BREDHOFF & KAISER, P.L.L.C.
805 FIFTEENTH STREET, NW, SUITE 1000
WASHINGTON, DC 20005
(202) 842-2600

Joshua Shiffrin (DC Bar # 501008) (admitted *pro hac vice*)
jshiffrin@bredhoff.com

GORDON REES SCULLY MANSUKHANI, LLP
TWO NORTH CENTRAL AVENUE SUITE 2200
PHOENIX, AZ 85004
(602) 794-2472

David L. O'Daniel (SBN: 006418)
dodaniel@grsm.com

Attorneys for Defendant Allied Pilots Association

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Bahig Saliba, Plaintiff, v. Allied Pilots Association, Defendant.	CASE NO.: 2:22-CV-01025-DLR **DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS**

In its Motion to Dismiss, Defendant Allied Pilots Association explained that a union's conduct is reviewed under a "highly deferential" standard, under which union conduct is unlawfully arbitrary only when it is "so far outside [the] 'wide range of reasonableness' that it is wholly 'irrational.'" APA Mot. [Dkt. No. 9] at 9 (quoting *Demetris v. TWU*, 862 F.3d 799, 804-05 (9th Cir. 2017) (cleaned up)). Unions receive this deference because it has long been recognized that the members of a bargaining unit to whom a union owes a duty of fair representation ("DFR") often have competing interests, and "[t]he complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

As demonstrated by his Response [Dkt. No. 12], Plaintiff Bahig Saliba's claims stem from his dissatisfaction with APA's decision not to challenge the mask policy that American Airlines ("American") instituted for its passengers and employees during the pandemic, which carried over into a decision by APA not to adopt arguments regarding the mask policy urged by Plaintiff during his discipline and grievance proceedings. On the facts alleged, far from being irrational, APA's decisions not to challenge the mask policy or adopt Plaintiff's arguments were the product of reasoned judgment. Plaintiff "takes issue" with APA's decisions regarding American's mask policy, Pl. Resp. at 2 [Dkt. No. 12], but his disagreement with APA's decisions—which are grounded in his unsupported belief about the meaning of 14 C.F.R. § 61.53 ("FAR 61.53")—cannot overcome the deference to which APA is entitled in making judgments as how to best represent the entire pilot group at American. Plaintiff has also not plausibly alleged a DFR breach regarding the manner in which APA has handled his disciplinary and grievance proceedings, which remain ongoing, based on any of the contentions raised in his Response.

Finally, as explained in APA's Motion to Dismiss, Plaintiff's remaining legal claims lack any legal merit. Plaintiff has not shown otherwise, and those claims, as well as his DFR claim, should be dismissed with prejudice.

I. Plaintiff's DFR Claim Fails as a Matter of Law

A. Plaintiff Has Not Plausibly Alleged that APA Acted Arbitrarily in Deciding Not to Object to American's Mask Policy

As APA explained in its Motion, a union does not breach its DFR if its conduct was the product of an exercise of judgment that was not "wholly irrational." *See* Dkt. No. 9 at 10 (quoting *Demetris,* 862 F.3d at 805 (cleaned up)). That is, "[a] union does not breach its duty of fair representation to others as long as it proceeds on some reasoned basis." *Peters v. Burlington N. R. Co.* 931 F.2d 534, 538 (9th Cir. 1990) (internal citation omitted). This remains true if the union's judgment calls "are ultimately wrong." *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 45-46 (1998).

As referenced in the Complaint, APA described the reasons behind its decision to support American's mask mandate in a joint APA-American letter that APA sent to its members in May 2020, which explained that APA's decision was based, in part, on what it understood to be a "consensus among epidemiologists . . . that wearing a face covering can significantly reduce the spread of [coronavirus] . . . ." Dkt. No. 9-3 at 3 (May 2020 Letter); Compl. at 13.[1] Given APA's reasoned explanation for its decision not to object to American's mask policy, the decision cannot be deemed a breach of its DFR.

