

**PETITIONER-APPELLANT'S APPENDIX  
TABLE OF CONTENTS**

**APPENDIX A - ORDER DENYING MOTION TO RECALL  
MANDATE (dated 10/202017).**

**APPENDIX B - SUMMARY ORDER OF SECOND CIRCUIT  
COURT OF APPEALS.**

**APPENDIX C - ORDER FOR PANEL REHEARING, OR IN THE  
ALTERNATIVE, FOR REHEARING ENBANC.**

**APPENDIX D - ORDER DENYING STAY OF MANDATE.**

**APPENDIX E- DECISION AND ORDER OF DISTRICT COURT**

**APPENDIX F- MEMORANDUM DECISION AND ORDE/  
DISTRCTCOURT**

**APPENDIX G- OPINION AND AWARD OF ARBITRATOR**

**APPENDIX H- SUPPLEMENTAL OPINION AND AWARD OF  
ARBITRATOR**

**APPENDIX I - GENERAL DOCKET COURT OF APPEALS,  
2ND CIRCUIT.(1-9)**

**APPENDIX J - NOTICE OF DEFIENCY (pg. 1,2,4)**

**APPENDIX K - UNITED STATES TAX COURT (final status report  
Gerald Nelson v. Commissioner of Internal Revenue)**

**APPENDIX L- EXCERPTS/BRIEFS (Jeffrey Pollack pg 7)  
(Richard N.Gilberg,Richard A. Brooks pg.12) Attorney's**

**APPENDIX M- NELSON'S PAY STUB FOR BACK PAY 21 of 21**

# **EXHIBIT    A**

**UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT**

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20<sup>th</sup> day of October, two thousand and seventeen.

Before: Amalya L. Kearse,  
Ralph K. Winter,  
Dennis Jacobs,  
*Circuit Judges.*

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Gerald Nelson,

Plaintiff - Appellant,

v.

Amalgamated Transit Union Local 1181-1061,  
AFL-CIO, MV Transportation, Inc., Jessica D.  
Ochs, Michalaire Phantor,

Defendants - Appellees.

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**ORDER**

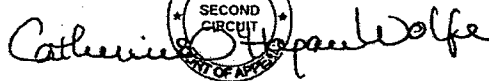
Docket No. 15-951

Appellant, pro se, moves the Court to recall the mandate.

IT IS HEREBY ORDERED that the motion is DENIED.

For the Court:

Catherine O'Hagan Wolfe,  
Clerk of Court

# **EXHIBIT B**

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

**SUMMARY ORDER**

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16<sup>th</sup> day of June, two thousand sixteen.

**PRESENT:**

**AMALYA L. KEARSE,  
RALPH K. WINTER,  
DENNIS JACOBS,**  
*Circuit Judges.*

**Gerald Nelson,**

*Plaintiff-Appellant,*

**v.**

**15-951**

**Local 1181-1061, Amalgamated Transit Union,  
AFL-CIO, Jessica D. Ochs, MV Transportation,  
Inc., Michalaire Phantor,**

*Defendants-Appellees.*

**FOR PLAINTIFF-APPELLANT:**

Gerald Nelson, pro se, Brooklyn, NY.

**FOR LOCAL 1181-1061,  
AMALGAMATED TRANSIT  
UNION, AFL-CIO AND JESSICA D.  
OCHS:**

Richard A. Brook (with Richard N. Gilberg  
on the brief), Meyer, Suozzi, English &  
Klein, P.C., New York, NY.

33 **FOR MV TRANSPORTATION, INC.**  
34 **AND MICHALAIRE PHANTOR:**

Jeffrey D. Pollack, Mintz & Gold LLP,  
New York, NY.

35  
36 Appeal from a judgment of the United States District Court for the Eastern District of New  
37 York (Cogan, J.; Go, M.J.).

38 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**  
39 **DECREED** that the judgment of the district court is **AFFIRMED**.

40 Appellant Gerald Nelson, pro se, appeals from a judgment in favor of Appellees,  
41 principally his employer and his union, in his suit originally filed in state court and raising state  
42 law claims for misrepresentation, fraud, breach of contract, breach of fiduciary duty, malpractice,  
43 unjust enrichment, and conversion. Appellees removed the case to federal court, arguing that  
44 Nelson's claims were completely preempted by section 301 of the Labor Management Relations  
45 Act, 29 U.S.C. § 185, and the district court denied Nelson's motion to remand, construing the  
46 allegations to raise a "hybrid" claim for breach of the collective bargaining agreement and for  
47 breach of the union's duty of fair representation, and dismissed his complaint, concluding that he  
48 failed to state a claim. We assume the parties' familiarity with the underlying facts, the  
49 procedural history of the case, and the issues on appeal.

