arising under LOA 05-03M despite allegations in the complaint LOA 05-03M expressly waived any statute of limitations related to its enforcement. (1-ER-9; 4-ER-0263,264). The complaint contains not only the express language attesting to the same but also allegations related to Jim Seitz, AMFA Administrative Officer and Chairman of Negotiations, who negotiated LOA 05-03M, specifically negotiating the waiver of the statute of limitations provisions, having documentary and first-

hand knowledge that parties agreed to this waiver. (4-ER-0263,264). The district court could not have properly construed these facts as required, in favor of Appellants, when it found all claims of all Appellants were untimely.

United Appellees did not make a statute of limitations argument likely due to United Appellees awareness, as attested to before the bankruptcy court judge, that LOA 05-03M waives any statute of limitations related to the enforcement of LOA 05-03M. United Appellees are also well aware that the earliest its last act of denial occurred was on May 4, 2018, when SFO Appellants received the Reardon letter refusing to complete the grievance procedures by initiating the arbitration board. (9-ER-0968).

III. The District Court Has Subject Matter Jurisdiction to Hear All of Appellants' Claims Because All Claims Were Plausibly Pled.

Union Appellees incorrectly state the standard of review for a district court's dismissal of a complaint pursuant to FRCP Rule 12(b) is abuse of discretion, citing to Benavidez v. Cnty. of San Diego, 993 F.3d 1134, 1141-42 (9th Cir. 2021). This is not correct nor the standard of review stated by the Benavidez court. The Benavidez court held jurisdictional determinations, Rule 12(b)(1), and for failure to state a claim, Rule 12(b)(6), are reviewed de novo. Id. at 1141. This Court should reject Appellees' abuse of discretion standard of review for Rule 12(b) dismissals and instead review de novo, as argued by the Appellants and United Appellees.

A. Appellants Plausibly Pled a Hybrid Action Over which the District Court Had Subject Matter Jurisdiction.

The Appellees do not state what is insufficient about the facts alleged as they related to pleading the elements of a hybrid action. What Appellees do argue is for a determination of the facts favorably to them. This is the opposite of the standard the district court was to apply. Appellants facts are presumed true and construed in their favor. When viewed through the correct standard, the complaint's allegations are sufficient to plausibly plead a hybrid action. In addition to not addressing Appellants' arguments directly, no Appellee address the discovery and production of disclosure issues effecting Appellants ability to provide any perceived missing additional information. Appellees simply argue Appellants should be barred from testing their claims on the merits. Mere vagueness or lack of detail will not justify dismissal. Harman v. Valley National Bank, 339 F.2d 564, 567 (9th Cir. 1964). The Appellees desire not to have these claims be given a fair and proper hearing so as to not expose their misdeeds should not be granted.

1. Appellants' Plausibly Pled Breach of DFR Claim.

Union Appellees offer no legal basis to support the heightened pleading standard inflicted on Appellants by the district court nor do the Appellees cite to a single allegation, construed as true, that would lead the district court to determine Appellants' can prove not set of facts to prove their DFR claim. "[W]here the courts are called upon to fulfill their role as the primary guardians of the duty of

fair representation," complaints should be construed to avoid dismissals. Czosek v. O'Mara, 397 U.S. 25, 27 (1970).

The district court's rejection of Appellants undisputed alleged facts that the Union Appellees' acceptance $1,500,000 million dollars, in contravention to RLA 152 Fourth and Tenth, from Appellee United, and without any explanation, was error because this fact, again uncontested, unexplained, and unaccounted for by any Appellee, plausibly alleges a DFR claim worthy of being tested on the merits. When viewed with the other facts in the complaint, or even in isolation, this fact is highly suggestive of the kind of irrational and dishonest conduct that constitutes wrongdoing on the part of the Union Appellees sufficient to state a DFR claim at the pleading stage. (4-ER-287).