Plaintiff responds by characterizing APA's decision as "counter to the interests of [American] pilots" and "legally flawed." Pl Resp. at 9. For the reasons explained above, whether Plaintiff believes APA's decision to have been counter to the interests of pilots is beside the point; so long as APA's decision was not "wholly irrational," Plaintiff's disagreement with APA's decision cannot establish a DFR claim.

Plaintiff also offers no substantive argument in support of his assertion that APA's position was "legally flawed." To be sure, Plaintiff asserts his belief that FAR 61.53

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[1] Plaintiff asserts that, as a non-member of APA, he did not receive notice of the May 2020 letter when it was sent. Pl. Resp. at 1-2. APA recognizes that the question of when Plaintiff received notice of APA's position with respect to American's mask policy may not be answered solely based on the allegations of the Complaint, and, as such, its statute-of-limitations defense may be premature at this time.

grants pilots the sole authority to determine what generally applicable rules, whether imposed by an employer or a public authority, they may choose to follow in the event they believe the rules may have an impact on their health. *See* Pl. Resp. at 2-3, 9. APA showed that this interpretation has no basis whatsoever in the actual language of FAR 61.53. APA Mot. at 10-11. By its plain terms, that regulation requires a pilot to refrain from operating an aircraft if he or she has a medical condition that would make the pilot unable to meet the requirements for a pilot's medical certificate, and it says nothing more. *See id.*; FAR 61.53(a). Plaintiff ignores the language of the regulation entirely in his Response, and he cites no other legal authority in support of his interpretation, which would have wide-ranging consequences well beyond this case.[2]

Plaintiff also appears to argue that APA did not have the "authority" under the Railway Labor Act ("RLA") to choose not to object to American's mask policy, or, alternatively, that APA was obligated to treat American's imposition of a mask policy as a major dispute under the RLA. *See* Pl. Resp. at 2-3, 9-10, 15. If that is his argument, it lacks any merit. APA is the certified bargaining representative charged under the RLA with the responsibility to "make and maintain agreements concerning rates of pay, rules, and working conditions" for the pilots at American. 45 U.S.C. § 152, First. At a time when public and private entities across the country were instituting mask policies based on recommendations from public health officials, American instituted a new policy that required pilots and other employees to wear masks. As it may choose to do whenever

[2] Plaintiff includes with his Response several documents that are not even arguably incorporated by reference into his Complaint. *See* Dkt. Nos. 12-11, 12-12, 12-14, 12-15, 12-16, 12-17, 12-18, 12-19, 12-20, 12-23, 12-24. As such these documents should be disregarded by the Court in considering Plaintiff's Response. *Cf. See J.K.J. v. City of San Diego*, 42 F.4th 990, 998 (9th Cir. 2021). But even if the Court were to consider these documents in connection with APA's Motion, none of them change the analysis of any of the points raised in APA's Motion.

One such document is a collection of "declarations" from pilots agreeing with Plaintiff's belief about the meaning of FAR 61.53. Dkt. No.12-14. Of course, Plaintiff's unsupported interpretation of FAR 61.53 is not entitled to greater weight merely because other pilots share his belief. But it is also worth noting that at least two of the "declarations" are from pilots not employed by American to whom APA owes no duty of fair representation at all. *See id.* at 30, 130.

American enacts, or seeks to enact, an employment policy affecting pilot working conditions, APA chose to support American's mask policy for the reasons identified in the joint communication sent to pilots in May 2020. *Supra* at 2. In doing so, APA did not act as a "Health Care Provider," as Plaintiff suggests, Pl. Resp. at 2, nor did it impugn any "rights" that are "not subject to" negotiation under the RLA, *see id*. at 3-4. Indeed, Plaintiff cites no authority for his contention that the mask policy was beyond APA's ability to either negotiate or agree to; his argument appears to rest on his unsupported belief, discussed above, that he cannot be required to comply with *any* policy that he believes may impact his ability to maintain his medical certificate. Instead, APA fulfilled its conventional role as a union that must determine, based on available information, whether objecting to, agreeing to, or otherwise acquiescing in, a new employer policy regarding pilot working conditions is in the interests of the employees it is certified to represent. Plaintiff has not shown that APA acted beyond its statutory authority under the RLA in deciding not to object to American's policy, even if he disagrees with APA's assessment.

