

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

SHEILA FOSTER,
Petitioner,

v.

ROBERT JESEL; MIKE KLEMM; IAMAW DISTRICT LODGE 141,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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United States Court of Appeals
for the Fifth Circuit

No. 25-20122

United States Court of Appeals
Fifth Circuit

FILED

January 13, 2026

Lyle W. Cayce
Clerk

SHEILA FOSTER,

Plaintiff—Appellant,

versus

ROBERT JESEL; MIKE KLEMM; IAMAW DISTRICT LODGE 141,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:24-CV-3356

Before ELROD, *Chief Judge*, and SMITH and WILSON, *Circuit Judges*.

PER CURIAM:

When Sheila Foster's union did not prosecute grievances she filed against her former employer, Foster sued the union, its president, and a union representative for breach of contract and misrepresentation. The district court dismissed the claims with prejudice for failure to file within the statute of limitations. Foster appeals. We affirm.

I.

Foster worked for United Airlines. She was represented by IAMAW District Lodge 141 ("Union"), as outlined in the Passenger Service Agree-

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ment (“PSA”), the collective bargaining agreement between the Union and United.

After Foster injured her knee while working, she requested multiple accommodations and transfers. United denied her requests and ultimately fired her. Foster filed a formal complaint with her union representative, Robert Jesel. Foster sought for Jesel to pursue her complaint against United under the PSA. On September 2, 2022, Jesel informed Foster that he had closed her file and that the Union would not be pursuing her claims.

On September 9, 2024, Foster sued Jesel, Lodge 141 President Mike Klemm, and the Union for not pursuing her claims. Though Foster identified her two causes of action as “breach of contract” and “misrepresentation,” she invoked federal question jurisdiction. The sole basis for her two claims was an alleged breach of the representational duties outlined in the PSA, a breach covered by the Railway Labor Act (“RLA”).

Defendants moved to dismiss for failure to state a claim. The district court dismissed with prejudice, holding that Foster had failed to state a claim because “the statute of limitations for duty of fair representation claims had expired.”

II.

The court has jurisdiction under 28 U.S.C. § 1291 to review final judgments. Because Foster’s claims arise under the RLA, and a district court’s granting of a motion to dismiss is a “final decision” under § 1291, this court has jurisdiction over Foster’s appeal. 28 U.S.C. § 1331.

We review a dismissal for failure to state a claim *de novo*. *Jones v. Adm’rs of Tulane Educ. Fund*, 51 F.4th 101, 109 (5th Cir. 2022). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”

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Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when “the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.*

A district court’s decision to dismiss with or without prejudice is reviewed for abuse of discretion. *D&T Partners, L.L.C. v. Baymark Partners Mgmt., L.L.C.*, 98 F.4th 198, 210 (5th Cir.), *cert. denied*, 145 S. Ct. 264 (2024). The district court has discretion to dismiss a claim with prejudice under Federal Rule of Civil Procedure 12(b)(6) and to deny leave to amend a complaint where amendment would be futile. *See Doe 1 v. City View Indep. Sch. Dist.*, 150 F.4th 668 (5th Cir. 2025) (*per curiam*).

III.

Foster raises three issues on appeal. Two issues challenge the district court’s holding that her claims are preempted by the RLA. The other issue challenges the dismissal of her claim for not being filed within the RLA’s statute of limitations.

A.

Foster asserts that “the district court erred by allowing United Airlines and IAMAW District Lodge 141 to invoke RLA preemption selectively” and “the district court misapplied choice-of-law principles by refusing to enforce a uniform RLA duty of fair representation standard.”¹

The duty of fair representation is implied in the RLA. *See Ford Motor*

¹ It is unclear how Foster’s preemption arguments relate to this case. United is not a party, and defendants do not rely on, and the district court did not apply, any state law. Nonetheless, we proceed with a preemption analysis.

Co. v. Huffman, 345 U.S. 330 (1953); *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944). “Under this doctrine, the exclusive agent’s statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.” *Vaca v. Sipes*, 386 U.S. 171, 177 (1967) (citing *Humphrey v. Moore*, 375 U.S. 335, 342 (1964)). The federal duty of fair representation preempts state substantive law. *Richardson v. United Steelworkers of Am.*, 864 F.2d 1162, 1166 (5th Cir. 1989).

Foster alleges that defendants breached the PSA, which she admits is a federal issue. Though she raises state law claims, she does not allege that defendants owed her a duty under an obligation outside the PSA. Her allegations fall squarely within the RLA and the duty of fair representation. Her state law claims are thus preempted by the RLA.

B.

Foster asserts that the district court erred in dismissing her claim for failure to file her lawsuit within the statute of limitations.

“Dismissal is appropriate if it is clear from the face of the complaint that the claims asserted are barred by the applicable statute of limitations.” *Stanley v. Morgan*, 120 F.4th 467, 470 (5th Cir. 2024) (quoting *Harris v. Hegmann*, 198 F.3d 153, 156 (5th Cir. 1999)), *cert. denied*, 145 S. Ct. 1314 (2025). A six-month limitations period applies to duty-of-fair-representation claims under the RLA. *Brock v. Republic Airlines, Inc.*, 776 F.2d 523, 526 (5th Cir. 1985). “The statutory period begins to run when the plaintiff either knew or should have known of the injury itself, i.e., the breach of duty of fair representation, rather than of its manifestations.” *Barrett v. Ebasco Constructors, Inc.*, 868 F.2d 170, 171 (5th Cir. 1989) (citing *Farr v. H.K. Porter Co.*, 727 F.2d 502, 505 (5th Cir. 1984)).

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Foster alleged that “[o]n September 2, 2022, defendants notified [her] that they closed her file and that they would not be pursuing arbitration[.]” Thus, as of that date, Foster was on notice that Jesel would not pursue her claim against United, the alleged breach of duty of fair representation. Foster did not sue until September 9, 2024.

Foster avers that her delay is justified because “repeated misrepresentations induced her delay and that she only discovered the refusal upon diligent inquiry.” But the alleged misrepresentations all occurred before September 2, 2022. Foster stated that the misrepresentations ended September 16, 2021. Thus, the alleged misrepresentations do not justify a delay after September 2, 2022, when she received notice that Jesel would not pursue arbitration on her claim.

Because Foster sued more than six months after her claim accrued, she did not file within the limitations period. *See Brock*, 776 F.2d at 526. Because any potential amendment would be futile, the district court did not err in dismissing with prejudice. *See Doe 1*, 150 F.4th at 677.

AFFIRMED.

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United States District Court
Southern District of Texas

ENTERED

March 12, 2025

Nathan Ochsner, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SHEILA FOSTER,

Plaintiff,

VS.

IAMAW DISTRICT LODGE 141, *et al.*,

Defendants.

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CIVIL ACTION NO. 4:24-CV-3356

FINAL JUDGMENT

Plaintiff Sheila Foster filed this suit against Defendants International Association of Machinists & Aerospace Workers, District Lodge 141, Robert Jesel, and Michael Klemm, bringing claims for breach of contract and misrepresentation. ECF No. 1. Defendants filed a Motion to Dismiss. ECF No. 10. At a hearing on March 11, 2025, the Court granted Defendants' Motion to Dismiss and dismissed all of Plaintiff's claims with prejudice, for the reasons stated on the record.

Pursuant to Federal Rule of Civil Procedure 58(a), and for the reasons set forth at the hearing, final judgment is hereby **ENTERED** for Defendants International Association of Machinists & Aerospace Workers, District Lodge 141, Robert Jesel, and Michael Klemm.

IT IS SO ORDERED.

SIGNED at Houston, Texas on this the 12th day of March, 2025.



KEITH P. ELLISON

UNITED STATES DISTRICT JUDGE

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UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

DOCKET NO: 25-20122

SHEILA FOSTER,

Plaintiff, Appellant,

vs.

IAMAW DISTRICT LODGE 141, et al.,

Defendants, Appellees

ON APPEAL FROM THE UNITED

STATES DISTRICT COURT FOR

THE SOUTHERN DISTRICT OF TEXAS,

HOUSTON DIVISION NO.4

TRIAL COURT CASE NO. 24-CV-03356

SAT BELOW

The Honorable Keith P. Ellison

APPELLANT'S OPENING BRIEF

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Date of Submission: June 2, 202

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Transcript of Motion Hearing dated March 11th, 2025.

Minute Entry dated March 11th, 2025.

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JURISDICTIONAL STATEMENT

Plaintiff–Appellant Foster filed her complaint on September 2, 2022, asserting a duty of fair representation claim against IAMAW District Lodge 141 and individual union agents under the Railway Labor Act (RLA). The district court dismissed the complaint on March 12, 2025, concluding it was time-barred. This Court has jurisdiction under 28 U.S.C. § 1291 as this is a final appealable order.

ISSUES FOR REVIEW

1. Whether the district court erred by allowing United Airlines and IAMAW District Lodge 141 to invoke RLA preemption selectively arguing RLA preemption when advantageous but relying on state or federal discrimination laws when not contrary to Fifth Circuit and Supreme Court precedents.
2. Whether the district court misapplied choice-of-law principles by refusing to enforce a uniform RLA duty of fair representation standard, instead permitting United to shift between RLA, NLRA, and other statutes, thereby prejudicing employees and undermining the RLA.

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3. Whether dismissal on statute-of-limitations grounds was improper given Foster's allegations of misrepresentation and the need for further factual development.

STATEMENT OF THE CASE

A. Procedural History

On September 2, 2022, Sheila Foster filed suit in the Southern District of Texas alleging that IAMAW District Lodge 141 and union agents breached their RLA duty of fair representation by refusing to arbitrate her grievance, misrepresenting the status of arbitration, and failing to pursue her workplace discrimination claims. (ROA 5–12). Defendants moved to dismiss for deficient service and statute of limitations. After a hearing on March 11, 2025, the district court granted dismissal with prejudice, holding that Foster's single cause of action failure to arbitrate in September 2022 was barred by the 180-day limitations borrowed from NLRA § 10(b).

B. Factual Background and Transcript Highlights

Foster, a former United Airlines employee, alleged in her complaint that:

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- i. Beginning in 2021, she experienced workplace discrimination and harassment. She filed a grievance with IAMAW District Lodge 141, which informed her repeatedly that it would arbitrate her claim.
- ii. In September 2022, counsel for the union notified Foster that it would not pursue arbitration and that her grievance was closed.
- iii. Foster relied on the union's representations for months, only learning of its abandonment of arbitration shortly before filing suit.

At the motion hearing, Mr. Reifel argued that misrepresentation and Ferguson tolling required further discovery. Defendants countered that the sole operative fact, the refusal to arbitrate in September 2022, triggers the 180-day RLA limitations period, citing *Del Costello* and *Thomas v. LTV Steel, Inc.* (Transcript 3:12-4:2). The district court agreed, dismissing "with prejudice." Minute Entry, 3/11/25.

SUMMARY OF THE ARGUMENT

United Airlines and IAMAW District Lodge 141 improperly shift between the RLA and other labor statutes to suit their litigation strategy. Under Fifth Circuit precedent (*Thomas v. LTV Steel, Inc.*) and Supreme Court authority (*Steel v. Louisville & Nashville R.R.*),

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preemption and choice of law under the RLA must be applied uniformly. United's strategic invocation of the RLA when seeking preemption, then reliance on NLRA-style procedures when advantageous, prejudices employees and subverts the statutory framework Congress established for railroad labor relations. Moreover, the district court prematurely dismissed Foster's claims based solely on the 180-day limitations period without allowing development of Foster's tolling and misrepresentation allegations. The Order should be reversed, and this matter remanded for further proceedings.

ARGUMENT

I. United Airlines' Selective Invocations of the RLA Preemption Are Legally Impermissible

A. RLA Preemption Must Be Consistently Applied

The RLA preemption doctrine shields railroad and airline labor relations from state regulation and ensures disputes are channeled through the Act's grievance and arbitration procedures. Under *San Diego Building Trades Council v. Garmon*, state or other federal remedies are displaced when the RLA covers the dispute. 359 U.S. 236 (1959). United's counsel readily invokes RLA preemption to bar Foster's

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state-law discrimination claims yet resists RLA grievance procedures when defending against Foster's fair-representation suit. This "cherry-picking" undermines the uniform application of federal labor policy.

B. Fifth Circuit Precedent

In *Thomas v. LTV Steel, Inc.*, this Court held that any dispute "arguably grounded in this section" of the RLA must be resolved exclusively under the Act's mechanisms. 34 F.3d 221, 224 (5th Cir. 1994). The Court rejected attempts to recast RLA claims under analogous NLRA or LMRA paradigms to evade preemption. United's selective invocation—arguing for RLA displacement only when favorable—directly contravenes *Thomas*. The duty of fair representation under the RLA cannot be waived when convenient and enforced when inconvenient.

