IN THE CIRCUIT COURT FOR THE NINTH JUDICIAL CIRCUIT
FOR ORANGE COUNTY, FLORIDA

CHRISTINE JANNING,

Plaintiff,

v. **CASE NO: 2022-CA-008876-O**

SOUTHWEST AIRLINES CO., SOUTHWEST AIRLINES PILOTS' ASSOCIATION, MICHAEL HAAK, DAVID NEWTON, and MICHAEL HAWKES,

Defendants.
_____/

DEFENDANTS SOUTHWEST AIRLINES CO. AND MICHAEL HAWKES' MOTION TO DISMISS COUNTS I, II, VII, VIII, IX, X, XI AND XII OF PLAINTIFF'S AMENDED COMPLAINT

Defendants Southwest Airlines Co. ("SWA") and Michael Hawkes, pursuant to Fla. R. Civ. P. 1.140(b)(6), file this Motion to Dismiss Counts I, II, VII, VIII, IX, X, XI and XII of the Amended Complaint for failure to state a cause of action, and in support thereof states as follows:

MEMORANDUM OF LAW

I.

INTRODUCTION

This lawsuit arises out of Plaintiff Christine Janning's employment with SWA. *See* Am. Compl. ¶20. Plaintiff brings claims against SWA for Negligent Supervision (Count I), Negligent Retention (Count II), Retaliation under the Florida Civil Rights Act ("FCRA") (Count V), Hostile Work Environment under the FCRA (Count VI), Conspiracy to Retaliate (Counts VII and VIII), Slander/ Slander Per Se (Counts IX and XI), Libel/ Libel Per Se

(Counts X and XII), and Gender Discrimination (Count XIII) "stemming from the sexual assault of Captain Michael Haak on Captain Christine Janning, and the events that followed thereafter." Am. Compl. ¶1. Plaintiff brings claims of Sexual Assault (Count III) and Sexual Battery (Count IV) against Captain Haak; claims of Conspiracy to Retaliate (Counts VII and VIII) against Southwest Airlines Pilots' Association ("SWAPA"); and claims of Conspiracy to Retaliate (Count VIII), Slander/ Slander Per Se (Count XI), and Libel/ Libel Per Se (Count XII) against Captains David Newton and Michael Hawkes.

Counts I, II, VII, VIII, IX, X, XI and XII should be dismissed because the Amended Complaint fails to set forth actionable claims under Florida law, and because Plaintiff's claims are preempted by the Railway Labor Act ("RLA") or barred by applicable statute of limitations. Plaintiff's allegations of Negligent Supervision (Count I) and Negligent Retention (Count II) should be dismissed because the claims are not based on any recognized common law claim and the pleaded allegations are intertwined with SWAPA's collective bargaining agreement (CBA) and thus, raise a minor dispute that is preempted by the RLA. Plaintiff's conspiracy to retaliate claims (Counts VII and VIII) fail under the intracorporate conspiracy doctrine, fail to set forth an underlying tort, and are time barred because they are disguised RLA duty of fair representation claims. The Amended Complaint also fails to state a claim for Slander / Slander Per Se (Counts IX and XI) or Libel / Libel Per Se (Counts X and XII) because these causes of actions are insufficiently pleaded and fail to adequately allege that any defamatory statements were published to third-parties and, in any event, these claims are inextricably intertwined with the CBA and thus preempted by the RLA. Additionally, Counts XI and XII are time barred.

I. RLA Preemption Background

SWA's pilots are represented for collective bargaining purposes by SWAPA, which has entered into a CBA that sets forth the terms and conditions of employment applicable to all SWA pilots. *See* Exhibit 1 (CBA).[1] The current CBA between SWA and SWAPA has an effective date of September 1, 2012 through August 31, 2020. SWA and SWAPA are currently engaged in negotiations to amend the CBA, but the existing CBA remains in effect under the RLA while the parties negotiate over changes.