50 We review de novo a district court's decisions on a motion to remand and a motion for  
51 dismissal of a complaint pursuant to Federal Rule of Civil Procedure Rule 12(b)(6). *ACLU v.*  
52 *Clapper*, 785 F.3d 787, 800 (2d Cir. 2015) (Rule 12(b)(6)); *Cuomo v. Crane Co.*, 771 F.3d 113,  
53 115 (2d Cir. 2014) (remand). To survive a motion to dismiss, a plaintiff must allege sufficient  
54 facts to state a claim of relief that is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S.  
55 544, 570 (2007). We review the denial of a reconsideration motion for abuse of discretion.  
56 *Stevens v. Miller*, 676 F.3d 62, 67 (2d Cir. 2012).

1 Preliminarily, Nelson does not adequately challenge the ruling that Appellees Ochs and  
2 Phanor could not be held personally liable. Nor has Nelson presented any argument as to why the  
3 Union Appellees' failure to sign the notice of removal rendered their consent to removal invalid.  
4 Accordingly, these issues are waived on appeal. See *Norton v. Sam's Club*, 145 F.3d 114, 118 (2d  
5 Cir. 1998) (stating that "the appellee's casual reference to" a claim was insufficient to preserve it  
6 on appeal); *LoSacco v. City of Middletown*, 71 F.3d 88, 92-93 (2d Cir. 1995) (concluding that pro  
7 se appellant abandoned issue by failing to raise it in his appellate brief).

8 Section 301 confers "an especially broad jurisdiction" on the federal courts in actions  
9 involving collective bargaining agreements. *Wynn v. AC Rochester*, 273 F.3d 153, 157 (2d Cir.  
10 2001). "Section 301 governs claims founded directly on rights created by collective-bargaining  
11 agreements, and also claims substantially dependent on analysis of a collective-bargaining  
12 agreement." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987) (internal quotation marks  
13 omitted); *Allis-Chambers Corp.*, 471 U.S. at 213 ("[S]tate-law rights and obligations that do not  
14 exist independently of private agreements, and that as a result can be waived or altered by  
15 agreement of private parties, are pre-empted by those agreements."); see also *Hernandez v. Conriv*  
16 *Realty Assocs.*, 116 F.3d 35, 38 (2d Cir. 1997). Nelson's state law claims were held to be  
17 preempted by section 301. Although Nelson makes much of the fact that his claims did not  
18 require analysis of any of the terms of the collective bargaining agreement ("CBA"), his claims  
19 were "founded directly on rights created by [the CBA]"; without the CBA, neither his employer  
20 nor union would have had any obligation to participate in or be bound by the arbitration  
21 proceedings. Accordingly, the district court properly denied Nelson's motions to remand. See  
22 *Franchise Tax Bd. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 23 (1983).

1 We have considered Nelson's remaining arguments and find them to be without merit.

1 ("[T]he preemptive force of § 301 is so powerful as to displace entirely any state cause of action  
2 for violation of contracts between an employer and a labor organization. Any such suit is purely a  
3 creature of federal law, notwithstanding the fact that state law would provide a cause of action in  
4 the absence of § 301." (internal quotation marks and footnote omitted)).

5 The district court properly construed Nelson's petition to raise the strongest claim it  
6 suggested—a hybrid § 301/fair representation claim—and concluded that it was legally  
7 insufficient. "To establish a hybrid § 301/[fair representation] claim, a plaintiff must prove both  
8 (1) that the employer breached a collective bargaining agreement and (2) that the union breached  
9 its duty of fair representation vis-a-vis the union members." *White v. White Rose Food*, 237 F.3d  
10 174, 178 (2d Cir. 2001).

11 Nelson was therefore required to show that, in reaching the agreement, his employer  
12 breached the CBA and his union breached its duty of fair representation. As the district court  
13 ruled, there was no breach. The arbitrator's supplemental award specifically contemplated that  
14 additional income, such as unemployment benefits, would be set off against the back pay award.  
15 And even if Nelson were correct that the supplemental award was somehow invalid, he has  
16 presented no persuasive argument that Appellees were required to adopt his preferred  
17 interpretation of "made whole"—the relevant language from the initial arbitral award—much less  
18 that the union "act[ed] in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to  
19 breach its duty of fair representation" in failing to do so. See *DelCostello v. Int'l Bhd. of*  
20 *Teamsters*, 462 U.S. 151, 164 (1983).

21

22

We have considered Nelson's remaining arguments and find them to be without merit.

Accordingly, we **AFFIRM** the district court's judgment.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

Catherine O'Hagan Wolfe



# **EXHIBIT C**

**UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT**

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14<sup>th</sup> day of September, two thousand sixteen.