C. The Duty of Fair Representation Framework

The Supreme Court in *Steel v. Louisville & Nashville Railroad* clarified that union members may sue for duty of fair representation only under the RLA's statutory scheme, including its 180-day limitations period. 323 U.S. 192, 200-01 (1944). Foster alleged misrepresentation tolling, a recognized equitable doctrine, which the district court did not fully

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consider. United cannot minimize RLA procedures to shortcut mandate when defending, then amplify them to bar Foster's suit.

II. United's Strategic Choice-of-Law Undermines the Statutory Scheme

A. Compare RLA Duty of Fair Representation with NLRA/LMRA Protections

The RLA imposes a 180-day limitations period and channels disputes through the National Railroad Adjustment Board. 45 U.S.C. § 153 First (i). By contrast, LMRA § 301 suits (29 U.S.C. § 185) allow broader discovery and a six-month limitations period. United's counsel, in related matters, has conceded to LMRA procedures to secure NLRA-style damages and remedies. This inconsistent posture frustrates Congress's careful balance between speedy resolution (RLA) and more expansive remedies (LMRA).

B. United's Shifting Positions Prejudice Employees

When United's representatives argue for LMRA-style discovery in arbitration of employment discrimination grievances but rely on the RLA's restrictive deadlines in fair representation suits, employees cannot effectively vindicate their rights. The Fifth Circuit rejects such

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gamesmanship: “The Act’s preemption is not a sword for selective defense.” Thomas, 34 F.3d at 225. Foster was misled by union representations similar to the misrepresentations United now uses to short-circuit her suit.

III. The District Court Erred in Dismissing Foster’s Claims as Time-Barred

A. Transcript and Minute Entry Do Not Foreclose Further Discovery

The district court relied exclusively on the September 2022 arbitration refusal as the accrual date. (Transcript 6:3–7; Minute Entry, 3/11/25). But Foster alleged that repeated misrepresentations induced her delay and that she only discovered the refusal upon diligent inquiry. Such allegations invoke equitable tolling, as recognized in *Del Costello v. Teamsters*, 462 U.S. 151 (1983). The court should have allowed discovery on misrepresentation facts before ruling.

B. Equitable Tolling and Relation Back

The Fifth Circuit consistently permits equitable tolling when union misrepresentation conceals accrual dates. See Thomas, 34 F.3d at 225. Foster’s complaint meets the pleading standard for misrepresentation tolling. Dismissal with prejudice was therefore premature.

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CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court:

1. Reverse the district court's dismissal.
2. Remand for further proceedings, including discovery on equitable tolling and misrepresentation; and
3. Grant such other relief as justice requires.

Respectfully submitted,

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By: /s/ Ross B. Reifel

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ATTORNEY FOR APPELLANT

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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2025, a true and correct copy of the foregoing Appellant's Opening Brief was served via the Court's CM/ECF system upon counsel of record for Defendants–Appellees.

/s/ Ross B. Reifel
Ross B. Reifel

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Certificate of Compliance with Rule 32(a)

*Certificate of Compliance with Type-Volume Limitations,
Typeface Requirements, and Type Style Requirements*

1. This brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because it contains 1,139 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in Cambria 14-point font for the text and Cambria 12-point font for the footnotes.

Date: June 2, 2025

/s/ Ross B. Reifel
Ross B. Reifel

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they form part of the same case or controversy under Article III of the United States Constitution.

4. IAMAW District Lodge 141, may be served through their registe
5. Robert Jesel and Mike Klemm may be served at their residence or office of employment, or wherever they may be found.
6. Venue is proper in the Southern District of Texas, Houston Division because the causes of action alleged accrued within said district. This court has jurisdiction over the causes of action alleged by Plaintiff.

PARTIES

7. Plaintiff, SHEILA FOSTER, is an individual and resident of Houston, Texas.
8. Defendant, IAMAW District Lodge 141 is an employee union that represents workers in the airline industry. It covers airline employees who are in the customer service division within United Airlines, among others. Service of process may be perfected through Defendants located at 1771 Commerce Dr., Suite 103, Elk Grove Village, IL 60007
9. Defendant Robert Jesel is an individual and the Assistant General Chairman if the IAMAW 141. He can be served at his place of work at 1771 Commerce Drive, Suite 103, Elk Grove Village, IL 60007 or any place that he may be found.
10. Defendant Mike Klemm is an individual and President and Directing Chair of the IAMAW 141. He can be served at his place of work at 1771 Commerce Drive, Suite 103, Elk Grove Village, IL 60007 or any place that he may be found.

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FACTUAL BACKGROUND

11. In July of 2011, Plaintiff started her employment as an (ADA member in the workforce society) in the transportation department with Chelsea Foods, a division of her employer's predecessor, Continental Airlines. During that time in March 2012, Plaintiff injured her knee when she was coming down off the bed of a work truck. Her injury was deemed an "On Job Injury" (OJI) and Plaintiff was placed on disability. Once the extent of her injuries was determined, she was informed by her doctor that she could not return to transportation because of the extensive limitations caused by her injury. Her injuries became more severe, when other areas of her body began to experience pain because of the injury. When Plaintiff returned to work, she received reasonable accommodations from Chelsea. Plaintiff was then transferred into a production coordinator position and eventually was transferred to the airport division as a Part-Time Customer Service Agent in October 2012.
12. In May of 2012, Plaintiff met with her employer to discuss her work and injuries and how it impacted Plaintiff's position. During that meeting, her employer doubted the severity of Plaintiff's injuries and requested certification of injuries from a doctor. In June 2012, Plaintiff provided Heath Care Certification from her employer's doctor which stated the severity of Plaintiff's injuries and listed out limitations on what work could be performed by Plaintiff. Since 2012, Plaintiff's employer knew of the Plaintiff's injuries and to what extent that her work would be impacted.
13. Due to the continuous roadblocks that Plaintiff received from her employer as it related to accommodations with her position, Plaintiff requested a transfer to another position within the Company.
14. In October of 2012, Plaintiff interviewed for the position of "Customer Service Agent-Part-Time" with her employer. At the time of her interview, there was no mention of "Mandatory

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Overtime". When discussions of a union contract began, Plaintiff entered discussions with Gilbert Greene and Kim Kerr in upper management to allow accommodations for her disability. Plaintiff was granted accommodations for her disability by exempting Plaintiff from "Mandatory Overtime." Plaintiff was also excused from work should other medical reasons arise, and then she would be required to provide a note to her supervisors. However, after these accommodations were agreed to, Plaintiff started receiving "points" on her record for missing work due to her taking certain medications, which did not allow her to function properly while at work. Plaintiff then had to visit Kim Kerr's office to get the points erased and the matter resolved. This seemed to be unnecessary as Plaintiff thought she had an agreed to accommodation. Plaintiff's Doctor had already restricted her to working a certain number of hours a day because of her disability and the medication she was required to take. Due to her restrictions, her employer informed Plaintiff that she could call staffing to let them know when she was leaving for the day.

15. Three months later in August of 2015, her employer placed Plaintiff on workers' compensation leave when she had two surgeries on her shoulder, spine, and back. When Plaintiff wanted to return to work with partial restrictions, her employer refused. Instead, Plaintiff was placed on "Extended Illness Status." This was detrimental to Plaintiff, and against her accommodations, because her "EIS" was paid through her allotted sick hours, and once she ran out of sick hours, she would be subject to administrative termination. Plaintiff has been out of work for almost two and half years. It appeared that her employer was directing the Plaintiff towards administrative termination by preventing her from returning to work, when she had been cleared, and forcing the Plaintiff to exhaust all her allotted sick time.
16. In January of 2018, Plaintiff was eager to return to work and submitted all of her disability paperwork to her employer. She also provided a doctor's note as to her restrictions. As required, her employer set up a Reasonable Accommodations meeting to assess Plaintiff's

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restrictions and determine when she could return to work. During this meeting, no mention of mandatory overtime was discussed. When Plaintiff had been working with her employer's predecessor, she was not required to work mandatory overtime; this accommodation was notated in her personnel file. Her previous supervisors (Stephanie Stanky, Gilbert Green, and Kim Kerr) approved her accommodations for no mandatory overtime. Surprisingly (or conveniently), Plaintiff's personnel file went missing soon after this was approved. During this time Kathy Page became the new director of Human Resources. Gwen Taylor, who was another administrator, informed Plaintiff that she could leave before mandatory overtime was requested. Once Kathy Page became HR director, she could not review any of this information since the Plaintiff's personnel file disappeared. Since Ms. Page could not corroborate the agreement and accommodations for the Plaintiff, a disagreement occurred.

17. Two months later in March of 2018, Plaintiff was cleared to return to work, and badges attempted to be cleared for training. Unfortunately, her employer alleged that Plaintiff's badges were not cleared after she started training. Plaintiff suffered embarrassment and stress from being pulled out of class in front of other employees for something as trivial as a badge. It appeared that Plaintiff was being singled out for being disabled and was incurring extra scrutiny that was not being done to non-disabled employees. Once Plaintiff was removed from the training, she was not allowed to return and missed five days of training. Once the Plaintiff cleared the issue herself with no help from her superiors, she was then advanced to the next phase of training, even though she had not properly completed training, which was a result of her employer's intentional interruption.
18. A few months later in June 2018, Plaintiff was called to another reasonable accommodation meeting. Plaintiff also provided a doctor's note stating she was cleared to work, as well as the restrictions on what job duties Plaintiff could perform. During this meeting, it was determined that Plaintiff would work her shift. Plaintiff was disabled at the time and could only work 6

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hours a day which is part time. However, when her employer unionized, another accommodations meeting was held and once again Plaintiff was informed that she did not have to work "mandatory overtime."

19. In August of 2018, Plaintiff worked mandatory overtime only because it was called during her 6-hour shift and stayed within her 6 hours. Her employer was supposed to give its employees two hours' notice prior to calling mandatory overtime. Additionally, mandatory overtime was only to be called during a catastrophic event. Plaintiff stayed past her shift a second time, in order to finish up with a customer before she left work, adding an additional 25 minutes to her shift.

20. Two months later in October 2018, Plaintiff's employer allows for bidding for job shifts to take place. Plaintiff was unable to bid on the computer, so Plaintiff called in to bid for a shift in "Zone 7." Kathy Page had a meeting with the supervisors in Zone 7 to discuss Plaintiff's accommodations from performing mandatory overtime. However, Ms. Page neglected to inform all supervisors. Due to this, Plaintiff had a disagreement with a supervisor when she tried to leave after her 6-hour shift. The issue was eventually resolved, but the supervisor informed Plaintiff that he was not told about her accommodations. Additionally, Plaintiff had trouble leaving her shift when the supervisors refused to sign her paperwork at the end of her 6-hour shift. Another accommodation meeting is called (October 2018), and the administrators are concerned that Plaintiff can no longer do her job because she cannot stay past her 6-hour shift. Plaintiff had previously worked "mandatory overtime" with no issues as it did not exceed her 6-hour limitation by her doctors. At that time, Plaintiff was designated a part-time employee. Part time means that she was working four out of eight hours per day, or half of the normal 40-hour work week. Since Plaintiff was working part time shifts, then she could work mandatory overtime as any time that was over her scheduled shift time would be considered overtime, and she would comply with the essential job function as had been

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outlined. However, due to her being disabled, Plaintiff's employer knowingly made it difficult for this to occur as they kept referring to mandatory overtime applied to a fulltime, 8-hour shift. In the meantime, the employer told Plaintiff to apply for other positions within the company. The employer attempted to transfer Plaintiff to another department. However, Plaintiff did not want to be transferred, since she could perform the essential functions of the job as required, even though she was disabled. Since Plaintiff did not want to be transferred, her employer placed her on EIS again and she was removed from work. Once this occurred, it forced the Plaintiff to use up the remaining sick time she had. This meant that she could be administratively terminated; work around that was intentionally done in order to avoid allegations of discrimination under the ADA. Plaintiff attempted to find another position but was only referred to full-time positions that her employer knew Plaintiff could not perform within her disability restrictions. Employer also informed Plaintiff that as long as she was on leave, she could not apply for other positions.

21. In November of 2018, Plaintiff learns that that her personnel file is still missing. Plaintiff scheduled a meeting with Michelle Brown, who was the superior to Kathy Page. The issue of "mandatory overtime" is discussed yet again, and Ms. Brown and Ms. Page claim that Mr. Green never informed them that Plaintiff was excused from it as an accommodation protected by the ADA. Plaintiff then receives a letter that she will be terminated on December 4, 2018. However, Ms. Page called another accommodation meeting with Plaintiff; two union representatives were present as well. During this meeting, Ms. Page and Ms. Taylor admit to having knowledge of Plaintiff's accommodations from performing "mandatory overtime", and that they had been informed of this by Mr. Green. Ms. Page then informs Plaintiff that if her doctor can change her paperwork to reflect an 8-hour shift instead of 6-hour shift, then Plaintiff would be able to return to work immediately. Rightfully, Plaintiff's doctor refuses to do so because she believes that such an act would be falsifying information and perpetrating

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fraud. Plaintiff's doctor does write a note stating that there is no reason why Plaintiff should be off work.