As an airline pilot, the CBA governed Plaintiff's terms and conditions of employment with SWA. CBA § 1.B. Among the CBA's provisions are detailed sections governing pilot fitness-for-duty and training requirements. CBA § 20.B. The CBA also contains provisions governing the discipline of SWA's pilots and states in relevant part:

> The Company will adhere to the concept of "progressive discipline" in dealing with pilots. The goal is to modify the behavior of pilots to acceptable standards and retain them as productive employees. However, the Company retains the right to proceed directly to termination on a first occurrence if just cause for termination exists…The discipline standard for non-probationary pilots shall be "just cause."

[1] While the Court is generally limited to the four corners of the complaint in ruling on a motion to dismiss, the Court may nonetheless consider the contents of a document "impliedly incorporated by reference" into the complaint. *See One Call Prop. Services Inc. v. Sec. First Ins. Co.,* 165 So. 3d 749, 752 (Fla. 4th DCA 2015) ("But where the terms of a legal document are impliedly incorporated by reference into the complaint, the trial court may consider the contents of the document in ruling on a motion to dismiss"); *Veal v. Voyager Prop. & Cas. Ins. Co.,* 51 So.3d 1246, 1249 (Fla. 2d DCA 2011) (rejecting argument that the trial court erred by considering the contents of a settlement agreement that was attached to a motion to dismiss: "[I]n this case, the complaint refers to the settlement agreement, and in fact, Veal's standing to bring suit is premised on the terms of that agreement. Accordingly, since the complaint impliedly incorporates the terms of the agreement by reference, the trial court was entitled to review the terms of that agreement to determine the nature of the claim being alleged"). Here, Plaintiff references and explicitly incorporates the CBA. *See* Am. Compl. ¶68. Moreover, as explained further below, several claims are preempted by the Railway Labor Act ("RLA") and subject to mandatory arbitration pursuant to the CBA's grievance and arbitration procedures and this Court may, therefore, consider the CBA on this basis as well. *See Steiner Transocean Ltd. v. Efremova,* 109 So. 3d 871, 873 (Fla. 3d DCA 2013) (recognizing that a trial court is permitted to consider evidence outside the four corners of the complaint where the motion to dismiss is based on a contractual forum selection clause).

CBA § 15.A. ¶¶ 3-4(a); *see also* CBA § 15.E. (administration of discipline). In addition, the CBA provides detailed procedures for conducting investigations into potential misconduct by a SWA pilot:

> 1. A pilot is entitled, upon request, to Association representation at a Company investigatory interview/meeting that may reasonably result in discipline…
>
> 4. Investigation will not be complete without a pilot being afforded the opportunity for a meeting with the Chief Pilot, Assistant Chief Pilot or designee who is on the SWA Master Pilot Seniority List. The purpose of the meeting is to allow the pilot to be advised of and respond to the allegations against him. The notice of such meeting shall summarize the date(s) and event(s) and allegations in question and be provided to the pilot and the Association in writing.
>
> 5. If requested by the pilot or the Association, the Company shall produce documentary information (including written witness statements and information in electronic format), known and in its possession.
>
> 6. The pilot shall be afforded the opportunity to respond to information described above before a decision is rendered. If necessary, the meeting shall be recessed for a reasonable period of time in order to provide the pilot with adequate time to prepare and/or respond …

CBA § 15.D. ¶¶ 1, 4-6. The CBA further provides that if SWA removes a pilot from duty, a "2.C." letter must be compiled providing a written explanation for such removal:

> Any pilot removed from duty for a possible offense, questionable occurrence, or fitness for duty will have his pairing(s) coded Company Convenience (CC with Pay). The specific reason for a pilot's removal from duty will be explained to him at the time of removal. A written explanation detailing the specific reason for his removal will be provided to him with a copy to the Association as soon as is practicable, but definitely no later than three (3) business days from the time of removal. A pilot will continue in a paid status until such time that just cause for removal is clearly demonstrated.

CBA § 2.C.