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Gerald Nelson,

Plaintiff - Appellant,

v.

Amalgamated Transit Union Local 1181-1061, AFL-CIO, MV  
Transportation, Inc., Jessica D. Ochs, Michalaire Phantor,

Defendants - Appellees.

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**ORDER**

Docket No: 15-951

Appellant, Gerald Nelson, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

  
Catherine O'Hagan Wolfe

# **EXHIBIT D**

**UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT**

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21<sup>st</sup> day of October, two thousand and sixteen.

Before: Amalya L. Kears,   
Ralph K. Winter,   
Dennis Jacobs,   
*Circuit Judges.*

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Gerald Nelson,

Plaintiff - Appellant,

v.

Amalgamated Transit Union Local 1181-1061,   
AFL-CIO, MV Transportation, Inc., Jessica D.   
Ochs, Michalaire Phantor,

Defendants - Appellees.

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**ORDER**

Docket No. 15-951

Appellant, *pro se*, filed a motion to stay the mandate pending a petition for writ of *certiorari*.

IT IS HEREBY ORDERED that the motion is DENIED.

For the Court:

Catherine O'Hagan Wolfe,   
Clerk of Court



*Catherine O'Hagan Wolfe*

# **EXHIBIT E**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

C/M

GERALD NELSON,

Plaintiff,

- against -

AMALGAMATED TRANSIT UNION LOCAL  
1181-1061, AFL-CIO, *et al.*,

Defendants.

X

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X

**DECISION AND ORDER**

15-cv-672 (BMC)

COGAN, District Judge.

Plaintiff's time to submit opposition expires on March 28, 2015. In advance of that date, plaintiff has filed a motion to remand this case to state court. For the reasons set forth below, the motion to remand is denied.

**BACKGROUND**

The facts can be simply stated. Plaintiff's employer had terminated him. The union grieved the termination before an arbitrator pursuant to the procedure in the collective bargaining agreement between plaintiff's union and employer. The arbitrator directed plaintiff's reinstatement and stated that plaintiff should be "made whole" by the award. The union and the employer then requested a supplemental award as to the computation of back pay. The arbitrator issued a supplemental award, stating as follows:

The phrase, "make whole" or "made whole", is synonymous with the phrase "full back pay". In labor relations, back pay is a term of art and means the amount the employee would have earned had he/she not been discharged less what the employee did earn, or should have earned with a reasonable effort to find other suitable employment, during the period of the outage. Where an employee receives income from any source that is in any way related to the loss of employment, as opposed to passive income from savings or other investments,

that amount constitutes a deduction in the calculation of a make whole remedy.

Since the arbitrator set forth only this concept, and did not perform an actual calculation, the union and the employer negotiated an agreement, the "Back Pay Agreement," to implement the concept outlined by the arbitrator. The Back Pay Agreement provided for the payment of gross back wages, less unemployment payments that plaintiff had received and his withheld taxes, within 10 days.

On September 29, 2014, plaintiff (as "petitioner") commenced this case as a special proceeding under N.Y. C.P.L.R. Article 75. The original petition named only the union and the employer. Plaintiff filed an amended notice of petition on January 21, 2015. In the amended petition, he named his union, its attorney, his employer, and the General Manager of his employer as respondents (defendants here). His amended notice of petition requests "modification" of the arbitration award, but in his petition's substantive allegations, he complained that defendants defrauded him by entering into the Back Pay Agreement without telling him. In his view, under the arbitration award, he should have received the gross amount of his back pay, without deduction for taxes or unemployment benefits that he had received.

On February 10, 2015, the employer and its General Manager filed a notice of removal in this Court. The notice recites that these defendants were never served with the original petition in state court, and that they are removing based on the amended petition, which they received on January 23, 2015. The notice alleges that the amended petition presents a federal question because, among other things, it seeks modification of an arbitration award between a union and an employer, and thus falls under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

Plaintiff has moved to remand the case, contending that it was improperly removed because the case does not arise under federal law, and, in any event, removal was procedurally defective.

## DISCUSSION

### I. The Case is Removable

At the outset, it is necessary to properly characterize plaintiff's complaint. Although the amended notice of petition requests "modification" of the arbitration award, it is clear that plaintiff is not challenging or seeking an amendment of the arbitrator's award. To the contrary, his contention is that defendants, without notice to him, determined to implement the award in a way that is contrary to its language. Plaintiff believes that when the arbitrator ordered a "make whole" award, he was entitled to gross pay, not net pay. By entering into the Back Pay Agreement, and by doing so without informing him, plaintiff contends that defendants agreed to deprive him of the full benefit of the arbitrator's award. "The Arbitrator[']s ... award dated June 30, award dated June 30, 2014 and August 28, 2014 clearly states that the petitioner is to be made whole and whole means full back pay." Amended Petition at ¶30. Thus, it is the entry into the Back Pay Agreement that is at the center of plaintiff's case.