22. In January 2019, another accommodation meeting is held, and Plaintiff's termination is extended to January 23, 2019. Plaintiff was not invited to this meeting at first, but then received a request to join the meeting from Ms. Page at the last minute. January 23, 2019, comes and goes and Plaintiff's EIS time officially expired.
23. In February 2019, Plaintiff received a letter that she was ineligible for reasonable accommodations because she could not perform the "essential functions" of her job. Plaintiff then receives a letter from Tonya Patterson at the corporate office that she is officially terminated due to not returning from a leave of absence.
24. The Plaintiff soon after contacted her Union Representative, Robert Jesel, and filed a formal complaint against the employer, United Airlines, as was outlined in the 2016-2021 Passenger Service Agreement (PSA).
25. Beginning in August 2019, Plaintiff received information back from the Defendant regarding her complaint and the status of her 3rd Step as outlined in the PSA. From this point forward, it appeared as if the Defendants were not representing the Plaintiff as they should have as outlined in the PSA. Plaintiff had been told that there would be an arbitration hearing; however, arbitration did not occur. On more than one occasion, Plaintiff had been told that arbitration was scheduled months into the future, but as that time came closer, Plaintiff was told an excuse as to why arbitration would not occur.
26. From January 2020 through March 2020, Plaintiff was in contact with the Defendants to find out the status of the complaint and to find out who was representing her in her complaint. She was informed that the Defendants would represent her, however the Defendants lacked any urgency in the matter. To be clear, there was an impact to the entire claim from Covid-19, and

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there were numerous delays. However, delays aside, the Defendants did not perform their duties as was outlined in the PSA.

27. From March 2020 through September 16, 2021, there were numerous emails and communication between the Plaintiff and the Defendants regarding the Plaintiff's claim. Throughout these communications, Plaintiff was told time and again that arbitration would be scheduled, that the Defendants agreed with the Plaintiff, and that the Defendants disagreed with her employer's decision to terminate the Plaintiff. However, arbitration was never scheduled, and Plaintiff was not properly represented as outlined in the PSA.
28. When Plaintiff had decided to sue her employer due to the Defendants lack of action, she was informed by the Defendants that her claims would be placed on hold until the lawsuit had been settled.
29. Due to multiple suites and issues, the Plaintiff's claims against her employer were not settled until September 28, 2023.
30. On September 2, 2022, Defendants notified Plaintiff that they closed her file and that they would not be pursuing arbitration, as they had previously stated on multiple occasions. They also stated that she should have taken a settlement, which the Plaintiff believed to be unfair and not to the level of what she was owed.

CAUSES OF ACTION

Breach of Contract

31. Plaintiff repeats and re-alleges all the facts set forth above.
32. In order to have a breach of contract claim, there needs to have been a contract, performance of the contract, a breach and damages.

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33. Plaintiff contends that there was indeed a contract with the Plaintiff and the Defendants, which was the 2016-2021 Passenger Service Agreement (“PSA”) that controlled how employees and the union would interact as it pertained to the Plaintiff’s employer. The PSA states under Article 8 that the “Union is the exclusive representative and the sole collective bargaining agent with respect to pay, rules and working conditions.” The Plaintiff was a member of the union as her dues were automatically drafted from her account, and which would cover performance of the Plaintiff with the contract. Plaintiff’s claims as listed above, are that the Defendants did not represent her as was agreed by their lack of action with Plaintiff’s claims against her employer. The Defendants breached Article 8 of the PSA, as well as Article 9 of the PSA, and did not properly represent the Plaintiff. The Defendants did not arrange an arbitration meeting, although they stated several times that they would. They made decisions about what action should be taken that was contrary to the wishes of the Plaintiff. Finally, they made a legal decision that Plaintiff would not be successful if her claims went to arbitration, which was out of their prevue. Their responsibility was to dutifully represent the Plaintiff in her claims, and to set up the proper meetings/arbitration hearings. Making decisions to not move forward because they thought the Plaintiff would not be successful, is contrary to their duty and responsibilities. It was also contrary to all the rhetoric that the Plaintiff had received up to that point, i.e. emails stating that they 100% agree with her and that they disagree with the employer’s decision to terminate the Plaintiff.

34. Plaintiff did in fact incur damages as to the breach of the PSA by the Defendants. Those damages amount to lack of reinstatement, lack of pay, lack of back pay, and other items that are listed in this suit. Based on the above, the Defendants did indeed breach the PSA with the Plaintiff.

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Misrepresentation

35. Plaintiff repeats and re-alleges all the facts set forth above.
36. Plaintiff claims that Defendants intentionally and knowingly misrepresented the actions that would be talked about by them in their representation of the Plaintiff's claims against her employer. In order for a misrepresentation to occur, a statement or omission must have occurred, with an intent to deceive, that the plaintiff relied on, and which caused the plaintiff damages. Here, the fact that the Defendant made multiple statements that they would schedule, or had scheduled, arbitration on behalf of the Plaintiff was a misrepresentation as no such meeting had been scheduled or would be scheduled. These statements appeared to have been made to quash or quell the Plaintiff as the Defendants had no intention of doing so. The Plaintiff relied on these statements as she waited for her claims to be heard, but they never came to pass. Because of this reliance, after the Plaintiff waited a length of time, she then had to try to pursue litigation since there was no actions taken by the Defendants. This caused her financial damage, as well as emotional stress as this was not what she had thought would occur when she followed the procedures outlined in the PSA. Further, the Plaintiff incurred further financial hardship and emotional distress when she was then notified by the Defendants that they would not be pursuing arbitration or any other actions, and continued to press upon the Plaintiff a remedy that was contrary to the wants of the Plaintiff. Based on the above, the Defendants misrepresented what course of action would be taken by the Defendants on behalf of the Plaintiff, and this was relied on by the Plaintiff, to her detriment.

DAMAGES

37. Defendants' conduct constitutes violations against the Plaintiff. Such unlawful conduct seriously affected Plaintiff as she relied on her union to represent her and support her in her

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claims against her employer. Because of Defendants' conduct, Plaintiff has suffered, suffers, and will continue to suffer humiliation, mental anxiety, and stress along with other damages. As a result of the Defendants' actions, Plaintiff has incurred mental and financial hardship and had been made to feel that the Defendants supported her employer and did nothing to assist the Plaintiff in her claims against her employer. In their actions as alleged above, Defendants acted with malice or reckless indifference to the rights of the Plaintiff and thereby entitling her to an award of punitive damages. Plaintiff seeks all general, special, and incidental and consequential damages in an amount of \$2,000,000.00.

JURY TRIAL DEMAND

38. Plaintiff demands a jury trial in this case.

PRAYER

WHEREFORE Plaintiff SHEILA FOSTER, respectfully prays that Defendants be cited to appear and file an answer herein and that the Court award judgment in favor of Plaintiff at Defendants, jointly and severally, for all damages and amounts to which Plaintiff is entitled, plus any amounts allowable under law for pre-judgment interest, post-judgment interest, attorneys' fees, and court costs; tax the court costs and discretionary costs of this against Defendant; and award any such further relief, at law or in equity, to which Plaintiff may show it is justly entitled.

RESPECTFULLY SUBMITTED,

/s/ Ross Reifel

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

SHEILA FOSTER,

Plaintiff

v.

**IAMAW DISTRICT LODGE 141,
ROBERT JESEL, and
MICHAEL KLEMM,**

Defendants

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Civil Action No. 4:24-cv-03356

**DEFENDANTS' MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL
PROCEDURE 4(m), 12(b)(5), AND 12(b)(6) AND MEMORANDUM OF LAW IN
SUPPORT THEREOF**

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Defendants International Association of Machinists & Aerospace Workers, District Lodge 141 (*District 141* or *Union*), Robert Jesel, and Michael Klemm hereby move the Court to dismiss this action pursuant to Rules 4(m), 12(b)(5), and 12(b)(6), Federal Rules of Civil Procedure, as follows.

Statement of the Issues

1. Should this civil action be dismissed without prejudice under Rule 4(m), Federal Rules of Civil Procedure, because Plaintiff failed to serve Defendants and file proofs of service within 90 days after the filing of her Complaint, and further failed to timely request an extension of the service period upon good cause shown? The Court's ruling on this issue is reviewed for abuse of discretion. *Jones v. Ramos*, 12 F.4th 745, 749 (7th Cir. 2021); *Thompson v. Maldonado*, 309 F.3d 107, 110 (2d Cir. 2002).

2. Should this civil action be dismissed without prejudice under Rule 12(b)(5), Federal Rules of Civil Procedure, for insufficient service of process because Plaintiff's attempted service of process on Defendants by Federal Express was improper and ineffective? A district court has broad discretion in determining whether to dismiss an action for insufficient service of process. *Epley v. Luong*, No. 23-40038, 2023 WL 8595674, at *2 (5th Cir. Dec. 12, 2023) (per curiam), citing *George v. U.S. Dep't of Lab., Occupational Safety & Health Admin.*, 788 F.2d 1115, 1116 (5th Cir. 1986) (per curiam).

3. Should this civil action be dismissed with prejudice under Rule 12(b)(6), Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted because Plaintiff's claims are, on the face of the Complaint, cognizable only as a claim for breach of the Union's duty of fair representation under federal law, and as such are barred by the six-month statute of limitations applicable to such claims, and amendment would be futile? The district

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court's dismissal of an action for failure to state a claim under Rule 12(b)(6) is reviewed de novo. *Stanley v. Morgan*, 120 F.4th 467, 470 (5th Cir. 2024); *D&T Partners, LLC*, 98 F.4th 198, 203 (5th Cir. 2024), *cert. denied sub nom. D&T Partners, LLC v. Baymark Partners Mgmt.*, No. 24-18, 2024 WL 4427165 (U.S. Oct. 7, 2024), citing *In re Life Partners Holdings, Inc.*, 926 F.3d 103, 116 (5th Cir. 2019); *Smith v. American Postal Workers Union*, 306 F. Appx. 178, 180 and n. 1 (5th Cir. 2009), citing *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer*, 354 F.3d 348, 351 (5th Cir. 2003). The district court's decision to dismiss with or without prejudice is reviewed for abuse of discretion. *D&T Partners*, 98 F.4th at 210, citing *Club Retro, LLC v. Hilton*, 568 F.3d 181, 215 n.34 (5th Cir. 2009).

4. Should this civil action be dismissed with prejudice as against Defendants Jesel and Klemm under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted because there is no cause of action against individual union officials for the alleged breach of a labor union's duty of fair representation? The district court's dismissal of an action for failure to state a claim under Rule 12(b)(6) is reviewed de novo on appeal. *Stanley*, 120 F.4th at 470 (5th Cir. 2024); *D&T Partners, LLC*, 98 F.4th at 203 (5th Cir. 2024). The district court's decision to dismiss with or without prejudice is reviewed for abuse of discretion. *D&T Partners*, 98 F.4th at 210.

Statement of the Nature and Stage of the Proceeding

On September 9, 2024, Plaintiff Sheila Foster filed her *Complaint* [Dkt. 1] against Defendants District 141, Jesel, and Klemm, asserting purported causes of action for breach of contract and misrepresentation.

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On September 10, 2024, the Court issued its *Order for Conference and Disclosure of Interested Parties*. (Dkt. 3). Among other things, the Court's September 10 order warned Plaintiff that

Fed. R. Civ. P. 4(m) requires defendant(s) to be served within 90 days after the filing of the complaint. The failure of plaintiff(s) to file proof of service within 90 days after the filing of the complaint may result in dismissal of this action by court on its own initiative.

(Dkt. 3, ¶ 3). The ninetieth day after the filing of the Complaint was Monday, December 9, 2024.

On October 11, 2024, Foster requested that Summons be issued to each Defendant (Dkt. 4-6). The Clerk issued three Summonses on October 16, 2024. (Dkt. 7).

On January 8, 2025, 120 days after Plaintiff filed her Complaint, the three Summonses issued to Defendants were delivered via the Federal Express commercial package delivery service to the Union's address in Elk Grove Village, Illinois in a single package addressed to "United Airlines, IAMAW District Lodge 141." (App. 1, ¶ 3; App. 3-4). The Court's docket reflects that Plaintiff has not filed any proofs of service with the Court.

In the introductory "Nature of the Case" section of her Complaint, Plaintiff characterizes this suit as one for the Union's breach of its duties under a collective bargaining agreement:

This is an action to recover damages and civil penalties for breach of contract of the 2016-2021 Passenger Service Agreement ("PSA"), which protects the plaintiff when dealing with an employment union and outlines remedies. Specifically, when the union does not perform as agreed and refuses to consult or negotiate in good faith or breaches the agreement by misrepresentation and failure to perform its fiduciary duties.