Pursuant to the RLA, the CBA contains grievance and arbitration procedures in Sections 16 and 17, respectively. CBA §§ 16-17. Under Section 16, "grievances" are

defined to encompass "[d]isputes arising out of the interpretation or application of this Agreement concerning rates of pay, rules or working conditions." CBA § 16.A.1.a. Section 17 establishes a System Board of Adjustment, which is the statutorily required forum for final and binding arbitration of minor disputes pursuant to the RLA. CBA § 17.B.1.a. The jurisdiction of the System Board is specified in Section 17 to encompass disputes over the "interpretation and application of this parties' Agreement . . . ." CBA § 17.C.2.

II.

LEGAL STANDARD

A. Pleading Standard

Florida is a fact-pleading jurisdiction. *See Cont'l Baking Co. v. Vincent,* 63 So. 2d 242, 244 (Fla. 5th DCA 1994). Florida Rule of Civil Procedure 1.110(b)(2) requires that "[a] pleading which sets forth a claim for relief . . . must state a cause of action and shall contain . . . a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." *Goldschmidt v. Holman*, 571 So. 2d 422, 423 (Fla. 1990). At the outset of a suit, plaintiffs must state their pleadings with sufficient particularity to allow for defendants to prepare their defenses. *See Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.*, 537 So. 2d 561 (Fla. 1988).

Rule 1.140(b) provides that dismissal of a cause of action is appropriate when no relief can be granted under the alleged set of facts. *Seigle v. Progressive Consumers, Ins. Co.*, 819 So. 2d 732, 734 (Fla. 2002). "One of the basic purposes of a motion to dismiss is to test the overall sufficiency of the complaint to state a claim upon which relief can be granted." *Augustine v. Southern Bell Tel. & Tel. Cor.*, 91 So. 2d 320, 323 (Fla. 1956). If any element of a claim is not sufficiently pleaded, the complaint should be

dismissed. *Royal & Sunalliance v. Lauderdale Marine Ctr.*, 877 So. 2d 843, 845 (Fla. 4th DCA 2004).

B. RLA Preemption

Courts must dismiss ostensible state law claims that raise a minor dispute under the RLA. Minor disputes must be resolved in arbitration, not in court.

The RLA provides that disputes "growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" are subject to the jurisdiction of the adjustment (arbitration) boards. 45 U.S.C. §§ 153 (i) and 184. Such "minor disputes" are left to the *exclusive* jurisdiction of the arbitration boards mandated by the RLA. *See Consol. Rail Corp. v. Ry. Labor Execs. Ass'n ("Conrail")*, 491 U.S. 299, 304 (1989); *see also Bhd. of Locomotive Eng'rs v. Louisville & Nashville R.R. Co.*, 373 U.S. 33, 38 (1963) (the adjustment board procedure "is a mandatory, exclusive, and comprehensive system for resolving grievance disputes," and "the other party may not defeat this [process] by resorting to some other forum"); *see also Selim v. Pan Am. Airways Corp.,* 889 So. 2d 149, 160 (Fla. 4th DCA 2004).

As the Supreme Court has recognized, this mandatory statutory framework precludes federal or state courts from exercising subject matter jurisdiction over claims that require the interpretation of a labor contract. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 253, 262-63 (1994). The broad scope of the arbitration boards' exclusive jurisdiction extends to not just contract-based claims, but to *any* claim in which an interpretation of the CBA would be potentially dispositive of the matter. *Id.* Congress specifically intended to keep such minor disputes "out of the courts." *Selim,* 889 So. 2d

at 160 (*quoting Edelman v. W. Airlines, Inc.,* 892 F.2d 839, 843 (9th Cir. 1989)); *see also Stewart v. Spirit Airlines, Inc.,* 503 Fed. Appx. 814, 817 (11th Cir. 2013).