There are also sufficient facts in the record of egregious misstatements by the Union sufficient to evidence bad faith. (4-ER-270-71,283,300,309-311,314). The repeated insistence CARP is not a single employer plan despite the express language of CARP's plan document (6-ER-656), CARP Annual funding Notice (9-ER-972), Union Appellees' own website (7-ER-670), PBGC (7-ER-668), as well as Gleason himself (9-ER-1089,1091,1095-96,1104), meets the bad faith sufficient to survive a motion to dismiss. ERISA unequivocally states a single-employer plan is an employee benefit plan other than a multi-employer plan. ERISA § 3(41), 29 U.S.C.A. § 1002(41). Even if CARP is a multiple employer plan (it is not), CARP

is certainly not a multi-employer plan and therefore, it is a single employer plan contemplated by LOA 05-03M. The Union Appellees do not explain why the district court could ignore these facts.

There are additional facts in the record similarly sufficient, when construed properly, to find Appellants had plausibly stated a claim. Union Appellees own admissions that on December 9, 2010, they agreed to delay and block the pension election vote, and any enrollment in CARP, in order for United Appellees to avoid tax consequences, while at the same time failing to obey their own constitution, bylaws, and contracts by not putting this agreed to negotiated change to the membership for a ratification vote. (4-ER-274; 9-ER-1095). These facts support an inference that instead of protecting Appellants' interests, Union Appellees bartered those interests away, leaving Appellants to fend for themselves, remediless and without representation. This is sufficient to state a claim for DFR.

The complaint also alleges Union Appellees changed or ignored CBA terms to provide pre-merger Continental mechanics with profit sharing pool monies they were not entitled to at the expense of pre-merger United mechanics. these facts are also sufficient. (4-ER-275-78, 298-300, 316-17, 321-26. 335-36, 339, 341-42,)).

Furthermore, the failure to process multiple grievances at all, at any step, without any notice, hearing, or say from Appellants, and then to fail to notify them prior to the withdrawal of the grievances is sufficient to state a claim. Courts have

held the withdrawal of the grievances without prior notice to the grievant lacks any rational basis and is arbitrary. The question for the district court was "not whether [Appellants] will ultimately prevail but whether [appellants] [are] entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (procedural history omitted). The district court erred in finding no DFR claim was plausibly pled and must be reversed.

2. Appellants Sufficiently Pled Facts of Appellees' Concerted Activity (Collusion) to Provide a Federal Forum.

United Appellees argue the Appellants' allegations fall short of the required in concert activity, "collusion" yet do not say why these facts fall short other than the district court found the same. The district court was wrong and so are United Appellees.

Appellants provide no reasoned argument why the Ninth Circuit's reasoning in Beckington collusion standard is wrong. Appellants sufficiently alleged facts that Appellee United took direct action in coordination with Union Appellees against Appellants to cover up and ignore contract breaches by United. The Union's Gleason memo freely admits Appellees did this in concert. (9-ER-1088-1108).

Moreover, there is an uncontested breach of contract claim to anchor the claim of collusion against United. The pilot arbitration award put United directly

on notice regarding profit-sharing and the bankruptcy agreements' import, making United knowingly and intentionally violating the CBA & LOA. (9-ER-1041-75).

Appellants alleged United conspired with Union Appellees to deprive them of their rights under the CBA, and LOA 05-03M, and that Appellee United refused to submit Appellants' claims to the grievance procedure as provided by the CBA. Therefore, complicity in concerted action is easily averred or at the very least gleaned from the complaint. Appellants' collusion facts satisfy the Beckington standard to permit jurisdiction in the district court. Moreover, if at early stages of the proceedings, the absence of factual detail does not enable the court to ascertain whether the union properly exercised its discretion, the proper decision is to not dismiss. Ford Motor Co. v. Huffman, 345 U.S. 330, 337-338 (1953). Dismissal for lack of subject-matter jurisdiction is proper only when the claim is so completely devoid of merit as not to involve a federal controversy. Brownback v. King, 141 S.Ct. 740 (2021).