(Complt., ¶ 1) (emphasis added).

Although Plaintiff identifies her two causes of action as "breach of contract" and "misrepresentation" (Cmplt., pp. 9, 11), she invokes federal question jurisdiction: "The jurisdiction

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of this Honorable Court is invoked because the issues in this case raise federal questions as this 'PSA' is a national agreement for employees throughout the United States." (Cmplt., ¶ 2).

Plaintiff's breach of contract and misrepresentation causes of action are entirely premised on her claim that "Plaintiff was not properly represented as outlined in the PSA." (Cmplt., ¶ 27). Pertinent to the Court's disposition of Defendants' motion to dismiss under Rule 12(b)(6) for failure to state a claim, Plaintiff makes the following allegations in the Complaint:

- In February 2019, her then-employer, United Airlines, determined that Foster was not eligible for reasonable accommodation under the Americans with Disabilities Act and then discharged her for not returning from a leave of absence. (Cmplt., ¶ 23).
- Foster then contacted Defendant Jesel, Assistant General Chairman of the Union, to file a complaint against United Airlines in accordance with the terms of the collective bargaining agreement, the PSA. (Cmplt., ¶ 24) Defendant Klemm is the Union's President and Directing General Chairman. (Cmplt., ¶ 10).
- Beginning in August 2019, "Defendants were not representing the Plaintiff as they should have as outlined in the PSA," including the claim that arbitration with United Airlines was never scheduled. (Cmplt., ¶ 25-27).
- **"On September 2, 2022, Defendants notified Plaintiff that they closed her file and that they would not be pursuing arbitration, as they had previously stated on multiple occasions."** (Cmplt., ¶ 30) (emphasis added).¹

¹ A true and correct copy of the September 2, 2022, case closing letter that Plaintiff references in paragraph 30 of her Complaint is included in the supporting Appendix. (App. 1-2, ¶ 4; App. 5). The letter concludes with the Union notifying Plaintiff of its position that her case would be unsuccessful in arbitration and that the retirement agreement offered to her by United Airlines was fair. (App. 5). The Union left no doubt that it would not further pursue Plaintiff's claim, concluding the letter by stating that "your case is now closed in our files." (App. 5). The Court may consider the September 2 letter without converting the motion to dismiss to a motion for summary judgment because it is referenced in the Complaint. *See Brand Coupon Network, LLC v. Catalina Mktg. Corp.*, 748 F.3d 631, 635 and n. 10 (5th Cir. 2014) (district court has discretion to consider documents attached to a motion to dismiss when they are referred to in the pleadings and are central to the plaintiff's claims). In the alternative, should the

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The sole basis for Plaintiff's breach of contract claim is her allegations that she was a member of the Union and that Defendants breached their representational duties to her under the PSA:

Plaintiff contends that there was indeed a contract with the Plaintiff and the Defendants, which was the 2016-2021 Passenger Service Agreement (PSA") that controlled how employees and the union would interact as it pertained to the Plaintiff's employer. The PSA states under Article 8 that the "Union is the exclusive representative and the sole collective bargaining agent with respect to pay, rules and working conditions." **The Plaintiff was a member of the union as her dues were automatically drafted from her account, and which would cover performance of the Plaintiff with the contract. Plaintiff's claims as listed above, are that the Defendants did not represent her as was agreed by their lack of action with Plaintiff's claims against her employer.** The Defendants breached Article 8 of the PSA, as well as Article 9 of the PSA, and did not properly represent the Plaintiff. The Defendants did not arrange an arbitration meeting, although they stated several times that they would. They made decisions about what action should be taken that was (sic) contrary to the wishes of the Plaintiff. Finally, they made a legal decision that Plaintiff would not be successful if her claims went to arbitration, which was out of their prevue [sic]. Their responsibility was to dutifully represent the Plaintiff in her claims, and to set up the proper meetings/arbitration hearings. Making decisions to not move forward because they thought the Plaintiff would not be successful, is contrary to their duty and responsibilities. It was also contrary to all the rhetoric that the Plaintiff had received up to that point, i.e. emails stating that they 100% agree with her and that they disagree with the employer's decision to terminate the Plaintiff.

(Cmplt., ¶ 33) (emphasis added). Foster does not assert that Defendants breached any contract other than the PSA.

Similarly, Plaintiff's "misrepresentation" claim is based entirely on her allegation that Defendants made misrepresentations to her in connection with their representation of her under the PSA:

Court determine that it cannot consider the letter without conversion of the motion, Defendants request that the Court simply disregard the letter, as they believe that Plaintiff's Complaint is clear and unequivocal on its face that Plaintiff was notified on September 2, 2022, that the Union was closing her case and would take no further action. *See United States ex rel. Long v. GSD & M Idea City LLC*, No. 3:11-CV-1154-O, 2014 WL 11321670, at *3 (N.D. Tex. Aug. 8, 2014) (a district court is not required to convert a motion to dismiss to a motion for summary judgment when it does not rely on extraneous materials in making its ruling).

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Plaintiff claims that Defendants intentionally and knowingly misrepresented the actions that would be talked about by them in their representation of the Plaintiff's claims against her employer. In order for a misrepresentation to occur, a statement or omission must have occurred, with an intent to deceive, that the plaintiff relied on, and which caused the plaintiff damages. **Here, the fact that the Defendant made multiple statements that they would schedule, or had scheduled, arbitration on behalf of the Plaintiff was a misrepresentation as no such meeting had been scheduled or would be scheduled. These statements appeared to have been made to quash or quell the Plaintiff as the Defendants had no intention of doing so.** The Plaintiff relied on these statements as she waited for her claims to be heard, but they never came to pass. Because of this reliance, after the Plaintiff waited a length of time, she then had to try to pursue litigation since there was no actions taken by the Defendants. This caused her financial damage, as well as emotional stress as this was not what she had thought would occur when she followed the procedures outlined in the PSA. Further, the Plaintiff incurred further financial hardship and emotional distress when she was then notified by Defendants that they would not be pursuing arbitration or any other actions, and continued to press upon the Plaintiff a remedy that was contrary to the wants of the Plaintiff. Based on the above, the Defendants misrepresented what course of action would be taken by the Defendants on behalf the Plaintiff, and this was relied on by the Plaintiff, to her detriment.

(Cmplt., ¶ 36) (emphasis added). Plaintiff does not allege any misrepresentations other than those she alleges were made to her in connection with Defendants' representation of her under the PSA.

Summary of the Argument

This civil action should be dismissed under Rule 4(m) due to Plaintiff's failure to timely serve Defendants with summons and the Complaint and to file proofs of service with the Court. Plaintiff failed to effect timely service even after the Court warned her that her case might be dismissed if she did not file proofs of service within 90 days in its *Order for Conference and Disclosure of Interested Parties* of September 10, 2024. (Dkt. 3). Although 140 days have passed since the filing of her Complaint as of the filing of this motion, Plaintiff has still not properly served Defendants, has not filed the required proofs of service, and she did not timely make a request to the Court for an extension of the period on good cause shown.

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This civil action should also be dismissed under Rule 12(b)(5) for insufficient service of process because service by Federal Express, the only method of service that Plaintiff has attempted, is improper and ineffective.

The action should be dismissed with prejudice as to all Defendants under Rule 12(b)(6) for failure to state a claim on which relief can be granted. Plaintiff's purported state law breach of contract and misrepresentation claims are preempted by the federal duty of fair representation that arises from a labor union's role as the exclusive bargaining agent for its members. On the face of the Complaint, Plaintiff's suit is barred by the six-month statute of limitations applicable to a duty of fair representation claim, so any amendment of the Complaint would be futile.

Finally, as to the two individual Defendants, Jesel and Klemm, the action should be dismissed with prejudice under Rule 12(b)(6) for failure to state a claim on which relief can be granted because under federal labor law, individual union officers are not liable for the breach of union's duty of fair representation.

Argument

I. The Action Should Be Dismissed Under Rule 4(m) for Failure to Timely Serve Defendants with Process

Under Rule 4(c)(1), "[t]he plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m)." Fed. R. Civ. P. 4(c)(1). Rule 4(m) provides that "[i]f a defendant is not served within 90 days after the complaint is filed, the court — on motion or on its own motion after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time." Fed. R. Civ. P. 4(m). In the absence of a waiver of service, the plaintiff is also required to file proof of service with the court. Fed. R. Civ. P. 4(l).

Thus, in this case Plaintiff was responsible for serving Defendants no later than December 9, 2024, the Monday after the 90-day service period expired on December 8, 2024. Moreover, she failed to do so even though the Court had warned her that her failure to file proofs of service by that date could result in the dismissal of her case.

As of the filing of this motion, 140 days have elapsed since the filing of the Complaint and Plaintiff has still failed to perfect service of process on Defendants. Moreover, although Plaintiff had the opportunity to file a motion with the Court to request an extension of the period for service upon good cause shown, she failed to do so. *See* Fed. R. Civ. P. 4(m) (“But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.”). Accordingly, the case should be dismissed.

II. The Action Should be Dismissed Under Rule 12(b)(5) for Insufficient Service of Process Because Service by Federal Express is Improper and Ineffective

“A motion to dismiss pursuant to Rule 12(b)(5) turns on the legal sufficiency of the service of process.” *Herrmann v. Bridger*, No. 5:24-CV-00545-JKP, 2024 WL 4849079, at *1 (W.D. Tex. Nov. 20, 2024), citing *Quinn v. Miller*, 470 F. App'x 321, 323 (5th Cir. 2012). When an objection to service is made, it is the burden of the party making service to demonstrate its validity. *Id.* If the serving party fails to meet its burden to demonstrate the validity of the service, the district court may quash the service and dismiss without prejudice all causes of action against the improperly served defendant or defendants. *Id.*, citing *Gartin v. Par Pharm. Companies, Inc.*, 289 F. App'x 688, 691 (5th Cir. 2008).

Here, Plaintiff attempted (untimely) service on Defendants by sending all three issued Summonses to the Union's offices in Elk Grove Village, Illinois via Federal Express in a single package addressed to:

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UNITED AIRLINES
IAMAW DISTRICT LODGE 141
1771 COMMERCE DRIVE
SUITE 103
ELK GROVE VILLAGE IL 60007

(App. 3-4). The face of the Federal Express envelope indicates that the package was shipped on January 2, 2025. (App. 3). The Union did not receive the package until January 8, 2025. (App. 1, ¶ 3). In addition to being untimely, this attempt at service was not legally sufficient because Federal Express is not a legally valid method of service of a Summons and Complaint.

Rule 4(e) outlines the permissible methods of effecting service of process on an individual. For service on individuals, Rule 4(e) provides for personal service, certain personal service at the individual's abode, or delivery to an agent authorized by law to accept service of process on behalf of the individual. Fed. R. Civ. P. 4(e)(2). The rule also provides for service in accordance with the law of either the state in which the district court sits, or the state in which service is made. Fed. R. Civ. P. 4(e)(1). For an association such as the Union, service may be made in the manner prescribed for serving individuals, or by delivering a copy to an officer, a managing or general agent, or other agent appointed by law to accept service (provided that in the latter case, a copy is also mailed to the defendant). Fed. R. Civ. P. 4(h). Courts have held that delivery of a copy to an officer of a corporation or association under Rule 4(h)(1)(B) requires personal service, and that even service by mail is insufficient. *Hazim v. Schiel & Denver Book Grp.*, No. H-12-1286, 2013 WL 2152109, at *2 (S.D. Tex. May 16, 2013) ("Courts have held that Rule 4(h)(1)(B) refers to personal service and does not include service by mail.").

This action should be dismissed for insufficient service of process because Plaintiff has not met her burden of proving service on Defendants by any method, let alone an authorized method. Although Plaintiff did make one attempt at service by sending a Federal Express package

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to the Union's business office (not addressed to any authorized agent of the Union or to either of the individual Defendants), Federal Express is not an authorized method of service. Although Texas allows service by mail, mail service may only be accomplished through the United States Postal Service via certified mail with a proper return receipt, and not by a commercial delivery service such as Federal Express. *Dixon v. Tesla Motors, Inc.*, No. 1-23-CV-326-RP, 2024 WL 4875291, at *3 (W.D. Tex. Nov. 13, 2024) (only service through the United States Postal Service suffices as registered or certified mail); *Benavides v. Johnson*, No. 3:19-cv-01424-S-BT, 2020 WL 521087 (N.D. Tex. Jan. 6, 2020), *findings and conclusions accepted*, 2020 WL 515872 (N.D. Tex. Jan. 30, 2020) (same); *Arumugam v. William March Rice Univ.*, No. H-13-376, 2014 WL 12599640 (S.D. Tex. Feb. 6, 2014) (same). Moreover, the state of Illinois, in which service by Federal Express was attempted in this case, does not allow for service by mail except in small claims cases. *See* 735 ILCS 5/2-202i, 2.205.1; Ill. S. Ct. Rule 102; Ill. S. Ct. Rule 284.