Most relevant to this case, even if a plaintiff's claim is grounded upon rights stemming from a source other than the CBA (such as a state law claim), "the claim will [still] be preempted if it cannot be adjudicated *without interpreting* the CBA." *Selim,* 889 So. 2d at 160 (citing *Brown v. Ill. Cent. R.R. Co.,* 254 F.3d 654, 658 (7th Cir. 2001) (emphasis added)). Put another way, state law claims that are "inextricably intertwined" with a collective bargaining agreement or otherwise require "application" of the agreement to resolve the claim are preempted. *Eisenberg v. Trans World Airlines, Inc.,* 654 F. Supp. 125, 128 (S.D. Fla. 1987), *aff'd sub nom. Eisenberg v. Trans World Airlines,* 875 F.2d 872 (11th Cir. 1989) (internal citations omitted).

"[T]he threshold to bind the parties to the exclusive arbitral jurisdiction accompanying a minor dispute is a low one." *CSX Transp., Inc. v. Bhd. of Maint. of Way Emps.,* 327 F.3d 1309, 1321 (11th Cir. 2003). As the Eleventh Circuit has reasoned, where any "reasonable doubt exists as to whether the dispute is major or minor, we will deem it to be minor." *Id.* Indeed, as one federal district court recently put it, when analyzing whether a dispute is major or minor, courts should "[p]lac[e] a thumb on the scale" in favor of finding a minor dispute. *Prof'l Airline Flight Control Association v. Spirit Airlines Inc.,* No. 21-60396-CIV, 2022 WL 888368, at *5 (S.D. Fla. Mar. 25, 2022).

III.

ARGUMENT

A. Plaintiff Fails To State A Claim For Negligent Supervision (Count I) And Negligent Retention (Count II)

In Florida, a claim of negligent supervision and negligent retention may occur "when during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicates his unfitness and the employer fails to take further action such as investigation, discharge, or reassignment." *Baumgartner v. Papa Johns USA, Inc.*, 2019 U.S. Dist. LEXIS 223942, at *15 (M.D. Fla. Oct. 15, 2019) (*quoting Martinez v. Pavex Corp*., 422 F. Supp. 2d 1284, 1298 (M.D. Fla. 2006)). Critically, under Florida law, "the underlying wrong allegedly committed by an employee in a negligent supervision or negligent retention claim must be based on an injury resulting from a tort which is recognized under common law." *Footstar Corp. v. Doe*, 932 So. 2d 1272, 1278 (Fla. 2d DCA 2006).

Here, Plaintiff's claims should be dismissed because: (1) Plaintiff fails to allege an underlying tort and (2) the RLA preempts them.

1. Count I and II fail without an underlying tort.

Plaintiff alleges that SWA failed to supervise Captain Haak and negligently retained Captain Haak after being placed on notice of at least three instances of Captain Haak allegedly sexually molesting, assaulting, and/or harassing female employees of SWA. Am. Compl. ¶¶133 and 141. Plaintiff fails to sufficiently plead an underlying tort for at least three reasons.

First, Florida does not recognize a common law claim of sexual assault or sexual harassment as an independent tort. *See Smith v. Am. Online, Inc.*, 499 F. Supp. 2d 1251,

1267 (M.D. Fla. 2007) ("Florida law does not recognize a common law claim of sexual harassment as an independent tort"); *Perry v. Walmart Inc.*, No. 2:18-cv-606-FTM-29NPM, 2020 U.S. Dist. LEXIS 41210, at *42 (M.D. Fla. Mar. 10, 2020) ("neither harassment nor discrimination are recognized claims under Florida common law"). For this reason alone, Plaintiff's negligent supervision and negligent retention claims should be dismissed. *See Footstar*, 932 So. 2d at 1278.

Second, Plaintiff notably only brings her sexual assault and sexual battery claims against Captain Haak – *not* against SWA. Simply put, there is no underlying tort claim against SWA to support a claim for negligent supervision or negligent retention.