3. Appellants Plausibly Pled Facts Sufficient to Excuse an Arbitral Forum for Appellants' Claims.

United claims that a hybrid action is only for racial discrimination is not supported by the subsequent holdings of this court or other federal courts. The Ninth Circuit has found, when facts are viewed in total, the failure to initiate a grievance procedure after many letters demanding initiation of the process yet failure to do so, months of delay violating contractual time periods, failures to

invoke the process even after litigation initiated, can be taken as repudiation of the grievance procedure by the RLA employer sufficient for subject matter jurisdiction to deny employer's motion to dismiss. Dean v. Trans World Airlines, Inc., 924 F.2d 805, 810-811 (9th Cir. 1991). United Appellees statements to the contrary are in fact wrong, as well as disingenuous. As argued below, the Appellee Union does not have the sole authority to access the grievance process not do the Union Appellees have the power to block Appellee United from cooperating in its grievance process duties pursuant to the RLA dictates. Repeated complaints to the airline and union suffices to provide a federal forum where the plaintiff exhausted the remedial process to their detriment, which are the facts here.

United Appellee also appears to argue Dean is unpersuasive in that in the case at bar there is no evidence the union and carrier substantial breached the CBA grievance process. United Appellees are wrong. The complaint alleged specific facts of procedural abuse on the part of Appellees like in Dean. (4-ER-292-316). No steps of the grievance process were followed and documents purported to evidence steps of the grievance process were forged. (4-ER-292-314).

Repudiation can also occur by ignoring what you know to be the correct interpretation of a CBA and instead proceed with a unilateral, new interpretation change. United appellees knew exactly what LOA 05-03M mandated but still imposed harsh unilateral changes to its terms for self-enrichment. Appellant United

can no more hide behind the Union Appellees' wrongful failure to act, Humphrey v. Moore, 375 U.S. 335 (1964), than the Union Appellees can operate under United Appellees control. 45 U.S.C. § 152, Fourth and Tenth (it is illegal for a union to operate under an employer's control); 45 U.S.C. § 182; Barthelemy v. Air Lines Pilots Ass'n., 897 F.2d 999, 1015–16 (9th Cir. 1990). This is precisely why these two claims may, and should, be joined in one suit.

United Appellees further argue Appellants have not shown resort to the Board would be futile. Futility has two elements – one, blocked from exhausting grievance process, Morales v. Laborers Union Local 304, 2012 WL 70578, *3 (N.D. Cal. 2012) and two, union bias so pervasive so as to poison the grievance process. Clayton v. UAW, 451 U.S. 679, 689 (1981) ("union officials are so hostile to the employee" cannot "hope to obtain a fair hearing"). Appellants have plausibly pled both and United Appellees agree appellants have sufficiently pled the Union Appellees' hostility is so pervasive, it infects every step of the grievance process. Appellants alleged these facts. (4-ER-292-314),

Given the complaint's factual allegations, and the required standard of review, the district court erred in finding Appellants had not plausibly pled this claim sufficient to survive a motion to dismiss. Moreover, given the many factual questions this claim requires to resolve to make a determination, because Appellants have been denied discovery, and required disclosures, the district court

should not have dismissed this claim at this stage of the proceedings as implausible finding inferences of misconduct are not warranted.

No Appellee has ever challenged these allegations made by Appellants nor argued the documentary evidence was false, misleading, or inadmissible. Appellees simply argue so what, Appellants have no right to be heard over a complicit Union Appellees' objection. This is not the law and should not be the basis to uphold the district court's wrongful dismissal with prejudice.

Plaintiffs did not try and side step the procedures, they went to herculean efforts to utilize the grievance procedures to remedy the CBA violations. With complete respect for Union Appellees' authority and deference to the grievance process, Appellants not only gave the union a chance to act on their behalf, but in every way possible tried to convince them of the grievances' merit. Repeated unheeded complaints to the union suffice to provide a federal forum when the union controls grievance procedures. Glover v. St. Louis–S.F. Railway Co., 393 U.S. 324, 330–31 (1969).