III. The Action Should Be Dismissed with Prejudice Under Rule 12(b)(6) Because the Suit is Barred by Limitations on the Face of the Complaint, So Any Amendment Would be Futile

A. The Governing Standard

Dismissal of a suit for failure to state a claim on which relief can be granted under Rule 12(b)(6) is appropriate when it appears certain that the pleadings on their face reveal beyond doubt that the plaintiff cannot prove any set of facts in support of her claim that would entitle her to relief. *Smith v. Am. Postal Workers Union Local No. 1477*, No. 6:07CV347, 2008 WL 11429483, at *2 (E.D. Tex. Apr. 8, 2008), *report and recommendation adopted*, No. 6:07CV347, 2008 WL 11429484 (E.D. Tex. Apr. 17, 2008), *aff'd sub nom. Smith v. Am. Postal Workers Union*, 306 F. App'x 178 (5th Cir. 2009), citing *Doe v. Dallas Indep. School Dist.*, 153 F.3d 211, 215 (5th Cir. 1998). "The facts alleged in the complaint must be accepted as true for the purpose of reviewing

a motion to dismiss.” *Id.*, citing *Battle v. Liberty National Life Ins.*, 493 F.2d 39, 44 (5th Cir. 1974). The district court has discretion to dismiss a claim with prejudice under Rule 12(b)(6) and deny leave to amend the plaintiff’s Complaint where amendment would be futile. *Vela v. Compton*, No. 24-40302, 2024 WL 4891786, at *4 (5th Cir. Nov. 26, 2024) (per curiam) (district court did not abuse its discretion in dismissing claim with prejudice where the claim was barred by limitations and amendment would thus have been futile).

B. Plaintiff’s Purported State Law Claims are Preempted by the Federal Duty of Fair Representation

The U.S. Supreme Court has held that both the National Labor Relations Act and the Railway Labor Act, which governs labor relations between airlines and their employees, imply a duty of fair representation that arises from a labor union’s role as the exclusive bargaining agent for its members. *See Miranda v. National Post Mail*, 219 F. Appx. 340, 343 (5th Cir. 2007), citing *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) and *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944); *Richardson v. United Steelworkers of America*, 864 F.2d 1162, 1166 (5th Cir. 1989) (footnote omitted), *cert. denied*, 495 U.S. 946 (1990). *See also Smith*, 2008 WL 11429483, at *2, citing *Turner v. Air Transport Dispatchers’ Ass’n*, 468 F.2d 297, 299 (5th Cir. 1972) (“A union’s duty of fair representation arises from its role as the exclusive bargaining agent for its members.”).

“This duty of fair representation generally governs a union’s conduct vis-a-vis the bargaining unit members when the union is representing them.” *Richardson*, 864 F.2d at 1166 (footnote omitted). When an employee sues a labor union for breach of that duty, the federal duty of fair representation preempts substantive state law. *Id.*, citing *Vaca v. Sipes*, 386 U.S. 171 (1967).

Plaintiff’s allegations are entirely premised on Defendants’ alleged conduct in representing her in connection with her claim against her former employer, United Airlines, in accordance with

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the Union's status as her collective bargaining agent under the PSA. Her Complaint alleges no other source for the Union's alleged contractual duties. Thus, her allegations fall squarely within the coverage of the duty of fair representation. Because Plaintiff alleges that Defendants breached a duty that arose under federal law because of the Union's status as her collective bargaining agent, the duty must be defined by federal law. *Richardson*, 864 F.2d at 1167. *See also Obeginski v. United Airlines, Inc.*, No. 4:21-cv-03215, 2022 WL 391947, at *2 (S.D. Tex. Feb. 9, 2022) (Eskridge, J.) (concluding that Magistrate Judge Sheldon correctly found that the plaintiff's state law claims against the flight attendants union were preempted by federal law because her complaint alleged in substance that the union had breached its federally imposed duty of fair representation). Indeed, Plaintiff acknowledges as much by pleading that federal question jurisdiction exists "because the issues in this case raise federal questions as this 'PSA' is a national agreement for employees throughout the United States." (Cmplt., ¶ 2).

C. On the Face of the Complaint, Plaintiff's Claims are Barred by the Six-Month Statute of Limitations Applicable to Breach of Duty of Fair Representation Claims

Dismissal on a 12(b)(6) motion is appropriate if it appears from the face of the Complaint that the claim is barred by limitations and the pleadings do not allege any basis for tolling. *Stanley*, 120 F.4th at 470; *Darbey v. Air Transport District Lodge 142*, No. 3:21-CV-00202-E, 2021 WL 3732749, at *5 (N.D. Tex. July 6, 2021), citing *Jones v. Alcoa, Inc.*, 339 F.3d 359, 366 (5th Cir. 2003). Because it is apparent from the face of Plaintiff's Complaint that her duty of fair representation claim is barred by the applicable six-month statute of limitations, and because the Complaint suggests no basis for tolling the limitations period, the Complaint should be dismissed.

Although there is no statute of limitations that is expressly applicable to a duty of fair representation claim, the Supreme Court has imposed a six-month limitations period on such

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claims, applying Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). *DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 164 (1983). See *Richardson*, 864 F.2d at 1167 (the six-month limitations period of Section 10(b) of the NLRA applied because plaintiff's claims were properly characterized as NLRA duty of fair representation claims). Because Plaintiff's claim is only cognizable as a duty of fair representation claim, the six-month limitation period applies.

The sixth-month statute of limitations applies to both hybrid claims against the union and the employer, and to stand-alone claims against the union. *Smith v. Int'l Or. Of Masters, Mates, & Pilots*, 296 F.3d 380, 382 (5th Cir. 2002). The six-month limitations period is also applied to duty of fair representation claims under the Railway Labor Act. *Brock v. Republic Airlines, Inc.*, 776 F.2d 523, 526 (5th Cir. 1985). See also *Darbey*, 2021 WL 3732749 (N.D. Tex. July 6, 2021) (finding in case governed by the Railway Labor Act that the plaintiff's common law claims stated a duty of fair representation claim and were thus preempted, and that the six-month statute of limitations for duty of fair representation claims applied). This short statutory limitation period supports a federal policy of "relatively rapid final resolution of labor disputes." *Wood v. Hous. Belt & Terminal Ry.*, 958 F.2d 95, 98 (5th Cir. 1992) (quoting *DelCostello*, 462 U.S. at 168).

The six-month limitations period begins to run when the employee knew or should have known of the facts forming the basis of the duty of fair representation claim, rather than the effects of the breach. *Barrett v. Ebasco Constructors, Inc.*, 868 F.2d 170, 171 (5th Cir. 1989); *Wood*, 958 F.2d at 98. For example, in *Simmons v. Loc. 565 Air Transp. Div. Transp. Workers Union of Am., AFL-CIO*, No. 3:09-CV-1181-B, 2010 WL 2473840, at *4 (N.D. Tex. June 16, 2010), the district court held that the plaintiff knew or should have known of the union's potential breach of the duty of fair representation when she received a letter from the union stating that her grievance was

withdrawn and closed. *Id.* at *4.² Similarly, in *Rideout v. Metropolitan Transit Authority*, No. H-12-2234, 2012 WL 4963822 (S.D. Tex. Oct. 16, 2012), U.S. District Judge Rosenthal held that the six-month statute of limitations applied to the plaintiff's breach of contract claim against the union, rather than Texas's four-year statute of limitations on breach of contract claims, where the plaintiff alleged that the union had improperly refused to pursue his wrongful-discharge grievance to arbitration. 2012 WL 4963822, at **1-2 ("The case law clearly supports applying the statutory six-months limitations period under the LMRA, which bars his claim."). Judge Rosenthal granted summary judgment where, just as occurred in this case, the evidence showed that nearly two years prior to the filing of the suit, the union had sent the plaintiff a letter notifying him that it would not pursue his case to arbitration. *Id.*

In this case, Foster pleaded that on September 2, 2022, just over *two years* before she commenced this action, the Union informed her that her grievance would not be arbitrated and that her case had been closed. (Cmplt., ¶ 30). Upon her receipt of that letter, Plaintiff knew of the facts forming the basis for her duty of fair representation claim, so the six-month statute of limitations began to run on that date. This limitations bar is apparent from the face of her Complaint.

Moreover, the Court should exercise its discretion to dismiss the suit with prejudice because amendment would be futile. Plaintiff has not suggested any facts that would support tolling of the statute. *See Vela*, 2024 WL 4891786, at *4 (district court properly exercised its discretion to dismiss the plaintiff's claims with prejudice as they were barred by limitations on the face of the complaint and amendment would be futile).

IV. The Action Should be Dismissed with Prejudice Under Rule 12(b)(6) as Against the Two Individual Defendants Because Individual Union Officers Cannot be Held Liable for Breach of the Union's Duty of Fair Representation

² The court in *Simmons* was unable to dismiss the case on limitations grounds because unlike this case, the plaintiff did not provide a specific date of the case closure letter in her pleading. Here, Plaintiff's Complaint is unequivocal on its face that she received notice of the Union's case closure on September 2, 2022. Cmplt, ¶ 30.

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In any event, Plaintiff's fair representation claim against Defendants Jesel and Klemm should be dismissed with prejudice for failure to state a claim upon which relief can be granted because it is well-established that individual union officers cannot be held liable for a union's breach of duty. *Smith*, 2008 WL 11429483, at *2, citing *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 249 (1962) and 39 U.S.C. § 1208(c) ("Assuming Plaintiff can show a breach of the union's duty of fair representation, the law is well-established that his claim for damages may only be recovered against the union, not its individual officers or agents.").

This is so even where, as here, Plaintiff's claims purportedly are based on state law theories because the federal duty of fair representation preempts state law. *Id.*, citing *Universal Communications Corporation v. Burns*, 449 F.2d 691, 693 (5th Cir. 1971); citing *Atkinson*, 370 U.S. 238 ("The limitation on recovery forbidding the collection of damages from individual union members applies even if the claim purports to be based exclusively on state law."). For example, in *Smith*, the district court adopted a magistrate judge's recommendation that the plaintiff's defamation and slander claims against the individual union defendants be dismissed with prejudice under Rule 12(b)(6), leaving only the union as a defendant, because the claims against the individuals were "intertwined with his claim that union refused to represent him on a grievance against his employer concerning a change in employee seniority." *Id.* at *3. In affirming the dismissal, the Fifth Circuit stated that "[t]he district court did not err in dismissing the claims against the individual defendants as they were not proper defendants." 306 F. Appx. at 180.

Because Plaintiff's claims against Jesel and Klemm are inextricably intertwined with and subsumed by the Union's duty of fair representation, she is unable to amend her Complaint to state a cognizable duty of fair representation claim against the individual Defendants. Accordingly, the dismissal of the claim against Jesel and Klemm should be entered with prejudice.

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Conclusion

For the foregoing reasons, Defendants request the Court to grant their motion in its entirety and dismiss Plaintiff's action with prejudice, to award Defendants their costs, and to grant Defendants such other and further relief as may be necessary and proper.

Dated January 28, 2025.

Respectfully submitted,

/s/ Rod Tanner

Rod Tanner

Texas Bar No. 19637500

Tanner and Associates, PC

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rtanner@rodtannerlaw.com

Attorney for Defendants

Certificate of Service

The undersigned attorney certifies that on January 28, 2025, he filed and served the foregoing document electronically on all counsel of record through the Court's CM/ECF system.

/s/ Rod Tanner

Rod Tanner

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SHEILA FOSTER,

Plaintiff

v.

**IAMAW DISTRICT LODGE 141,
ROBERT JESEL, and
MICHAEL KLEMM,**

Defendants

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Civil Action No. 4:24-cv-03356

**APPENDIX TO DEFENDANTS' MOTION TO DISMISS PURSUANT TO FEDERAL
RULES OF CIVIL PROCEDURE 4(m), 12(b)(5), and 12(b)(6) AND MEMORANDUM
OF LAW IN SUPPORT THEREOF**

Ex. No.	Description	Pages
N/A	<i>Declaration of Michael Klemm</i>	1-2
1	Front and Back of Federal Express Package Received on January 8, 2025	3-4
2	Letter to Plaintiff Sheila Foster Dated September 2, 2022	5

Dated January 28, 2025.

Respectfully submitted,

/s/ Rod Tanner

Rod Tanner

Texas Bar No. 19637500

Tanner and Associates, PC

6300 Ridglea Place, Suite 407

Fort Worth, Texas 76116-5706

817.377.8833 (phone)

rtanner@rodtannerlaw.com

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Certificate of Service

The undersigned certifies that on the 28th day of January 2025, he filed and served on opposing counsel a true and correct copy of the foregoing document electronically through the Court's CM/ECF system.

/s/ Rod Tanner
Rod Tanner

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SHEILA FOSTER,

Plaintiff

v.