This means that plaintiff's claims have nothing to do with challenging the arbitration award, and do not implicate either C.P.L.R. Article 75 or the Federal Arbitration Act. Indeed, the state court action should have been commenced as a plenary action rather than as a special proceeding under Article 75, but once the case was removed, this distinction lost any significance.

The Amended Petition purports to state claims for, *inter alia*, misrepresentation, fraud, breach of contract, and breach of fiduciary duty, and plaintiff's employer, in its motion to

dismiss, argues that those claims are inadequately pled. However, under federal labor law, plaintiff is not permitted to assert these state law claims against his union and his employer. The Labor Management Act and the National Labor Relations Act have been interpreted to permit only one cause of action when an employee contends that his union and employer have acted improperly towards him – a “hybrid” action against the employer for breach of contract, and against the union for breach of the duty of fair representation. See generally Gorwin v. Local 282, I.B.T., 838 F. Supp. 116, 119, (S.D.N.Y. 1993) (Sotomayor, J). A state law claim against the union is subsumed by the duty of fair representation, and thus preempted, if it seeks to impose the same obligation on the union that federal law already imposes. See, e.g., Goodman v. Port Auth. of N.Y. & N.J., No. 10 Civ. 8352, 2011 WL 3423800, at \*8 (S.D.N.Y. Aug. 4, 2011); see also Agosto v. Corr. Officers Benev. Ass’n, 107 F.Supp.2d 294, 310 (S.D.N.Y. 2000) (“State law claims are preempted if they arise out of or are encompassed by a breach of the duty of fair representation.”).

In the context of federal question removal, what this means is that regardless of the claims that an employee may attempt to plead in state court, his claim against his union and employer present a federal question, and thus may be removed. This doctrine of “complete preemption” is an exception to the rule that a plaintiff controls the claims in his complaint and may elect to stay in state court by invoking only state law claims. See Morillo v. Grand Hyatt New York, No. 13 Civ. 7123, 2014 WL 3498663, at \*3 (S.D.N.Y. July 10, 2014). “When federal common or statutory law so utterly dominates a preempted field that all claims brought within that field necessarily arise under federal law, a complaint purporting to raise state law claims in that field actually raises federal claims.” Marcus v. AT & T Corp., 138 F.3d 46, 53 (2d

Cir. 1998). In such a situation, removal is proper because the well-pleaded complaint rule is satisfied.

Accordingly, defendants' removal of this case based on federal question jurisdiction was proper.

## **II. Removal was Procedurally Proper**

Plaintiff's procedural attack on the removal of the action is somewhat unclear. He may first be contending that because the original petition was filed in September, 2014, and the case was not removed until February 10, 2015, more than 30 days elapsed and thus removal was untimely. He cites to C.P.L.R. § 304, which states that "a special proceeding is commenced by filing a petition . . .". However, commencement of the case under state law does not trigger the removal period. Rather, under 28 U.S.C. § 1446, service of the pleading, where the pleading shows that it is removable, starts the 30 day period. Plaintiff appears to concede, as defendants alleged, that the original notice of petition in the state court action was never served, and thus the 30 day period to remove the case did not commence until service of the amended notice of petition. The employer defendants removed within 30 days of that service.

Second, plaintiff may be contending that the union defendants never properly joined in the notice of removal. He recognizes that the employer defendants' notice of removal recites that the co-defendants join in the petition. As to this allegation, plaintiff complains that the employer defendants' attorney "simply and vaguely states [that] respondents and co-respondents 'joined' – no date is given, nor a signature or letter stating a date."

Congress did not define "consent" in 28 U.S.C. § 1446. However, although the cases are not entirely uniform, the better reasoned view is that a representation in a notice of removal that all defendants join is sufficient to achieve removal. See Esposito v. Home Depot U.S.A., Inc.,

590 F.3d 72 (1st Cir. 2009); Mayo v. Board of Educ. Of Prince George's Cnty., 797 F. Supp. 2d 685 (D. Md. 2011), aff'd, 713 F.3d 735 (4th Cir. 2013); Samaan v. St. Joseph Hosp., 685 F. Supp. 2d 163 (D. Me. 2010), aff'd, 670 F.3d 21 (1st Cir. 2011); Tresco v. Cont'l Cas. Co., 727 F. Supp. 2d 1243 (D. N.M. 2010). As the Mayo court pointed out, if the notice's representation that co-defendants join is fraudulent or false, the defendant who does not want removal will step forward and the case will then be remanded.