B. The District Court's Dismissal of the ERISA Claims Should Be Reversed and Remanded.

1. Union Appellees Arguments ERISA Claims Are "Peripheral DFR Claims" Are Unconvincing and Unsupported.

The Union Appellees offer the same incoherent argument the district court made that claims for equitable relief pursuant to ERISA are merely repackages of a

DFR claim rendering such claims "peripheral" claims because: (i) the same facts are used to plead each claim; and (2) the claims can "only be resolved," or will be "conclusively resolved, by interpreting the CBA." (Dkt. Entry 19, p. 31, App. Union Brief).

Neither Union Appellees, nor the district court, cite a provision in ERISA's comprehensive federal statutory scheme exempting air carrier employees from its reach nor holding ERISA fiduciaries to a RLA union's DFR standard. Indeed, none of the alleged ERISA fiduciaries in this case, de facto or de jure, are union officials or in any way connected to Union Appellees. Judging the alleged fiduciaries' owed duties of prudence and loyalty as related to the ERISA claims is strictly according to ERISA, and its dictates, and has nothing to do with the RLA's DFR standard.

Union Appellees also argue because there are common facts to the DFR and ERISA claims, one must cede to the other. This defies the pleading standards set out in the FRCP which explicitly permits pleading in the alternative, Rule 8(d)(2); stating as many claims as a plaintiff has, Rule 8(d)(3), 10(b); and joining as many claims, Rule 18, or parties as is necessary, Rule 19, or permitted, Rule 20. Fed.R.Civ.P. Rule 8(d)(2),(3), 10(b), 18, 19, 20. Because one set of facts gives rise to a series of claims is not dispositive of either nor does it negate any of them. Union Appellees offer no authority for this claim.

Furthermore, Union Appellees continued assertion they cannot be held liable for having knowingly participated in an ERISA fiduciary's breach of the ERISA fiduciary's duty because Union Appellees are not ERISA fiduciaries completely misstates the claim and its elements.

Pursuant to ERISA, "a *non-fiduciary* may be held liable under 29 U.S.C. § 1132(a)(3) for knowingly participating" in a fiduciary's breach. Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 246 (2000)). Thus, the "knowing participant" does not need to be an ERISA fiduciary as Union Appellees allege to be violate this provision. This logically follows because there are separate and distinct provisions in ERISA for an ERISA fiduciary who breaches its duty. It is only when one is *not* an ERISA fiduciary, one may be liable under the ERISA "knowing participation" provisions. But more importantly, Union Appellees do not provide any factual, or legal basis, to dispute the complaint's allegations that by devising, and knowingly participating, in schemes with plan fiduciaries, and parties in interest, to block eligible participants from enrollment into CARP for six-years for financial gain, and to divert distribution of profit-sharing pool monies to non-participants, does not satisfy the ERISA provisions to allege this claim. Appellants' allegations are sufficient to state a claim for knowing participation pursuant to ERISA despite the Union Appellees, and the district court, finding otherwise.

Moreover, had the complaint not make this factual basis clear, the proper resolution was amendment not dismissal with prejudice. As argued above in this brief, part of the lack of specificity is driven by Appellees failure to provide the necessary and relevant factual information, an issue the district court failed to address, and the stay the district court placed on all discovery almost 4-years ago, at the case's earliest stages. (1-ER-34-40). Nevertheless, a potential failure to plead a needed detail in a claim does not nullify it; it does counsel for amendment and specificity. This erroneous conclusion by the district court must be reversed.

2. Appellees Offer No Persuasive Authority to Refute ERISA Plan Wide Relief Claims Are Not Precluded By RLA.

Appellees agree with the district court Appellants' ERISA claims all require interpretation of the CBA, and therefore, these claims are precluded by the RLA, without pointing to any part of the record to support this contention.