In all, nothing in Plaintiff's Response plausibly suggests that APA's decision to support American's mask policy was "wholly irrational" such that it fell outside the "wide range of reasonableness" afforded to unions that must represent a group of employees with competing interests. As such, Plaintiff's claim that APA breached its DFR by choosing not to object to American's mask policy must be dismissed.

B. Plaintiff Has Not Plausibly Alleged that APA Breached its DFR in the Handling of his Disciplinary and Grievance Proceedings

In December 2021, Plaintiff was detained by TSA at Spokane International Airport after he refused to wear a mask. Compl. at 17-19. American subsequently held a disciplinary hearing on January 6, 2022 regarding the incident, and it issued discipline to Plaintiff, in the form of a written advisory, for violating its mask policy. *Id.* at 20-22; APA Mot. Ex. 4. With APA's assistance, Plaintiff subsequently filed a grievance

challenging the discipline imposed on him. Compl. at 23; Dkt. 12-8 at 3-8, 11-14. Plaintiff had the final say on what was included in that grievance. *See id.* Under the collective bargaining agreement between APA and American ("CBA"), the first two steps of the grievance process consist of an initial hearing and appeal hearing held with managers from American. *See* Dkt. No. 12-5 (CBA) at 192-193 (Section 21.F and G). If a grievance is not resolved at those steps, it proceeds to a pre-arbitration conference under Section 22 of the CBA, and, if not resolved at that stage, the grievance may be advanced by APA to arbitration. *Id.* at 195-202 (Sections 22 and 23). Plaintiff's grievance is currently pending at the pre-arbitration conference stage. Compl. at 25.

Plaintiff's Response, including the extensive correspondence between him and APA attached to the Response, confirms that his primary complaint about APA's handling of his disciplinary and grievance proceedings is that APA would not agree to attack APA's mask policy based on the arguments regarding FAR 61.53 that it had deemed to be meritless. Plaintiff attempts to characterize the facts on this issue as a failure by APA to represent him, *see* Compl. at 26-29; Pl. Resp. at 4-5, but the correspondence between Plaintiff and APA establish that Plaintiff never agreed to representation by APA within the parameters offered by APA, *i.e.*, that it would represent him without making Plaintiff's arguments challenging the mask policy. *See* Dkt. No. 12-7 (correspondence regarding disciplinary hearing) at 7-10, 23, 26-27, 29-32; Dkt. 12-9 (correspondence regarding grievance appeal hearing) at 10-12. As a result, Plaintiff ultimately represented himself at his disciplinary hearing and grievance hearings, where he was given the opportunity to make those arguments on his own behalf. *See* Compl. at 20; Dkt. No. 12-2 (1/6/22 Discipline Hearing Transcript) at 5-6; Dkt. No. 12-3 (2/10/22 Initial Grievance Hearing Transcript) at 7-10; Dkt. No. 12-4 (3/30/22 Grievance Appeal Hearing Transcript) at 8-9.

As APA explained in its Motion, APA did not breach its duty of fair representation by deliberately choosing not to make the arguments that Plaintiff

requested. The law is well established that APA is under no obligation to pursue grievances that it has determined either to be meritless or contrary to the interests of the bargaining unit as a whole. "Because the union must balance many collective and individual interests when it decides whether and to what extent to pursue a particular grievance, courts should accord substantial deference to the union's decisions." *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1273 (9th Cir. 1983); *see also* APA Mot. at 11-13 (citing additional cases). Plaintiff does not dispute this point in his Response. His claim against APA for choosing not to attack the AA mask policy in connection with his disciplinary and grievance proceedings should therefore be dismissed.

Plaintiff raises several additional issues with respect to the manner in which APA handled his grievance, which we address in turn.