IAMAW DISTRICT LODGE 141,
ROBERT JESEL, and
MICHAEL KLEMM,

Defendants

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Civil Action No. 4:24-cv-03356

DECLARATION OF MICHAEL KLEMM

1. “My name is Michael Klemm. I am a named Defendant in the above-referenced Civil action. The facts set forth herein are within my personal knowledge and are true and correct.

2. “I am the President and Directing General Chairman of IAMAW District Lodge 141, which is also a named Defendant in the above-referenced civil action. Robert Jesel, Assistant General Chairman for District Lodge 141, is also named as a Defendant in this case.

3. “On January 8, 2025, a single Federal Express envelope containing a copy of the Complaint and a Summons addressed to each of the three Defendants in this lawsuit was delivered to District Lodge 141’s offices in Elk Grove, Illinois. A staff member presented the documents to me the same day. A true and correct copy of the front and back of the Federal Express envelope that was received in District 141’s offices on January 8 are attached hereto as Exhibit 1.

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4. “To the best of my knowledge, Plaintiff Sheila Foster has made no other attempt to serve any papers on me or the other two Defendants in this action, District Lodge 141 and Mr. Jesel.

5. “As the Complaint states, District Lodge 141 represented Ms. Foster in a grievance that she had filed against United Airlines, her employer at that time, under the Union’s collective bargaining agreement with the company. By letter dated September 2, 2022, Mr. Jesel informed Ms. Foster that District Lodge 141 would take no further action on her behalf and that the “case is now closed in our files.” Accordingly, District Lodge 141 performed no further representational activities for Ms. Foster after September 2, 2022.

6. “Further, I conferred with Mr. Jesel about our decision to conclude all representational activities for Ms. Foster regarding her pending dispute with United Airlines before he sent the letter to her. I received a copy of the letter on or about September 2, 2022. As the Complaint indicates, Ms. Foster received the letter soon thereafter.”

On January 27, 2025, I declare under penalty of perjury that the foregoing is true and correct in accordance with 28 U.S.C. § 1746.



Michael Klemm, Declarant

Align top of FedEx Express® shipping label here.

SHIP DATE: 02JAN25
ACTWGT: 0.35 LB
CAD: 6994555/SSFE2560

EXP 08/25

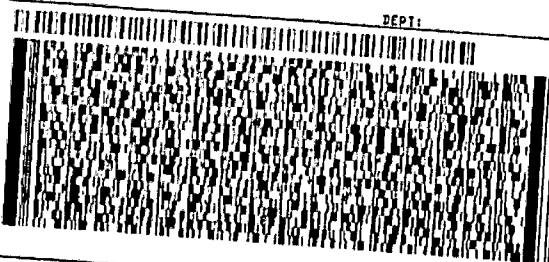
BILL CREDIT CARD

TO UNITED AIRLINES
IAMAW DISTRICT LODGE 141
1771 COMMERCE DRIVE
SUITE 103
ELK GROVE VILLAGE IL 60007
(470) 775-7896

(470) 776-7686

REF

DEPT:



FedEx
Express



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TRK# 2839 3675 4452
0201

MON - 06 JAN 5:00P
** 2DAY **

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UNITED AMMUNES
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SENCE: 1771 COMMERCE DRIVE
SUITE 103
ELK GROVE, IL 60007

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1111 Oliver Road
71201
Monroe, LA

(FEDEX)

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is FedEx envelope.

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Exhibit 2
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9/2/2022

Sheila Foster
22506 Willow Branch Ln
Tomball, TX
77357

Dear Ms. Foster

On Friday September 2, 2022, I contacted you via phone @ 9:27 a.m. (CST) to discuss your case with VP DL141 Tony Colina on the call as well. I had informed you that United was willing to offer you the original Retirement Agreement from 3/4/2021 which you verbally agreed to and I emailed a copy of the agreement from Dave Young, United's Labor Relation Manager on 5/10/2021 @ 11:36 a.m. (CST) without objection from you. On 9/16/2021 @ 11:37 a.m. you had sent me an email indicating the 3/4/2021 Agreement was null and void and that you had never signed the Agreement. Additionally, to the original Retirement Agreement United was willing to waive any incurred expenses you may owe United as a result of your Litigation Case.

On our Sept 2, 2022, call you had refused to accept the terms of the new agreement from United that I presented to you several times and I informed you that your case would not be going to Arbitration. After further review into the facts of your case, the language in the Collective Bargaining Agreement and the ruling in your Litigation Case by Judge Rosenthal stating:

First, an employer is not obligated to continue an accommodation indefinitely. See Credeur, 860 F. 3d at 797 (collecting Fifth Circuit cases), the Union believes your case would be unsuccessful in Arbitration and the Retirement Agreement offered to you twice was fair in all aspects of your case. Therefore, your case is now closed in our files. I wish you the best in all your endeavors.

Fraternally,

A handwritten signature in black ink, appearing to read 'Robert A. Jesel'.

Robert A. Jesel
Assistant General Chair
IAMAW District Lodge 141
Grievance # Foster.5.13.19

Cc Mike Klemm PDGC

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SHEILA FOSTER,

Plaintiff

vs.

IAMAW DISTRICT LODGE 141,
ROBERT JESEL, and MICHAEL KLEMM

Defendants

Case No. 4:24-cv-03356

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

COMES NOW Plaintiff Sheila Foster, through counsel, and respectfully submits this Response to Defendants' Motion to Dismiss filed on January 28, 2025 (Dkt. 10). Defendants seek dismissal under Federal Rules of Civil Procedure 4(m), 12(b)(5), and 12(b)(6), asserting untimely and insufficient service of process and failure to state a claim. For the reasons set forth below, Plaintiff opposes dismissal and requests that the Court deny Defendants' motion in its entirety or, in the alternative, extend the time for service.

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INTRODUCTION

1. Plaintiff's Complaint, filed on September 9, 2024 (Dkt. 1), alleges breach of contract and misrepresentation arising from Defendants' failure to fulfill their obligations under the 2016-2021 Passenger Service Agreement ("PSA"). Defendants IAMAW District Lodge 141 ("Union"), Robert Jesel, and Michael Klemm move to dismiss, claiming procedural defects in service and substantive deficiencies in the Complaint.

2. Plaintiff contends that good cause exists for any delay in service, that service was sufficient or can be cured, and that the Complaint states viable claims not barred by limitations or preemption. Plaintiff further asserts that individual liability may attach to Jesel and Klemm under certain circumstances, warranting further factual development.

ARGUMENT

I. Dismissal Under Rule 4(m) Is Unwarranted Because Plaintiff Can Show Good Cause for the Delay in Service

3. Defendants argue that this action should be dismissed under Rule 4(m) because Plaintiff failed to serve them within 90 days of filing the Complaint (i.e., by December 9, 2024). However, Rule 4(m) provides that "if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period." Fed. R. Civ. P. 4(m).

4. The Fifth Circuit has held that district courts have broad discretion to extend the service period upon a showing of good cause, even absent a formal motion, and that dismissal is inappropriate where the delay does not prejudice the defendant. *Millan v. USAA Gen. Indem. Co.*, 546 F.3d 321, 325-26 (5th Cir. 2008); *see also Thompson v. Brown*, 91 F.3d 20, 21 (5th Cir. 1996) (holding that "[e]ven if the plaintiff lacks good cause, the court has discretionary power to extend the time for service."

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5. Here, Plaintiff can demonstrate good cause for the delay. Summonses were issued on October 16, 2024 (Dkt. 7), showing Plaintiff's intent to serve Defendants promptly. The subsequent delay in effecting service via Federal Express, delivered on January 8, 2025, stemmed from logistical challenges and Plaintiff's reasonable belief that commercial delivery constituted valid service under federal or state rules—a mistake excusable given her pro se status prior to retaining counsel. *See Thrasher v. City of Amarillo*, 709 F.3d 509, 512 (5th Cir. 2013) (noting that courts may consider a plaintiff's pro se status in assessing good cause).

6. Moreover, Defendants have not alleged prejudice from the 29-day delay beyond the 90-day period, and they received actual notice of the suit, as evidenced by their filing of this motion. *See Millan*, 546 F.3d at 326 (lack of prejudice supports extending service time).

7. Should the Court find good cause lacking, it retains discretion to grant a permissive extension. *Thompson v. Brown*, 91 F.3d 20, 21 (5th Cir. 1996) (district court may extend time even without good cause).

8. Accordingly, Plaintiff requests an extension to perfect service, ensuring this case is decided on its merits rather than a technicality.

II. Dismissal Under Rule 12(b)(5) Is Inappropriate Because Service Was Sufficient or Can Be Cured

9. Defendants contend that service via Federal Express on January 8, 2025, was insufficient under Rule 12(b)(5). While Plaintiff acknowledges that Federal Express is not an authorized method under Fed. R. Civ. P. 4(e) or 4(h), dismissal is not the proper remedy where service can be perfected.

10. The Fifth Circuit has emphasized that “when the defect in service does not prejudice the defendant and dismissal would effectively end the litigation due to a statute of limitations bar,

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the court should quash service and allow the plaintiff an opportunity to re-serve.” *Prod. Credit Ass’n of S. New Mexico v. Garcia*, 993 F.2d 1539, 1993 WL 185728, at *2 (5th Cir. May 26, 1993) (unpublished).

11. Here, Defendants received the summonses and Complaint at the Union’s address (1771 Commerce Drive, Suite 103, Elk Grove Village, IL 60007), providing actual notice. No prejudice has been shown, and the defect—use of Federal Express rather than personal service or certified mail—can be cured. Plaintiff requests that the Court quash the prior service attempt and grant 30 days to effect proper service under Rule 4, consistent with *Herrmann v. Bridger*, No. 5:24-CV-00545-JKP, 2024 WL 4849079, at *2 (W.D. Tex. Nov. 20, 2024) (quashing insufficient service and allowing re-service).

III. Dismissal Under Rule 12(b)(6) Is Improper Because Plaintiff States Viable Claims Not Barred by Limitations or Preemption

12. Defendants seek dismissal under Rule 12(b)(6), arguing that Plaintiff’s breach of contract and misrepresentation claims are preempted by the federal duty of fair representation (“DFR”), barred by a six-month statute of limitations, and not actionable against individual defendants Jesel and Klemm. These arguments fail at this stage.

i. The Governing Standard

13. A Rule 12(b)(6) motion tests the sufficiency of the complaint, accepting all well-pleaded facts as true and viewing them in the light most favorable to the plaintiff. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

14. Dismissal is warranted only if the plaintiff can prove no set of facts entitling her to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

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15. Leave to amend should be freely granted unless amendment would be futile. Fed. R. Civ. P. 15(a)(2); *Foman v. Davis*, 371 U.S. 178, 182 (1962).

ii. **Plaintiff's Claims Are Not Wholly Preempted by the Duty of Fair Representation**

16. Defendants assert that Plaintiff's state law claims are preempted by the DFR under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 et seq., citing *Richardson v. United Steelworkers of America*, 864 F.2d 1162 (5th Cir. 1989). However, preemption applies only where state law claims are "inextricably intertwined" with the union's duties as a bargaining agent. See *Vaca v. Sipes*, 386 U.S. 171, 186-87 (1967).

17. Plaintiff's breach of contract claim alleges a specific breach of the PSA—a written agreement—beyond the implied DFR. (Cmplt., ¶ 33). Similarly, the misrepresentation claim involves intentional deceit distinct from mere negligence in representation. (Cmplt., ¶ 36). The Fifth Circuit has recognized that state law claims can coexist with federal labor law where they involve independent contractual or tortious conduct. See *Thomas v. Norris*, 604 F. App'x 337, 341 (5th Cir. 2015) (state fraud claim not preempted where it alleged intentional misconduct beyond DFR scope).

18. At this stage, the Court must accept Plaintiff's allegations that the PSA imposes specific duties enforceable under state law. Discovery is needed to determine the PSA's terms and whether Defendants' actions breached obligations distinct from the DFR. Dismissal based on preemption is premature.

iii. **The Six-Month Limitations Period Does Not Bar Plaintiff's Claims**

19. Assuming arguendo that Plaintiff's claims are recharacterized as DFR claims, they are not time-barred. The six-month limitations period under *DelCostello v. Int'l Brotherhood of*

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Teamsters, 462 U.S. 151, 169 (1983), begins when the plaintiff “knew or should have known” of the breach. *Barrett v. Ebasco Constructors, Inc.*, 868 F.2d 170, 171 (5th Cir. 1989).

20. Defendants point to the September 2, 2022, letter closing Plaintiff’s case as triggering the limitations period, expiring March 2, 2023—well before the Complaint’s filing on September 9, 2024. However, Plaintiff alleges ongoing misrepresentations and delays, including assurances of arbitration that persisted “time and again” through September 16, 2021, and a lawsuit-related hold until September 28, 2023. (Cmplt., ¶¶ 27-29).