Here, there is no question that the union defendants consented to removal, a fact only reinforced by their decision to file a motion to dismiss plaintiff's complaint. Removal was therefore proper.

#### CONCLUSION

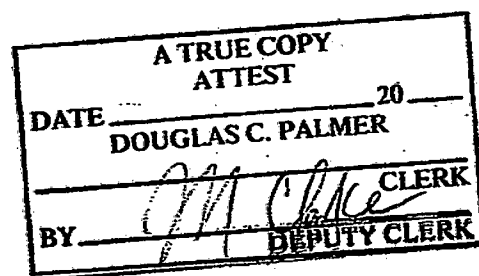
Plaintiff's motion to remand is denied.

SO ORDERED.

Digitally signed by Brian M. Cogan

U.S.D.J.

Dated: Brooklyn, New York  
March 16, 2015



# **EXHIBIT F**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

C/M

GERALD NELSON,

Plaintiff,

- against -

AMALGAMATED TRANSIT UNION LOCAL  
1181-1061, AFL-CIO, *et al.*,

Defendants.

X

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X

**MEMORANDUM DECISION**  
**AND ORDER**

15-cv-672 (BMC)

COGAN, District Judge.

Plaintiff *pro se* commenced a state court proceeding challenging the terms of an agreement between his union and employer as to the amount of back pay he was owed pursuant to an arbitration award in his favor. The union and employer (along with one representative of each, who have also been sued) removed the action to this Court and have separately moved to dismiss the case. Plaintiff also moves for reconsideration of an earlier Order denying his motion to remand. The motions to dismiss are granted and the motion for reconsideration is denied for the reasons set forth below.

**BACKGROUND**

Plaintiff's employer, defendant MV Transportation, Inc., ("MVT") terminated his employment. Plaintiff's union, Local 1181, grieved the termination before an arbitrator pursuant to the procedure in the collective bargaining agreement ("CBA") between plaintiff's union and employer. The grievance procedure in the CBA provided, among other things, that in event of an arbitration, "[t]he decision of the arbitrator shall be final and binding upon both parties."

The arbitrator directed plaintiff's reinstatement and stated that plaintiff should be "made whole" by the award. Local 1181 and MVT then requested a supplemental award as to the computation of back pay. The arbitrator issued a supplemental award, stating as follows:

The phrase, "make whole" or "made whole", is synonymous with the phrase "full back pay". In labor relations, back pay is a term of art and means the amount the employee would have earned had he/she not been discharged less what the employee did earn, or should have earned with a reasonable effort to find other suitable employment, during the period of the outage. Where an employee receives income from any source that is in any way related to the loss of employment, as opposed to passive income from savings or other investments, that amount constitutes a deduction in the calculation of a make whole remedy.

Since the arbitrator set forth only this concept, and did not perform an actual calculation, Local 1181 and MVT negotiated an agreement, the "Back Pay Agreement," to implement the concept outlined by the arbitrator. The Back Pay Agreement provided for the payment of gross back wages, less unemployment payments that plaintiff had received and his withheld taxes, within 10 days.

On September 29, 2014, plaintiff (as "petitioner") commenced this case in state court as a special proceeding under N.Y. C.P.L.R. Article 75. The original petition named only Local 1181 and MVT as respondents. This original petition was never served. Plaintiff filed an amended notice of petition on January 21, 2015. In the amended petition, he added as respondents (defendants here) Jessica D. Ochs, Esq., an outside counsel for Local 1181 who had represented Local 1181 in connection with his grievance, and Michalaire Phanor, the General Manager of MVT. All defendants removed the action to this Court based on federal question jurisdiction, asserting that the amended petition effectively asserted claims under, among other federal statutes, the National Labor Relations Act, 29 U.S.C. § 141, and section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185.

2

Defendants then moved to dismiss the petition. While those motions were pending, plaintiff moved to remand the case on the ground, *inter alia*, that there was no subject matter jurisdiction. I denied his motion, finding that federal labor law completely preempted his claims and formed a basis for federal question jurisdiction.

The amended petition is not clear as to its claims, but all of those claims revolve around one central contention – that defendants wronged plaintiff – call it fraud, breach of contract, or whatever – by entering into the Back Pay Agreement. Plaintiff contends that Local 1181 and Ochs wronged him by not requiring the employer to pay him the gross amount of his back pay, without setoff for taxes and unemployment benefits received, and MVT and Phanor wronged him by not paying him that gross amount.