1. Plaintiff complains about communications in which APA attorney Rupa Baskaran stated that APA representatives would represent him at his initial grievance hearing (which was not the case) and the fact that Ms. Baskaran made a certain argument at his grievance appeal hearing against Plaintiff's stated instructions.[3] *See* Pl. Resp. at 6-8. Even if, at this juncture, these actions were considered to have been errors by APA, they would not constitute they type of "egregious" conduct or "reckless disregard for [a bargaining unit member's] rights" required to establish a DFR claim, which requires proof of union misconduct beyond "mere negligence." *Patterson v. Int'l Brotherhood of Teamsters Local 959,* 121 F.3d 1345, 1349 (9th Cir. 1997); *see also Beck v. United Food and Com. Workers Union*, 506 F.3d 874, 881 (9th Cir. 2007); *Demetris*, 862 F.3d at 808. Where the union's conduct in question is an unintentional or inexplicable act or omission, a duty of fair representation claim can be established only when the act "substantially

[3] APA previously addressed Plaintiff's contentions regarding his requests to reschedule his disciplinary hearing, and the instance in which Ms. Buskaran erroneously sent American the wrong version of Plaintiff's grievance appeal letter—a mistake which she quickly corrected and that did not prejudice Plaintiff in any way. *See* Pl. Resp. at 6-8; APA Mot. at 14-15.

injures the union member."[4] *Beck*, 506 F.3d at 880. In *Beck*, for example, a union's failure to file a timely grievance was found to have substantially injured the plaintiff where that failure extinguished her right to challenge her termination. *Id.* Plaintiff has not experienced any injury here, let alone an injury prejudicing his rights. Rather, Plaintiff's grievance process is ongoing, and there has been no waiver of any issue that could ultimately be pursued in the next stages of the grievance process, *i.e.*, the pre-arbitration conference and arbitration.

2. At various places in his Response, Plaintiff references a presidential grievance APA submitted in October 2021 challenging certain practices by American regarding discipline for mask policy violations; at one point, he faults APA for not bringing the presidential grievance to his attention. Pl. Resp. at 3, 6, 10; Dkt. No. 12-16 (Presidential Grievance). Like many of the documents attached to Plaintiff's Response, the presidential grievance should be disregarded by the Court because it is not even arguably incorporated by reference into the Complaint. *See supra* at 3 n.2. In any event, even if the Court were to consider the presidential grievance in connection with APA's Motion, it is irrelevant to Plaintiff's disciplinary or grievance proceedings. The presidential grievance asserted that American breached the parties' CBA by summarily issuing discipline to pilots for mask policy violations without following any of the procedures in Section 21 of the CBA. *See* Dkt. No. 12-16. That did not occur here. The Company followed the Section 21 procedures with respect to Plaintiff (*i.e.*, a hearing was held prior to his discipline) and thus the issues raised in the presidential grievance were

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[4] Although in places in his Response Plaintiff attempts to characterizes APA's conduct as deceitful or dishonest, *see, e.g.*, Pl. Resp. at 6-7, 10, there are no facts alleged in the Complaint that even arguably constitute "substantial evidence of fraud, deceitful action or dishonest conduct, as would be required to establish a DFR claim based on bad faith conduct, or "substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives," as would be required to establish a DFR claim based on discriminatory conduct. *See Beck*, 506 F.3d at 880. At bottom, Plaintiff's dispute concerns Plaintiff's dissatisfaction with APA's decision not to object to American's mask policy, and Plaintiff should not be able to avoid dismissal by attempting to re-characterize that dispute in conclusory terms.

not implicated in Plaintiff's case.[5]