21. The Complaint suggests Defendants’ conduct may have tolled the limitations period by concealing the breach or inducing delay. Equitable tolling applies where a defendant’s actions prevent timely filing. *See Rashidi v. Am. President Lines*, 96 F.3d 124, 128 (5th Cir. 1996) (tolling DFR claim where union misled plaintiff).

22. Plaintiff filed within one year of the lawsuit settlement (September 28, 2023), a reasonable period if tolling applies. Factual development is needed to determine when Plaintiff’s claim accrued, making dismissal on limitations grounds improper now.

iv. Individual Defendants Jesel and Klemm May Be Liable Under Certain Theories

23. Defendants argue that Jesel and Klemm, as union officers, cannot be held liable for a DFR breach, citing *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 249 (1962). While individual liability is generally unavailable for DFR claims, Plaintiff’s misrepresentation claim alleges intentional tortious conduct—knowing misstatements with intent to deceive—that may fall outside this shield. (Cmplt., ¶ 36).

24. The Fifth Circuit has allowed individual liability for torts committed by union agents acting within their authority. *See Int’l Bhd. of Teamsters v. Oliver*, 358 F.2d 103, 105 (5th

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Cir. 1966) (union officials liable for tortious interference). Whether Jesel and Klemm acted personally or solely as Union agents requires discovery into their roles and actions.

IV. Leave to Amend Should Be Granted If Any Deficiency Exists

25. If the Court finds deficiencies in the Complaint or service, Plaintiff requests leave to amend under Rule 15(a)(2).

26. Amendment is not futile where additional facts could cure defects, such as clarifying the PSA's terms, detailing tolling circumstances, or perfecting service. *See Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002) (leave to amend favored absent futility).

CONCLUSION

27. For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendants' Motion to Dismiss. In the alternative, Plaintiff seeks an extension of time to perfect service under Rule 4(m) and leave to amend her Complaint under Rule 15(a)(2).

Dated: February 23, 2025

Respectfully submitted,

/s/ Ross B. Reifel

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Attorney For Plaintiff

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CERTIFICATE OF SERVICE

The following has been filed in accordance with the rules and served to all counsel of record using the court's CM/ECF system on February 23, 2025

/s/ Ross Reifel

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

SHEILA FOSTER,

Plaintiff

V.

**IAMAW DISTRICT LODGE 141,
ROBERT JESEL And
MICHAEL KLEMM.**

Defendants

§

§ Civil Action No. 4:24-cv-03356

**DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S UNTIMELY RESPONSE TO
DEFENDANTS' MOTION TO DISMISS AND REPLY SUBJECT THERETO**

Defendants International Association of Machinists and Aerospace Workers, District Lodge 141 (*District 141* or *Union*), Robert Jesel, and Michael Klemm hereby move the Court to strike *Plaintiff's Response to Defendant's Motion to Dismiss* [Dkt. 13] (*Response*) from the record on grounds that it was untimely filed. Subject to their motion to strike the Response, Defendants reply to the Response on its merits.

Motion to Strike Response as Untimely

A. Statement of the Issue to be Ruled Upon by the Court

Should the Court strike Plaintiff's Response because Plaintiff filed it five days after the filing deadline, and without filing the required motion for an extension of time demonstrating good cause and excusable neglect? The District Court has broad discretion to grant or deny a post-deadline extension. *Cooper v. Project Res. Grp., Inc.*, No. 4:21-CV-01060, 2022 WL 8089613, at *1 (S.D. Tex. Oct. 14, 2022) (Edison, M.J.).

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B. Nature and Stage of the Proceedings

On January 28, 2025, Defendants filed *Defendants' Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 4(m), 12(b)(5), and 12(b)(6) and Memorandum of Law in Support Thereof* [Dkt. 10] (*Motion to Dismiss*). The Motion to Dismiss includes a complete statement of the nature and stage of the proceedings through that date to which Defendants refer the Court.

The submission date for the Motion to Dismiss was February 18, 2025, 21 days after the filing date. S.D. Tex. Loc. R. 7.3. Plaintiff filed her Response five days after the submission date on February 23, 2023. [Dkt. 13]. She did not file a motion for leave to file a post deadline response based on a showing of good cause and excusable neglect.

C. Argument

A written response to a motion must be filed by the motion's submission date, and the failure to timely file a response is "taken as a representation of no opposition." S.D. Tex. Loc. R. 7.4(A), (B). *See also Court Procedures of Judge Keith P. Ellison* (updated July 2023) at § 5(A) (the Court follows the written motion practice of the Local Rules and will consider a motion and response after the submission date). The submission date is computed as 21 days after the date the motion was filed without notice from the Clerk. S.D. Tex. Loc. R. 7.3.

Plaintiff did not file a motion seeking a post deadline extension of time upon a demonstration of good cause and excusable neglect in accordance with Federal Rule of Civil Procedure 6(b)(1), which governs extensions of time to do an act. Under that rule, the Court "may" extend the time to do an act "for good cause" with or without a motion when a request is made *before* the time to act has expired. Fed. R. Civ. P. 6(b)(1)(A). But where the time to do the act has *already* expired, the Court may only extend the time "on motion made after the time has expired if the party failed to act because of excusable neglect." Fed. R. Civ. P. 6(b)(1)(B); *Cooper*, 2022

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WL 8089613 at *1 (“Because the deadline for filing a motion to authorize notice has passed, I may grant a post-deadline extension only for ‘good cause,’ and only if Cooper shows that he failed to act due to ‘excusable neglect.’”). Even if a post deadline motion to extend the filing time is made, the Court may deny the motion if the movant fails to show good cause and excusable neglect. *See, e.g., Garcia v. City of McAllen*, No. 7:19-cv-00068, 2020 WL 4934582, at **4-5 (S.D. Tex. Aug. 24, 2020) (Alvarez, J.) (granting the defendant’s motion to strike and denying the plaintiff’s motion for leave to file an untimely response to the defendant’s motion for summary judgment filed 9 days after the response deadline, finding that the plaintiff’s failure to read and interpret court rules was not in good faith and did not constitute excusable neglect).

Plaintiff’s Response should be struck because she failed to file the required motion for leave and has demonstrated neither good cause for late filing nor excusable neglect. Moreover, even if she were to belatedly file a motion for leave to file her late Response, the Court should deny it. In determining what constitutes *excusable neglect*, courts make an equitable determination considering all relevant circumstances surrounding the omission. The relevant factors “include the danger of prejudice, ‘the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.’” *Garcia*, 2020 WL 4934582 at *4, citing *Pioneer Inv. Servs. v. Brunswick Assoc., LP*, 507 U.S. 380, 395 (1993). Of the four relevant factors, “the excuse given for the late filing must have the greatest import.” *Cooper*, 2022 WL 8089613 at *1. “[I]nadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute excusable neglect.” *Id.*, citing *Pioneer Inv. Servs.* at 392. *See also id.* at *5 (“The Court does not find Plaintiff’s failure to read and interpret Court rules to be in good faith or excusable neglect.”).

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Notably, Defendants' grounds for seeking dismissal of the case under Rule 4(m) of the Federal Rules Civil Procedure in the first instance is that Plaintiff failed to timely serve Defendants with process and failed to timely seek an extension of her time to do so. Plaintiff's failure to either respond timely to the Motion to Dismiss or to seek an enlargement of her time to respond is further evidence of her disregard of the applicable procedural rules.

Reply to Response to Motion to Dismiss

Subject to and without waiving their motion to strike the Response as untimely, Defendants reply to the corresponding four points of the Response as follows.

I. Plaintiff Has Not Shown Good Cause for Extending Her Time to Effect Service of Process on Defendants (Response at Pages 5-6)

Defendants moved to dismiss the action under Federal Rule of Civil Procedure 4(m) because Plaintiff failed to effect timely service even after the Court warned her that her case might be dismissed if she did not file proofs of service within 90 days. *See* Motion to Dismiss at pp. 7-8. As of the filing of this reply, **175 days have elapsed since Plaintiff filed this lawsuit and she has still not effected proper service on Defendants or filed any proof of service with the Court.** In response, Plaintiff argues that she can demonstrate good cause for her delay, yet she wholly fails to do so. Response at ¶¶ 3-8.

Plaintiff submits no evidence in support of her good cause argument, not even a declaration of herself or her counsel. She first asserts that the fact she obtained summonses on October 16 shows "Plaintiff's intent to serve Defendants promptly." Response at ¶ 5. Of course, Plaintiff's purported "intent to serve promptly" without any timely action having been taken or attempted to effectuate that intent is no evidence of good cause. Moreover, the mere fact that she obtained summonses from the Clerk 37 days after filing her lawsuit is no evidence of her alleged subjective intent to serve those summonses promptly in any event.

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Without any evidentiary support, Plaintiff alleges that her delay in attempting to improperly serve Defendants via a Federal Express package delivered to the Union's offices on January 8, 2025, "stemmed from logistical challenges and Plaintiff's reasonable belief that commercial delivery constituted valid service under federal or state rules." Response at ¶ 5. Even if these flimsy excuses were otherwise sufficient, the Court should reject them out of hand because they are not supported by any evidence. Further, the Court should reject the excuses because Plaintiff vaguely refers to "logistical challenges" without so much as bothering to explain the nature of those alleged challenges.

In any event, Plaintiff and her counsel are responsible for following the applicable procedural rules and there is no basis offered for her alleged "reasonable belief that commercial delivery constituted valid service under federal or state rules." Her attempt to place the blame for her mistake of the law as to proper methods of service of process as being "a mistake excusable given her pro se status prior to retaining counsel" (Response at ¶ 5) is misleading and makes no sense since Plaintiff's current counsel filed the Complaint [Dkt. 1] that initiated this lawsuit on her behalf and since he has represented her throughout the course of the litigation, including at the time the improper service by Federal Express was attempted. In any event, the issue under Rule 4(m) is untimely service, and **Plaintiff did not even attempt the improper Federal Express service (her first and only attempt at service) until January 8, 2025, 23 days after her deadline to file proofs of service with the Court had already passed.**

Although the District Court does have discretionary power to extend the time for service even in the absence of a showing of good cause, the Court should not exercise that discretion in this case as it is typically warranted only where the defendant has attempted to evade service or concealed a defect in service (neither of which are shown to be the case here), or where the case

would be barred by limitations if dismissed. *Aguirre v. ISC Constructors, LLC*, 70 F. Supp.3d 766, 775 (E.D. Tex. 2014), citing *Millan v. USAA Gen. Indem. Co.*, 546 F.3d 321, 326 (5th Cir. 2008). Here, dismissal of the case under Rule 4(m) would not have the effect of a dismissal with prejudice due to limitations because as Defendants argue in support of their Motion to Dismiss under Rule 12(b)(6), Plaintiff's claims were already barred by the six-month limitations period applicable to duty of fair representation claims long before this lawsuit was filed. *See* Motion to Dismiss at pp. 12-14.

II. This Civil Action Should Be Dismissed Without Prejudice Under Rule 12(b)(5) for Insufficient Service of Process (Response at Pages 6-7)

Plaintiff acknowledges that her sole attempt at service of process via Federal Express was improper and argues in response only that dismissal without prejudice is not the proper remedy. Response at ¶ 9. She argues that instead of dismissal without prejudice, her prior attempt at service should be quashed and that she should be granted an additional 30 days to effect service. *Id.*

Defendants were unable to locate a case at Plaintiff's first citation to support this request, "*Prod. Credit Ass'n of S. New Mexico v. Garcia*, 993 F.2d 1539, 1993 WL 185728, at *2 (5th Cir. May 26, 1993) (unpublished.)" Response at ¶ 10. Plaintiff then "requests that the Court quash the prior service attempt and grant 30 days to effect proper service under Rule 4, consistent with *Herrmann v. Bridger*, No. 5:24-CV-00545-JKP, 2024 WL 4849070, at *2 (W.D. Tex. Nov. 20, 2024)." Response at ¶ 11. However, Plaintiff's request for an additional 30 days to effect proper service is not supported by the *Herrmann* case. In that case, the Court quashed the improper service on the moving defendants' motion under Rule 12(b)(5) and dismissed the case against those defendants without prejudice, just as Defendants request the Court do in this case. *Id.* It did *not* grant the plaintiff an additional 30 days to effect proper service on the moving defendants, but directed the court clerk to terminate the case. *Id.* at *2, 4.

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In any case, Defendants recognize that the Court generally does have discretion to quash the original service and allow the plaintiff additional time to effect proper service (*see, e.g., Topstone Commc'ns, Inc. v. Xu*, 603 F. Supp.3d 493, 497 (S.D. Tex. 2022)), but urge the Court to not do so here, given that Plaintiff failed to timely attempt the original improper service within the 90-days allotted without showing any good cause for her failure to do so; now 175 days have elapsed since the filing of the Complaint.