The Amended Notice of Petition seeks a judgment “pursuant to cpl[r] [sic] 7511 modifying award of an Arbitrator and directing that as modified, the award be confirmed and judgment be entered thereon.” Similarly, the “Wherefore” clause of the amended petition seeks, among other things, “modification of the award of [the arbitrator] so petitioner can receive the back pay amount of \$12,566.60 . . .” However, the amended petition itself does not assert any error in the arbitrator’s award or seek any changes to it; rather, it alleges wrongdoing by defendants. Specifically, the amended petition asserts five causes of action. The first is labeled “Misrepresentation, Fraud, and Breach of Contract,” against all defendants; the second is labeled “Breach of Fiduciary Duty” against the Union defendants and Phanor; the third is labeled “Malpractice” against the Union defendants, although it also, in its allegations, asserts a breach of fiduciary duty by these defendants; the fourth has no label but asserts that all defendants have been “unjustly enriched;” and the fifth, also unlabeled, asserts “conversion” against all defendants.

## DISCUSSION

The most difficult task in this action is to properly characterize plaintiff's claim or claims. The confusion apparent in his state court petition has continued post-removal. He has not filed any opposition to the motions to dismiss, but after I denied his motion to remand, he filed a "Motion to Vacate or Set Aside Order and Remand Case to State Court," essentially, a motion to reconsider my Order denying remand.<sup>1</sup> It contains the following assertions:

- He was compelled to file the Article 75 proceeding in state court as opposed to some other procedure because he lacks the power to modify the arbitrator's awards and defendants also lacked the power to modify the arbitrator's awards;
- Defendants violated the arbitrator's awards by entering into the Back Pay Agreement, thus suggesting that the arbitrator's awards were sound but the defendants misapplied them in the Back Pay Agreement;
- Plaintiff agrees with me when I stated, in the Order denying his motion to remand, that "this case is a hybrid case" because the Back Pay Agreement "is akin to ... an unfavorable arbitration award;"
- "The petitioner [plaintiff] repeats that this court has overlooked [that] the petitioner is seeking a modification pursuant to 7511(c) and not challenging the arbitration award."

As best as I can synthesize these statements, plaintiff is saying that while he is not challenging the arbitration award, his claim should be evaluated as if he is, because defendants' entry into the Back Pay Agreement is functionally the same as an adverse arbitration award.

~~Therein lies plaintiff's confusion. There is no authority for doing what plaintiff asks.~~

The alleged wrongdoing between Local 1181 and MVT is not in any way the same as an adverse arbitration award or, more specifically, an award in need of "modification." Plaintiff acknowledges that the arbitrator gave him everything that he wants. It is the parties, according to him, that have deprived him of the benefit of his award. That contention does not trigger application of Article 75 or the Federal Arbitration Act, because the body of law under those

<sup>1</sup> Plaintiff's motion to vacate also appended a "Notice of Interlocutory Appeal."

statutes addresses only vacating or modifying the award itself, and not wrongdoing in the agreed-upon implementation of the award by the parties to the arbitration proceeding.

So if plaintiff does not have the claims he thinks he has, and he does not, what, if any claims, does he have? In sorting this out, I start with a basic premise: I have to interpret plaintiff's pleadings "to raise the strongest possible arguments they suggest." Ortiz v. McBride, 323 F.3d 191, 194 (2d Cir. 2003). "The policy of liberally construing *pro se* submissions is driven by the understanding that '[i]mplicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training.'" Abbas v. Dixon, 480 F.3d 636, 639 (2d Cir. 2007) (quoting Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983)).

As noted above, plaintiff's strongest claim is not his claim analogizing defendants' alleged misconduct to a requested modification of an arbitration award, as the law recognizes no such analogy. Nor is his strongest claim any or all of a free standing common law causes of action for breach of contract, fraud, malpractice, or any of the other classic forms of action whose labels appear in his petition. Those claims are his most difficult and in fact fatally flawed because they not only must have merit, but, as I held in my Order denying his motion to remand and explain further below in connection with his motion for reconsideration, those claims must first overcome complete preemption under Federal labor law.

Reading plaintiff's claim most liberally and giving it its strongest construction, it is, as plaintiff appears to agree in some instances, a hybrid claim. The Supreme Court has defined such a claim thusly:

It has long been established that an individual employee may bring suit against his employer for breach of a collective bargaining agreement. Ordinarily, however, an employee is required to attempt to exhaust any grievance or arbitration remedies provided in the collective bargaining agreement. Subject to very limited

judicial review, he will be bound by the result according to the finality provisions of the agreement. . . . [H]owever, we [have] recognized that this rule works an unacceptable injustice when the union representing the employee in the grievance/arbitration procedure acts in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation. In such an instance, an employee may bring suit against both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceeding. Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on § 301, since the employee is alleging a breach of the collective bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act. Yet the two claims are inextricably interdependent. To prevail against either the company or the Union . . . [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty by the Union. The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both. The suit is thus not a straightforward breach of contract suit under § 301 . . . but a hybrid § 301/fair representation claim, amounting to a direct challenge to the private settlement of disputes under [the collective-bargaining agreement]. . . . [I]t has no close analogy in ordinary state law.

DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 163-65, 103 S. Ct. 2281, 2290-91 (1983)

(citations and quotation marks omitted).

Putting aside for the moment the question of whether plaintiff's hybrid claim has merit, it fits fairly comfortably within this definition. He is claiming that Local 1181 breached its duty of fair representation ("DFR") towards him by entering into the Back Pay Agreement, rather than insisting that MVT pay him the gross amount of his back pay. He is also asserting that MVT breached the CBA by not paying him the gross amount of his back pay, i.e. without deducting his unemployment benefits or withheld taxes, which constitutes to a failure to comply with a binding arbitration award. This is the strongest claim -- indeed, it is the only claim -- that the law permits him to assert against his union and his employer for their jointly depriving him of benefits to which he alleges entitlement under the CBA.

Moving on, then, to the evaluation of the merits of this hybrid claim, one point is immediately apparent -- Ochs and Phanor have no place in it. Local 1181's duty of fair

6

representation does not encompass its employees or agents. The fact that Local 1181 owes a duty to plaintiff does not mean that Ochs assumes that duty. To the contrary, Ochs owes plaintiff no duty at all; her duty as attorney is to Local 1181. Section 301(b) of the LMRA provides that a union is bound by the acts of its agents, as is the employer; but it expressly states that a claim against a union cannot be asserted against its employees, and by implication, its agents or attorneys. See 29 U.S.C. § 185(b).

As for Phanor, he is not a party to the CBA; MVT is. Only MVT can be sued for its breach as part of plaintiff's hybrid claim. A disclosed agent of a contracting party cannot be sued for breach of contract. See Mason Tenders Dist. Council Welfare Fund v. Thomson Const. Co., 301 F.3d 50 (2d Cir. 2002) (signature by company president on collective bargaining agreement did not make him liable for breach of the agreement); Ali v. Giant Food LLC/Stop & Shop Supermarket Co., LLC, 595 F. Supp. 2d 618, 624-25 (D. Md. 2009) ("The law is well settled that individual employees are not proper parties to a suit brought under § 301") (citing Jackson v. Kimel, 992 F.2d 1318, 1325 n. 4 (4th Cir. 1993) (quoting Loss v. Blankenship, 673 F.2d 942, 946-47 (7th Cir. 1982))).

We then need to examine plaintiff's hybrid claim against Local 1181 and MVT. Although, as explained above, there is a theoretical basis for the claim, it fails on the merits because the Back Pay Agreement is entirely faithful to the arbitrator's awards. Contrary to plaintiff's belief that he is entitled to a windfall – i.e., the gross amount of his back pay without deduction for unemployment benefits he received or taxes that would have been withheld – the arbitrator could not have been clearer that he did not want plaintiff to receive such a windfall: "Where an employee receives income from any source that is in any way related to the loss of employment, as opposed to passive income from savings or other investments, that amount

2

constitutes a deduction in the calculation of a make whole remedy." That is precisely what Local 1181 and MVT did when they agreed to deduct plaintiff's unemployment benefits. As to the deduction for withholding taxes that plaintiff would have been subjected to had he not been terminated (it is not entirely clear that plaintiff is challenging the Back Pay Agreement as to this aspect, but I am addressing it just in case), the arbitrator was equally clear: "... back pay is a term of art and means the amount the employee would have earned had he/she not been discharged less what the employee did earn." Plaintiff does not get to be placed in a better position than he would have been in had he not been wrongfully terminated. Rather, the arbitrator wanted him in the same position in which he would have been, and that is precisely what the Back Pay Agreement does.

Local 1181 did not breach its duty to fairly represent plaintiff by entering into the Back Pay Agreement, and MVT did not breach the collective bargaining agreement by entering into the Back Pay Agreement. Indeed, I can see no way of correctly implementing the arbitration awards other than through the Back Pay Agreement.

Finally, I will address plaintiff's motion for reconsideration of my Order denying his motion to remand. Like his motion to remand, plaintiff again relies on basic principles of removal procedure, e.g., the well-pleaded complaint rule and the usually-applied principle that plaintiff is the master of his own complaint. Plaintiff's motion for reconsideration, however, simply disregards what I told him in the Order denying his motion to remand - claims by employees against their unions and employers are an exception to all of these typically-applied rules. No matter how plaintiff tries to phrase his claim to remain in state court, it is still a claim against his union for breach of its duty of fair representation and his

At first blush, this language would appear to support plaintiff's position that his claim is not subject to complete preemption. None of the parties to this case have pointed me to any provision of the CBA that requires "interpretation." Nevertheless, there are two related reasons why plaintiff's claim is clearly subject to complete preemption.