3. Finally, Plaintiff appears to argue that APA deceived him into filing a grievance to challenge American's mask policy even though (he asserts) an arbitrator could not "address a right bestowed upon the plaintiff by a federal agency." Pl. Resp. at 10-11. This argument is nonsensical. It is Plaintiff's contention—not APA's—that American has violated rights that he believes he has under federal aviation regulations; in APA's view, the mask policy does not impact any rights under the federal aviation regulations at all. Further, Plaintiff was the one who initiated his grievance, and, although he received assistance from APA, he was ultimately responsible for its content. *See* Compl. at 23; Dkt. 12-8 at 3-8, 11-14. In any event, among other issues raised, Plaintiff's grievance contends that American imposed discipline without just cause, which is well within the authority of an arbitrator to determine. Dkt. 12-8 at 11-12; *see, e.g., Federated Dept. Stores v. United Food and Com. Workers Union, Local 1442*, 901 F.2d 1494, 1497-98 (9th Cir. 1990).

II. Plaintiff's Remaining Claims Are Due to Be Dismissed as a Matter of Law

A. As the Ninth Circuit and Other Circuits Have Conclusively Held, There is No Private Right of Action under the Federal Aviation Regulations

In its Motion, APA argued that Plaintiff's claim for violation of 14 C.F.R. § 91.11 should be dismissed as a matter of law because there is no private right of action under the Federal Aviation Regulations. In support of that argument, APA cited binding Ninth Circuit precedent holding that "there is no private right of action under the Federal

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[5] In his Response, Plaintiff also tries to draw a line between the presidential grievance, an APA communication to pilots regarding its position on the prospect of mandatory pre- or post-flight COVID testing for certain destinations, and a subsequent agreement reached between American and APA regarding that issue and vaccinations. *See* Pl. Resp. at 10; Dkt. Nos. 12-16, 12-18, 12-24. As previously noted, these documents should be disregarded by the Court. *Supra* at 3 n.2. They are also irrelevant. These documents all dealt with different (and novel) issues that APA was forced to confront during the pandemic, but they otherwise have no relationship to APA's specific exercise of judgment with respect to the mask policy that Plaintiff challenges in his lawsuit.

Aviation Act . . . particularly where plaintiff's claim is grounded in the regulations rather than the statute itself." *GS Rasmussen & Assoc. v. Kallita Flying Serv.*, 958 F.2d 896, 902-03 (9th Cir. 1992). APA also cited a decision from the First Circuit that comprehensively examined the issue under currently prevailing law and "join[ed] a long list of other courts" in concluding that "neither the Act nor the regulations create implied private rights of action." *Bonano v. East Carribean Airline Corp*., 365 F.3d 81, 86 (1st Cir. 2004) (citing cases); *see also Cardenas v. Am. Airlines, Inc.*, No. 17CV2513-GPC(JLB), 2019 WL 1469131, at *3 (S.D. Cal. Apr. 3, 2019) (citing cases). In his Response, Plaintiff ignores the controlling precedent from the Ninth Circuit and instead attempts to argue from first principles as why the Court should find a private right action. Pl. Resp. at 11-12. The Court should decline Plaintiff's invitation to ignore settled law, and it should dismiss Plaintiff's claim.

B. Plaintiff's Section 1983 Claim Fails as a Matter of Law Because APA is Not a State Actor

An essential element of a claim under 42 U.S.C. § 1983 is that the defendant was "acting under color" of law. 42 U.S.C. § 1983; As Plaintiff acknowledges in his Response, APA is a private actor, not a state actor. Pl. Resp. at 13. As Plaintiff points out, there are circumstances in which a private actor's conduct is so intertwined with government action that the conduct of the private action is deemed state action—that is, in circumstances where "the challenged conduct that caused the alleged" deprivation of rights is "'fairly attributable' to the state[.]" *Belgau v. Inslee*, 975 F.3d 940, 946 (9th Cir. 2020); Pl. Resp. at 13. This case does not remotely present such circumstances. Rather, what is at issue is a decision by a private labor organization (APA) not to object to an employment policy that was enacted and enforced by a private employer (American). In no conceivable way can APA's decision not to object to American's mask policy, or its handling of Plaintiff's disciplinary and grievance proceedings, be "fairly attribut[ed]" to the state.