ERISA § 502(a)(2) claims belong to the plan, and not to the individual participant. Because the plan is not an employee subject to the RLA, and there is nothing in the record that the plan has consented to arbitration, these claims must be heard in federal court as dictated by the statute. Munro v. Univ. of S. Cal., 896 F.3d 1088, 1092 (9th Cir. 2018). Nor does the CBA force the case into arbitration because ERISA § 502(a)(2) are brought in a representative capacity on behalf of the plan as a whole. Munro v. Univ. of S. Cal., 896 F.3d 1088 (9th Cir. 2018) ("an

arbitration agreement that binds only individual participants cannot bring such claims into arbitration.").

The complaint's allegations show the ERISA claims for breach of fiduciary duty are brought on behalf of the Plan and its participants. Appellants' allegations provide specific facts United Appellees harmed the Plan and its participants, not just the named Appellants. The complaint alleges United Appellees breached the fiduciary duties owed to the Plan by: (i) not following the Plan document; (ii) by operating, and acting, in a financial conflict of interest with respect to the Plan; (iii) by distributing Plan assets to non-participants, causing plan-wide injury.

Moreover, when a defendant contends a plaintiff's claims are minor disputes under the CBA and are thus preempted by the RLA, the defendant has the burden of proof. See Caterpillar, Inc. v. Williams, 482 U.S. 386, 393 (1987); and Jimeno v. Mobil Oil Corp., 66 F.3d 1514, 1526 n.6 (9th Cir. 1995). Thus, Appellees have the burden to prove resolution of these claims will require the court to interpret disputed term(s) in the CBA. Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 260 (1994). To date, no such terms have been identified or stated.

Furthermore, as Appellants argued in their opening brief, mere reference to the CBA, to decide ERISA claims is not interpretation. "Purely factual questions about an employee's conduct or an employer's conduct and motives do not require a court to interpret any term of the [CBA]." Id., at 261; see also Livadas v.

Bradshaw, 512 U.S. 107, 123 (1994). This is especially true when the claims involve the actions or conduct of a plan sponsor, plan administrator, or plan fiduciary. Preclusion is improper when the claim is independent of the CBA. Grote v. Trans World Airlines, Inc., 905 F.2d 1307 (9th Cir.).

In the Ninth Circuit, "interpretation is construed narrowly; it means something more than consider, refer to, or apply." Balcorta v. Twentieth Century-Fox Film Corp., 208 F.3d 1102, 1108 (9th Cir. 2000). More importantly, the CBA does not supply the standard by which an ERISA plan fiduciary is considered to have breached its duties of loyalty or prudence. Appellees do not overcome the authorities provided by Appellants regarding harmonization of these two federal statutes. Simple reference to the CBA to see if a right exists, without more, does not require interpreting the agreement. "[W]hen the meaning of contract terms is not the subject of dispute, the bare fact that a [CBA] will be consulted in the course of [ ] litigation plainly does not require the claim to be extinguished." Livadas, 512 U.S. at 124.

RLA Boards are only empowered to decide the meaning of a CBA; not to make the legal decisions necessary to decide federal disputes over the meaning of federal statutes. United Airlines, Inc., 48 LA 727, 733 (BNA) (1967) (jurisdiction of this System Board does not extend to interpreting and applying the [a federal statute]"). This is not part of the delegation of authority provided by the RLA to

the board. Northwest Airlines / Airline Pilots Ass'n., Int'l System Bd. of Adjustment, Decision of June 28, 1972, p. 13.

Here, even if sent to the Board, the Board would have no power to interpret the ERISA plan documents or force the ERISA plan fiduciaries to amend the plan. Likewise, absent an "intolerable conflict between two statutes, the RLA cedes to any statute providing 'minimum substantive guarantees' to particular workers beyond what they could obtain before RLA adjustment boards reasoning RLA claims no specific power over claims created by other federal claims." Atchison T. & S. F. R. Co. v. Buell, 480 U.S. 557, 565 (1987). United Appellees attempt to rewrite the complaint as not seeking plan wide relief, instead as one for claims for benefits, to avoid this result cannot be squared with the complaint's allegations.

Federal courts are expressly endowed by Congress with jurisdiction over certain federal statutory claims and retain that jurisdiction despite other aspects of the same transaction that are dependent on the meaning and application of a CBA, which may have to be decided by compulsory arbitration. Alexander v. Gardner-Denver Co., 415 U.S. 45, 49-54 (1974).