Plaintiff asserts that Defendants received actual notice of the lawsuit through her Federal Express package and so argues that no prejudice has been shown. Response at ¶ 11. But as the Court in *Herrmann* noted, actual notice of the lawsuit does not suffice to satisfy Rule 4's service requirements. *Id.*, citing *Way v. Mueller Brass Co.*, 840 F.2d 303, 306 (5th Cir. 1988) ("Although the Comal County Defendants apparently had actual notice of the insufficient service, the 'defendant's actual notice of the litigation ... is insufficient to satisfy Rule 4's requirements.'").

III. Plaintiff's Claims Are Wholly Preempted by the National Labor Relations Act And Are Thus Barred by the Applicable Six-Month Statute of Limitations (Response at Pages 8-9)

In a futile attempt to avoid the clear limitations bar, Plaintiff vaguely asserts that her claims are not entirely within the duty of fair representation without pointing the Court to any pertinent allegation in her Complaint. Response at ¶17. Instead, regarding her breach of contract claim, she merely cites the Court to the entire 19-line paragraph of her Complaint that contains all her breach allegations. *Id.* She asserts that her "breach of contract claim alleges a specific breach of the PSA — a written agreement — beyond the implied DFR," yet she notably fails to specify for the Court what that specific breach is that purportedly goes beyond the duty of fair representation. *Id.* In any event, any alleged breach of the PSA, the collective bargaining agreement, would fall squarely

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within the duty of fair representation under the National Labor Relations Act, and she does not allege any other contract that Defendants breached. *See* Motion to Dismiss at 11-12.

Similarly, regarding her misrepresentation claim, Plaintiff asserts that it “involves intentional deceit distinct from mere negligence in representation,” again citing the Court to the 18-line paragraph of her Complaint that contains all her misrepresentation allegations without pointing the Court to any allegation that does not fall within the scope of the duty of fair representation. Response at ¶ 17.

Defendants were not able to locate the case Plaintiff cites as “*Thomas v. Norris*, 604 F. App’x 337, 341 (5th Cir. 2015),” which she says stands for the proposition “that state law claims can coexist with federal labor law where they involve independent contractual or tortious conduct.” Response at 8. In any event, while there could conceivably be claims alleging independent contractual or tortious conduct falling outside the duty of fair representation, there are no such independent claims asserted here. Rather, all of Plaintiff’s claims relate to Defendants’ duty to represent her fairly in administering the collective bargaining agreement.

Being preempted by the duty of fair representation, Defendants explained in their Motion to Dismiss that Plaintiff’s claims are barred by the applicable six-month statute of limitations because Plaintiff admittedly received a letter dated September 2, 2022, that the Union would not arbitrate her grievance and that her case had been closed, and she did not commence this lawsuit until over two years later on September 9, 2024. *See* Motion to Dismiss at pp. 12-14. Plaintiff’s vague allegations that there were “ongoing misrepresentations and delays persisting through September 16, 2021,” and that she did not settle her lawsuit against her former employer until September 28, 2023, are of no significance in the face of the unequivocal September 2, 2022, case closing letter from the Union. Response at ¶ 20. Moreover, even if these allegations were of any

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significance, the case would still be barred by the six-month statute of limitations because they are alleged to have occurred more than six months before the filing of this lawsuit.

Similarly, Plaintiff's suggestion that tolling might apply is also completely unsubstantiated. Response at ¶ 21. She does not point to a single allegation of her Complaint that would suggest that tolling might be appropriate here.

IV. Defendants Jesel and Klemm Are Not Individually Liable as a Matter of Law (Response at pages 9-10)

In their Motion to Dismiss, Defendants established that Defendants Jesel and Klemm cannot be held individually liable for Plaintiff's claims as a matter of law because the claims are inextricably intertwined with and subsumed by the Union's duty of fair representation. *See* Motion to Dismiss at pp. 14-15. Without citing the Court to a single allegation in her Complaint that would fall outside of the scope of the duty of fair representation, Plaintiff states only that her "misrepresentation claim alleges intentional tortious conduct — knowing misstatements with intent to deceive — that *may* fall outside this shield." Response at ¶ 23 (emphasis added). This argument must be rejected because Plaintiff cannot point the Court to a single allegation of her Complaint that is not inextricably intertwined with and subsumed by the Union's duty of fair representation.¹

Conclusion

For the foregoing reasons and for the reasons set forth in their motion to dismiss, Defendants request the Court to grant the motion to dismiss in its entirety and dismiss Plaintiff's civil action without prejudice under Rules 4(m) and 12(b)(5), but with prejudice under Rule 12(b)(6).

¹ Plaintiff cites "*Int'l Bhd. of Teamsters v. Oliver*, 358 F.2d 103, 105 (5th Cir. 1966)" for the proposition that individual union agents acting within their authority can be individually liable for torts (Response at ¶ 24), but Defendants were unable to find the cited case and are thus unable to distinguish it on its facts.

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Dated March 3, 2025.

Respectfully submitted,

/s/ Rod Tanner

Rod Tanner

Texas Bar No. 19637500

S.D. Texas Bar No. 8946

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817.377.1136 (fax)

rtanner@rodtannerlaw.com

Attorney in Charge for Defendants

Certificate of Conference

Rod Tanner, the undersigned attorney, certifies that on March 2, 2025, he conferred via e-mail with Plaintiff's Counsel, Ross Reifel, about the merits of Defendants' motion to strike Plaintiff's untimely response to Defendants' motion to dismiss. Because the attorneys could not agree to the disposition of the motion to strike the response, it is presented to the Court for determination.

Counsel disagreed with respect to the merits of Defendants' motion to strike and whether Plaintiff properly obtained an extension to file the untimely response. The deadline for filing Plaintiff's response to the motion to dismiss was February 18, 2025. On March 2, Mr. Reifel informed Defendants' counsel for the first time that Gabrielle Clair, Relief Case Manager, had sent an e-mail to him on February 21, 2025, inquiring whether Plaintiff intended to file a late response. Ms. Clair did not send a copy of her e-mail to Mr. Tanner. Mr. Reifel responded to Ms. Claire that, "Yes, I hope to have it filed first part of next week." He failed to copy Mr. Tanner on the e-mail. *See Exhibit A.*

Moreover, Mr. Reifel neither conferred with Mr. Tanner nor informed him of Ms. Clair's inquiry and his response until nine days later when Mr. Tanner conferred with Mr. Reifel about filing a motion to strike the untimely response. Accordingly, Defendants object to Mr. Reifel's ex parte communication with the Case Manager and request a conference with the Court to address this matter.

/s/ Rod Tanner

Rod Tanner

Certificate of Service

The undersigned attorney certifies that on March 3, 2025, the foregoing document was filed and served electronically on all counsel of record through the Court's CM/ECF system.

/s/ Rod Tanner

Rod Tanner

Exhibit A
81a

From: Ross Reifel
To: Rod Tanner
Subject: Re: Foster v. IAMAW, District Lodge 141 et al. / Conferral Regarding Defendants' Motion to Strike Plaintiff's Response to Defendants' Motion to Dismiss
Date: Monday, March 3, 2025 6:10:33 AM
Attachments: [image001.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)
[image006.png](#)

From: Ross Reifel <rossreifel@reifelattorney.com>
Sent: Friday, February 21, 2025 9:42:34 AM
To: Art Rivera <Arturo_Rivera@txs.uscourts.gov>
Subject: Re: 4:24-cv-03356 Foster v. IAMAW District Lodge 141, et al.

Yes, I hope to have it filed first part of next week.

Sent from my T-Mobile 5G Device
Get [Outlook for Android](#)

From: Gabrielle Clair <Gabrielle_Clair@txs.uscourts.gov> on behalf of Art Rivera <Arturo_Rivera@txs.uscourts.gov>
Sent: Friday, February 21, 2025 9:41:27 AM
To: Ross Reifel <rossreifel@reifelattorney.com>
Subject: 4:24-cv-03356 Foster v. IAMAW District Lodge 141, et al.

Good morning,

Does plaintiff intend to file a late response to Defendants' Motion to Dismiss (ECF No. 10)?
Plaintiff's response was due on Tuesday, February 18.

Thank you,
Gabrielle Clair
Relief Case Manager

Sent from my T-Mobile 5G Device
Get [Outlook for Android](#)

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SHEILA FOSTER,

Plaintiff

Case No. 4:24-cv-03356

vs.

IAMAW DISTRICT LODGE 141,
ROBERT JESEL, and MICHAEL KLEMM

Defendants

**PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO STRIKE DUE TO
UNTIMELY RESPONSE**

1. COMES NOW Plaintiff Sheila Foster, through counsel, and respectfully submits this Response to Defendants' Motion to Strike filed on March 3, 2025. Defendants seek to strike the Plaintiff's Response to Defendant's Motion to Dismiss from the record asserting that it was untimely filed. For the reasons set forth below, Plaintiff opposes striking out of the response and requests that the Court deny Defendants' motion in its entirety or, in the alternative, grant leave to file out of time.

INTRODUCTION

2. Defendant's Motion to Strike, filed on March 3, 2025, and alleges that the Plaintiff's late filing of their response to the Motion to Dismiss claiming procedural defects pursuant to the Federal Rule of Civil Procedure 6 (b) (1).

3. Plaintiff contends that any late response does not prejudice the Defendants and that the case has a viable claim against the Defendants. Plaintiff asserts that the courts have jurisdiction to allow post-deadline filing based on potential prejudice to the opposing party and a justifiable cause.

ARGUMENT

I. The Court Has Broad Discretion To Consider Post-Deadline Filing

4. Defendants argue that the response should be struck from the court under Rule 6 (b) (1) because Plaintiff failed to file a motion seeking a post deadline extension of time upon a demonstration of good cause and excusable neglect. However, if the Plaintiff shows good cause for the failure or shows lack of prejudice to be suffered by both parties, the court ought to consider late-filed response in its records.

5. The district courts have broad discretion to consider a late-filed response upon evidence of a good cause, even with an absent formal motion, and that striking out is inappropriate where the delay does not prejudice the Defendants. Moreover, the courts have consistently recognized that minor delays, particularly those that do not prejudice the opposing party should not result in the striking of a response. See *Stelly v. Papania*, 927 S.W.2d 620, 622 (Tex. 1996).

6. Accordingly, Plaintiff requests a consideration of the Plaintiff's response, ensuring this case is decided on its merits rather than a technicality.

II. Prejudice Suffered By The Defendants

7. The Defendants have failed to demonstrate or show any potential prejudice that will be suffered from the minor delay in filing. In determining whether to grant or reject a late response, the court ought to consider whether substantial prejudice will be suffered by either party as procedural deadlines are meant to promote fairness to both parties. However, procedural technicalities should not lead to unfair and unjust outcomes as striking out the response will prejudice the Plaintiff who has valid claims against the Defendants. See *In re Z.O.N.*, 602 S.W.3d 541, 546 (Tex. App.—Houston [14th Dist.] 2020, no pet.).

III. Justification For The Delay in Filing

8. Despite the delay in filing, the Court had initiated contact with the Plaintiff seeking clarification on whether the Plaintiff would be filing a late response to which the Plaintiff confirmed (See Exhibit A and B). The Court was made aware of the delay and had the discretion to either grant or deny the Plaintiff authority to file the response. Additionally, should the Court find good cause lacking, it retains discretion to grant a permissive extension. *Thompson v. Brown*, 91 F.3d 20, 21 (5th Cir. 1996) (district court may extend time even without good cause).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny the Defendants' Motion to Strike and consider the Plaintiff's response to the motion to dismiss in the interest of justice.

Dated: March 6, 2025

Respectfully submitted,

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/s/ Ross B. Reifel

Ross B. Reifel

Texas Bar No. 24088286

S.D. Tex. 2543350

Reifel Law Firm, PLLC

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Richmond, Texas 77469

Telephone: (832) 851-7105

Facsimile: (832) 213-1230

E-Mail: rossreifel@reifelattorney.com

Attorney For Plaintiff

EXHIBIT
85a

From: Gabrielle Clair <Gabrielle_Clair@txs.uscourts.gov> on behalf of Art Rivera
<Arturo_Rivera@txs.uscourts.gov>

Sent: Friday, February 21, 2025 9:41:35 AM

To: Ross Reifel <rossreifel@reifelattorney.com>

Subject: 4:24-cv-03356 Foster v. IAMAW District Lodge 141, et al.

Good morning,

Does plaintiff intend to file a late response to Defendants' Motion to Dismiss (ECF No. 10)?
Plaintiff's response was due on Tuesday, February 18.

Thank you,
Gabrielle Clair
Relief Case Manager

EXHIBIT 86a

From: Ross Reifel <rossreifel@reifelattorney.com>
Sent: Friday, February 21, 2025 9:42:34 AM
To: Art Rivera <Arturo_Rivera@txs.uscourts.gov>
Subject: Re: 4:24-cv-03356 Foster v. IAMAW District Lodge 141, et al.

Yes, I hope to have it filed first part of next week.