Plaintiff nonetheless posits several reasons why APA should be deemed state actor in this case, including that (1) APA has lobbied the government on the state and federal level, including (according to Plaintiff) to promote the use of masks, (2) pilots operate out of airports controlled by States, and (3) APA has been certified by the government as the exclusive representative of the American pilots. Pl. Resp. at 13-15. If adopted as a basis for Section 1983, any of these reasons would not only transform *all* of APA's conduct into state action, but they would also transform the conduct of virtually *all unions* into state action as well. After all, unions are routinely certified by government entities to serve as the exclusive representative of the bargaining units they serve. Plaintiff's reasoning cannot be squared with the recognition by the Ninth Circuit and other courts that unions are "private part[ies]" for Section 1983 purposes. *Belgau*, 975 F.3d at 947; *Hallinan v. Fraternal Order of Police of Chicago Lodge No. 7*, 570 F.3d 811, 815 (7th Cir. 2009) ("Unions are not state actors; they are private actors.").[6] Plaintiff's Section 1983 claim should be dismissed because the facts alleged in the Complaint do not plausibly establish APA acted "under color of" law. 42 U.S.C. § 1983.[7]

III. Plaintiff's Complaint Should be Dismissed with Prejudice

Pursuant to the Court's June 16, 2022 Order [Dkt. No. 6], APA conferred with Plaintiff about the bases for its Motion prior to filing, and Plaintiff, at that time, declined the opportunity to file an amended complaint. APA Mot. at 17. The Plaintiff also did not file an amended complaint with his Response, as required by the Court's Order. *See* Dkt.

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[6] Plaintiff also asserts there was a "symbiotic relationship" between American and the Spokane Police, and a "cooperative" relationship between American and APA, and, as a result, "the "'symbiotic relationship' between AA and the Spokane police . . . must be viewed as a relationship between AA, APA and the Spokane police." Pl. Resp. at 14. There are no facts alleged in the Complaint that would plausibly establish that APA and the Spokane Police were themselves in a "symbiotic relationship," and Plaintiff has cited no authority for the proposition that APA can be deemed to have been in one merely through an alleged chain of logic.

[7] Plaintiff appears to have abandoned his claim under 18 U.S.C. § 242, which is a federal criminal statute with no applicability in a private civil suit.

No. 6 at ¶ 3. Nonetheless, Plaintiff, in his response liberally referred to alleged facts and documents outside of the Complaint in an effort to bolster his claims and avoid dismissal. *See, e.g.*, Pl. Resp. at 3, 8, 11; *see also supra* at 3 n.2. As we have shown, Plaintiff's claims should be dismissed even if these materials were to be considered by the Court in connection with APA's Motion. Given that Plaintiff received notice of the deficiencies in his Complaint and, that he has also demonstrated that any amendment would be futile, dismissal of the Complaint with prejudice is appropriate. *See, e.g.*, *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1039 (9th Cir. 2002); *Loring v. Daly*, No. CV1905133PHXJATJFM, 2021 WL 2105571, at *5 (D. Ariz. May 25, 2021) (dismissing *pro se* complaint with prejudice in light of determination that "further opportunities to amend would be futile.").

CONCLUSION

For all of the reasons set forth above and in Defendant's Motion to Dismiss, Plaintiff's Complaint should be dismissed with prejudice.

DATED this 12th day of September, 2022.

By: /s/ Joshua Shiffrin

Joshua Shiffrin, Esq.*
Bredhoff & Kaiser, P.L.L.C.
805 15th Street N.W., Suite 1000
Washington, DC 20005
(202) 842-2600 (Phone)
(202) 842-1888 (Fax)
jshiffrin@bredhoff.com

*Admitted *pro hac vice*

Attorneys for Defendant Allied Pilots Association

David L. O'Daniel (SBN: 006418)
GORDON REES SCULLY MANSUKHANI, LLP
Two North Central Avenue Suite 2200
Phoenix, AZ 85004
(602) 794-2472 (Phone)
(602) 265-4716 (Fax)
dodaniel@grsm.com