First, Vera did not involve a hybrid claim. It had nothing to do with the employees' union. When a claim against an employer is based on state or federal non-labor law and does not involve the union's alleged breach of a duty of fair representation, it is necessary to determine whether the collective bargaining agreement is necessarily, as opposed to only referentially, involved. However, that is not the case with a hybrid claim. In a hybrid claim, the part of the claim against the union and the part of the claim against the employer are each mandatory parts of the whole claim. "To establish a hybrid § 301/DFR claim, a plaintiff must prove both (1) that the employer breached [an agreement] [e.g., a collective bargaining or settlement agreement] and (2) that the union breached its duty of fair representation vis-a-vis the union members." White v. White Rose Food, 237 F.3d 174, 178 (2d Cir. 2001).

This is important for the following reason. In a hybrid claim, where the union's breach of duty is as much at issue as the employer's breach of contract, the scope of the union's duty has to be determined as a matter of federal law. The same policy that requires a federal, uniform interpretation of collective bargaining agreements requires a uniform determination of the scope of a union's DFR. That is because the duty only exists under federal law, and even if some states were to impose an analogue, federal labor policy would prohibit potentially inconsistent state-by-state interpretations of the manner in which a union must represent its members. Thus, in a hybrid claim, whether the collective bargaining agreement plays a central or merely referential

employer for breach of its obligation to comply with arbitration awards under the CBA. See generally Stephens v. 199 SEIU, AFL-CIO, 45 F. Supp. 3d 284 (E.D.N.Y. 2014).

Plaintiff's strongest argument is that his claim does not require any interpretation of the CBA, and thus the policy behind complete preemption – creating a uniform body of federal law interpreting collective bargaining agreements, see Livadas v. Bradshaw, 512 U.S. 107, 122, 114 S. Ct. 2068 (1994) (purpose of complete preemption is to avoid “common terms in bargaining agreements be[ing] given different and potentially inconsistent interpretations in different jurisdictions”) – does not apply.

An overbroad reading of the case law could support this argument. In Vera v. Saks & Co., 335 F.3d 109 (2d Cir. 2003), for example, the employee filed a class action challenging the employer's practice of charging back returns against sales commissions, which allegedly violated the New York Labor Law. The Second Circuit found that the claim was preempted by section 301 because it required substantial interpretation of the collective bargaining agreement. Specifically, the Court had to decide whether the agreement altered the common law rule as to when sales commissions were earned. Nevertheless, the Court was careful to point out that not every case that is related to a collective bargaining agreement in some way would be subject to complete preemption:

For example, if a state prescribes rules or establishes rights and obligations that are independent of a labor contract, actions to enforce such independent rules or rights would not be preempted by section 301. Nor would a state claim be preempted if its application required mere referral to the CBA for information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled.

Id. at 115 (citation and quotation marks omitted). The Court further recognized that “[t]he boundary between claims requiring ‘interpretation’ of a CBA and ones that merely require such an agreement to be ‘consulted’ is elusive....” Id.

role makes no difference; the court's need to approve or condemn the union's conduct must be done in light of federal case law defining the scope of that duty.

Relatedly, the need to interpret a collective bargaining agreement in a hybrid claim is not essential to complete preemption because the collective bargaining agreement is the very source from which plaintiff's claim springs. It is the *sine qua non* of the claim; without it, the employee would have no right to sue his employer at all. In this case, for example, absent the CBA, plaintiff would be an employee at will, MVT would have been able to fire him without recourse, and MVT would have had no obligation to participate in, let alone comply, with a neutral's evaluation of whether it properly terminated plaintiff and what the remedy should be for an improper termination. Thus, plaintiff's claim is that his employer failed to follow, at least, Article 13 of the CBA, which states: "The decision of the arbitrator shall be final and binding upon both parties." Because the right being asserted is not independent of the CBA, unlike Vega and other non-hybrid cases, there is no need to address the question of whether it is "close enough" to the CBA to trigger the concern for a uniform federal labor policy; rather, that concern is self-evident.

### CONCLUSION

Defendants' motions to dismiss are granted. Plaintiff's motion to vacate is denied. The Clerk is directed to enter judgment in favor of defendants, dismissing the case.

SO ORDERED.

*Digitally signed by Dorian H. Cogan*

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U.S.D.J.

Dated: Brooklyn, New York  
April 2, 2015

11

**Additional material  
from this filing is  
available in the  
Clerk's Office.**