Third, Plaintiff's allegations clearly indicate that her claims are based on SWA's alleged failure to "prevent or curtail [Captain] Haak's sexual predation prior to his sexual assault on Ms. Janning." Am. Compl. ¶¶137, 145. However, "Florida law does not recognize a common law cause of action based on the negligent failure to maintain a workplace free of sexual harassment." *Latson v. Hartford Ins.*, No. 6:05-cv-1435-Orl-19KRS, 2006 U.S. Dist. LEXIS 10669, at *15 (M.D. Fla. Feb. 28, 2006) (dismissing negligent retention, training, and supervision claim); *see also Merrick v. Radisson Hotels Int'l, Inc.*, No. 8:06-cv-01591-T-24TGW, 2007 U.S. Dist. LEXIS 39021, at *13 (M.D. Fla. May 30, 2007) (dismissing negligent retention and supervision claims because Florida does not recognize a common law cause of action for sexual harassment).

2. <u>Count I and II are preempted by the RLA.</u>

Courts routinely view negligent supervision and negligent retention claims to involve minor disputes that are preempted by the RLA because they require an interpretation of a collective bargaining agreement. *See Bradshaw v. Goodyear Tire &*

Rubber Co., 485 F.Supp.2d 821, 830 (N.D. Ohio 2007) ("[m]ost elements of [a negligent hiring, retention and supervision] claim make reference in some way to the employer-employee relationship ... [and][t]he employer-employee relationship in this case is governed entirely by the CBA. There is no way to apply these elements to the facts of this case without interpreting the CBA."); *Szarka v. Reynolds Metals Co.,* 17 F.Supp.2d 115, 128 (N.D.N.Y. 1998) (negligent supervision preempted by LMRA[2]).

Here, Plaintiff relies on identical factual allegations for her negligent supervision and retention claims. *Compare* Am. Compl. ¶¶131-138 *with* ¶¶139-146. Plaintiff alleges that "Southwest became aware" of Captain Haak's alleged wrongdoing, refrained from imposing "real consequences", instead sent Captain Haak to "Charm School", and therefore failed to prevent further wrongdoing by Captain Haak. Am. Compl. ¶¶133-137, 141-145.

These factual allegations are "inextricably intertwined" with the CBA and, therefore, the claims are preempted by the RLA. Plaintiff alleges SWA failed to properly discipline Captain Haak for his alleged misconduct and that, instead of removing him from flight duty, SWA sent him to "Charm School". Am. Compl. ¶¶135, 143. Pilot discipline, however, is squarely governed by the CBA and the "just cause" standard in Section 15. *See* CBA § 15.A. More specifically, removal of pilots from flight duty for an "offense" or "questionable occurrence" is likewise governed by the CBA's investigation and disciplinary procedures. *See* CBA § 2.C and § 15.

[2] The standard for LMRA – the Labor Management Relations Act governing private sector employers other than railroads and airlines – preemption is "virtually identical" to that for RLA preemption. *Hawaiian Airlines, Inc. v. Norris,* 512 U.S. 246, 260 (1994).

In addition, Plaintiff alleges that SWA failed to perform an adequate investigation into Captain Haak's actions, which Plaintiff claims resulted in "nothing to prevent or curtail" Captain Haak from engaging in further misconduct. Am. Compl. ¶¶57-59, 110, 137, 145. But analysis of these allegations requires an interpretation of the CBA's agreed-upon procedures for an investigation of alleged misconduct by a pilot. *See* CBA § 15.D. Accordingly, these claims invite the Court to intrude upon the exclusive jurisdiction of the arbitration board by assessing the adequacy of SWA's investigation of Captain Haak's alleged misconduct under the investigation process set forth in the CBA. These claims also would require the Court to interpret whether SWA could have taken disciplinary action against Captain Haak in accordance with the just cause standard in Section 15.A of the CBA, an inquiry which likewise is within the exclusive jurisdiction of the arbitration board. *See* CBA § 15.A.4.a ("The discipline standard for non-probationary pilots shall be 'just cause'").