3. United Appellees Additional Reasons For Dismissing Appellants ERISA Claims Are Not Ripe for Review.

United Appellees also suggest that this Court should independently evaluate alternative grounds for dismissal none of which were decided or addressed by the district court in its order. United Appellees assert this is permissible because these

arguments are preserved in the record; however, they are mistaken because the record on appeal does not consist of any briefs or memorandum, nor did the district court consider, or make findings of fact, for any of these grounds. FRAP 30-1.4; Advisory Committee Note to Rule 30-1.4; (1-ER-1-10). More importantly, these alternative grounds do not raise purely legal issues this Court would review *de novo* on appeal. On the contrary, each alternative ground requires the district court to make factual determinations, which are reviewed by this Court for abuse of discretion. Since the district court has not made any such factual determinations with respect to these proposed alternative grounds for dismissing Appellants' ERISA claims, these claims are not ripe for consideration by this Court and should be disregarded.

C. The District Court Erred Refusing to Consider, And Dismissing With Prejudice, Appellants' RLA § 184 Claim.

Appellees do not address Appellants' main argument that the district court's decision to dismiss with prejudice and without leave to amend, at this stage of the proceedings, was error. Appellees, in an effort to distract this Court from the true issues on appeal, obfuscate and misconstrue Appellants' claim; predict mischief if this claim is considered on the merits; and disregard the express terms of the RLA's statutory scheme. These arguments are feeble for deprivation of this right.

Appellants argued the district court could not have applied the proper standard of review because not only does the complaint allege facts sufficient to

show a statutory violation, not a duplicative DFR claim, to survive a Rule 12(b)(6) motion, the district court previously found, following full briefing by all parties, this claim was plausibly pled and could be added. Appellees fail to address the above in any meaningful way.

United Appellees argue the refusal to allow Appellants their statutory right to independently access the arbitral process is dictated by the express terms of the RLA; however, United Appellees use of inapplicable RLA § 153 to support this contention is wrong. RLA §§ 181, 182 specifically state RLA § 153 does not apply to air carrier employees, only RLA § 184 does. When RLA § 184 is construed with RLA § 152, which does apply to air carrier employees, one can readily find an air carrier employee has such a right.

No Appellee offers any explanation as to why, despite their contrary views on its merits, this claim was properly dismissed as a failure to state a claim, in light of the district court's prior approval following review of a draft proposal of the claim. (9-ER-1129, Dkt. No. 78, 81-84, 85). United Appellees had no objection to adding this claim, preserving its rights to object on the merits; Union Appellees objection was Appellants could not prove this claim and therefore, should not be permitted to plead it. (9-ER-1129, Dkt. No. 81, 82). These stated positions, however, do not support dismissing this claim as a failure to state a claim.

Notably, the Ninth Circuit has held a statutory claim is not a recycled DFR claim, and a district court has jurisdiction over such claim, because such a claim is based on a statute and not the CBA. Fennessy v. Southwest Airlines, 91 F.3d 1359 (9th Cir. 1996) (statutory claims are not "grounded in the [CBA]"). Moreover, the question of whether a plaintiff has a cause of action is distinct from the question whether a district court has subject matter jurisdiction. Arbaugh v. Y&H Corp., 546 U.S. 500, 510–16 (2006). "[T]he absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the court's statutory or constitutional power to adjudicate the case." Verizon Maryland Inc. v. Public Service Comm. of Maryland, 535 U.S. 635, 642–43 (2002). Because the district court had the power to hear it, it should have.

United Appellees provided this Court with a non-exhaustive survey of cases, which, given the wide range of courts, including the Supreme Court, who either specifically found, or have reasoned in dicta or otherwise, RLA employees have a right to independently access this arbitral process over their union and employer's objections, is perhaps the most persuasive reason to have considered it.

D. Appellees Arguments Do Not Support the District Court's Finding Appellants Have Failed to State a Claim Under LMRDA § 501.