Furthermore, in order to prove a claim of negligent supervision or negligent retention, Plaintiff must demonstrate Captain Haak's "unfitness" for his position. *See Baumgartner*, 2019 U.S. Dist. LEXIS 223942, at *15. To evaluate this element of Plaintiff's claims, the Court must interpret whether SWA properly adhered to the CBA—which specifically provides fitness-for-duty standards and procedures for pilots. *See* CBA § 20.B.

Plaintiff's first two counts, therefore, are inextricably intertwined with the CBA and preempted by the RLA.

B. Plaintiff's Conspiracy To Retaliate Claims (Counts VII and VIII) Are Barred By The Intracorporate Conspiracy Doctrine And Are Disguised RLA Duty Of Fair Representation Claims That Are Barred By The Statute Of Limitations And Preempted

Plaintiff purports to bring a conspiracy to retaliate claim against SWA and SWAPA (Count VII) and another conspiracy to retaliate claim against SWA, SWAPA, Captain Newton, and Captain Hawkes (Count VIII). Both of Plaintiff's conspiracy to retaliate claims fail under the intracorporate conspiracy doctrine, fail to set forth an underlying tort, and involve federal duty of fair representation claims that are barred by the applicable statute of limitations and also are preempted by the RLA because they would require the Court to interpret the CBA.

1. Counts VII and VIII fail under the Intracorporate Conspiracy Doctrine.

Civil conspiracy, as an independent cause of action, requires "(a) a conspiracy between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts performed pursuant to the conspiracy." *Walters v. Blankenship*, 931 So. 2d 137, 140 (Fla. 5th DCA 2006).

Plaintiff's Count VII conspiracy claim is based on the alleged intent of SWA and SWAPA to retaliate against her. The claim is improperly pleaded without basic facts, but to the extent "SWAPA and Southwest conspired to protect its male membership" (Am. Compl. ¶199) – the allegations must be construed such that the parties' "membership" is the same as pleaded and the claim is barred by the intracorporate conspiracy doctrine.[3] "Under the intracorporate conspiracy doctrine, a corporation's employees, acting as

[3] SWA is a separate legal entity from SWAPA. In making this intracorporate conspiracy argument, SWA is not suggesting that SWAPA is an agent of SWA; the intracorporate conspiracy argument is *solely* based upon the allegations as pleaded in the Amended Complaint.

agents of the corporation, are deemed incapable of conspiring among themselves or with the corporation. This doctrine stems from basic agency principles that attribute the acts of agents of a corporation to the corporation, so that all of their acts are considered to be those of a single legal actor." *Dickerson v. Alachua Cnty. Comm'n*, 200 F.3d 761, 767 (11th Cir. 2000) (citation omitted). Moreover, "a corporation cannot conspire with its own agents unless the agent has a personal stake in the activities that are separate and distinct from the corporation's interest." *Cedar Hills Properties v. Eastern Fed*, 575 So. 2d 673, 676 (Fla. 1st DCA 1991).

Here, Plaintiff's complaint essentially alleges that SWA's employees conspired to retaliate against Plaintiff, and thus her claims violate the intracorporate conspiracy doctrine. *See, e.g., Bishop v. Lipman & Lipman, Inc.*, No. 2:12-CV-562-FTM-29, 2013 WL 2190784, at *3 (M.D. Fla. May 21, 2013)) (dismissing conspiracy claim where "[t]he factual allegations pertaining to [the Count] can only be fairly read to implicate [defendant's] employees, and there are no plausible allegations which suggest that these employees had a personal stake in the retaliation conspiracy.").

Similarly, Plaintiff's Count VIII conspiracy claim is based on the alleged intent of SWA, SWAPA, Captain Newton, and Captain Hawkes to retaliate against her. Plaintiff's claim is based on an alleged "collective decision" by Southwest senior management, SWAPA senior management, Captain Newton, and Captain Hawkes "to remove Ms. Janning from flight status effective immediately and indefinitely after being made aware of a 'possible lawsuit.'" Am. Compl. ¶¶210-211. Again, these allegations essentially allege that SWA's employees conspired to retaliate against Plaintiff, and thus her claims violate the intracorporate conspiracy doctrine.