Union appellees agree with Appellants the LMRDA supports claims against individual Union officials. Although agreeing the LMRDA provides these rights, they argue, without any legal support, the LMRDA § 501 claim in the instant case

is nothing more than a is a repackaged DFR claim. Although the LMRDA claim may rely on the same set of operative facts, the FRCP permits, and even requires, this type of alternative pleading. *See, e.g.*, Fed.R.Civ.P. Rule 8(d)(3) (permitting pleading in the alternative); Fed.R.Civ.P. Rule 14 (allowing permissive claims thereby legitimizing filing one action for a multitude of claims); and Fed.R.Civ.P. Rule 18 (permitting joinder of parties and claims). Since Union Appellees provide no legal authority for their position, this court should disregard this argument.

Next, Union Appellees argue individual union officials did not misuse union members' property or rights solely based on a single self-serving affidavit. Since the Appellants were not permitted to test these affidavits for truthfulness, they must be disregarded at this stage of the litigation. Further, Appellants provided facts to support the LMRDA claim, i.e., (i) the $1.5 million dollar payment received from the United Appellees, (ii) acceptance of golf trips for union officers personal gain, (iii) redistribution of Appellants' profit-sharing monies to non-participants; and (iv) blocking access to grievance process. Since these allegations must be takes as true, Appellants have alleged sufficient facts to draw reasonable inferences Appellants had plausibly stated a claim pursuant to LMRDA § 501. Union Appellees do not provide any legal support to refute these facts, other than to allege the LMRDA claim is duplicative of the DFR claim.

The district court was required to presume the allegations were true. When correctly construed, these allegations evidence union officials accepted things of value and mishandled Appellants' property interests to such a degree so as satisfy the pleading standard. "So long as the plaintiff alleges facts to support a theory not facially implausible, the court's skepticism is best reserved for later stages of the proceedings when the plaintiffs' case can be rejected on evidentiary grounds." In re Gilead Sciences Sec. Lit., 536 F.3d 1049, 1057 (2008). The district court does not identify what prevents it from drawing these inferences; perhaps, as the court in In Re Gilead Sciences found, "what truly motivated the dismissal was the district court's incredulity" after it "expressly identif[ied] [one] allegation it was unwilling to accept." Id. "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554 (2007).

Moreover, the district court's legal basis that "[w]here the union has inflicted the injury it alone must pay," ignores the footnote to that quote from Atkinson that the court holding "do[es] not reach the question of whether the count would state a proper § 301(a) claim if it charged unauthorized, individual action," which are the precise facts in the present case.

Finally, Union Appellees' argument the court has no jurisdiction to hear this claim is not a basis on which the district court decided to dismiss this claim and therefore, this argument is not ripe for appeal.

CONCLUSION

For all of the aforementioned reasons raised in Appellants' briefs filed in this appeal, and in the interests of fairness, Appellants ask this Court to reverse the district court's decisions dismissing the complaint in its entirety, with prejudice, and without leave to amend, remanding this matter for further proceedings.

Dated: April 28, 2023 Signed: /s/ Jane C. Mariani

Jane C. Mariani,

Law Office of Jane C. Mariani
584 Castro Street, #687
San Francisco, CA 94114
jcm@marianiadvocacy.com
(415) 203-2453

Attorney for Appellants

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s): **22-16280**

I am the attorney or self-represented party.

This brief contains 8,376 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6) (14-point font, Times New Roman, Word 2016).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[**X**] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:

[ ] it is a joint brief submitted by separately represented parties;

[**X**] a party or parties are filing a single brief in response to multiple briefs; or

[ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature: /s/ Jane C. Mariani **Date:** April 28, 2023

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2023, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

Dated: April 28, 2023 Signed: /s/ Jane C. Mariani

Jane C. Mariani,

Law Office of Jane C. Mariani
584 Castro Street, #687
San Francisco, CA 94114
jcm@marianiadvocacy.com
(415) 203-2453

Attorney for Appellants