2. Counts VII and VIII fail to set forth an underlying tort.

"Florida does not recognize civil conspiracy as a freestanding tort." *Banco De Los Trabajadores v. Moreno*, 237 So. 3d 1127, 1136 (Fla. 3d DCA 2018). "In order to state a claim for civil conspiracy, a plaintiff must allege an underlying independent tort. The conspiracy is merely the vehicle by which the underlying tort was committed, and the allegations of conspiracy permit the plaintiff to hold each conspirator jointly liable for the actions of the coconspirators." *Tejera v. Lincoln Lending Servs.*, LLC, 271 So. 3d 97, 103 (Fla. 3d DCA 2019). "The conspiracy, therefore, is inextricably linked with the underlying tort." *Banco De Los Trabajadores*, 237 So. 3d at 1136.

Although Plaintiff's Amended Complaint is a shot-gun pleading improperly incorporating her retaliation claim into Count VIII, Plaintiff does not base either conspiracy to retaliate claim in an underlying tort. Instead, in both Count VII and Count VIII, Plaintiff sets forth the cursory allegations that SWA and SWAPA "agreed and conspired together to advance the positions and interests of male pilots over the positions and interests of all other employees, agents and staff." Am. Compl. ¶¶ 192, 205. In Count VIII, Plaintiff adds that Captain Newton and Captain Hawkes "also agreed to this conspiracy." Am. Compl. ¶207. But Plaintiff fails to base her claim in any alleged unlawful act, nor does she set forth allegations of a lawful act done by lawful means. Plaintiff instead seeks relief because SWAPA failed to assist her "at any point" in an FBI investigation (Am. Compl. ¶196) and SWA, SWAPA, Captain Newton, and Captain Hawkes allegedly made a collective decision to remove her from flight status in December 2020 (Am. Compl. ¶211). Even if Plaintiff's allegations were true, which they are not, she fails to set forth an actionable conspiracy.

3. Count VII and VIII are disguised RLA duty of fair representation claims that are barred by the statute of limitations and preempted.

Counts VII and VIII are thinly-disguised federal claims for a violation of the duty of fair representation owed by SWAPA, as a labor organization, to Plaintiff, a member of the pilot bargaining unit. Under the RLA, "the duty of fair representation … requires a union to treat all members of the collective bargaining unit fairly, adequately, and in good faith at all stages of bargaining." *Emery v. Allied Pilots Ass'n,* 16-80243-CIV, 2017 WL 1047029, at *1 (S.D. Fla. Mar. 20, 2017) (citing *Air Line Pilots Ass'n, Int'l v. O'Neill,* 499 U.S. 65 (1991)).

Count VII and Count VIII both allege that SWAPA violated the duty of fair representation by conspiring with SWA "to advance the positions and interests of male pilots over the positions and interests of all other employees, agents, and staff" and by fostering a "perfect breeding ground for the incidents and claims presented herein." Am. Compl. ¶¶190-194; 203-206. Plaintiff essentially alleges that SWA colluded with SWAPA in this alleged conspiracy to violate the duty of fair representation. *See* Am. Compl. ¶¶199-201. Plaintiff suggests that SWA and SWAPA "agreed and conspired together" to create a "conspired culture," and in Count VII, Plaintiff alleges Captain Newton and Captain Hawkes also agreed to the conspiracy. Am. Comp. ¶¶194; 206-207.

The statute of limitations for duty of fair representation claims is six months. *Smallakoff v. Air Line Pilots Ass'n, Intern.,* 825 F.2d 1544, 1546 (11th Cir. 1987). Plaintiff's claims concern events that allegedly occurred between August 9, 2020 and June, 2021. Am. Compl. ¶¶43, 92. Accordingly, because Plaintiff filed the Complaint well over a year after these alleged events, on September 26, 2022, her claims are undisputedly barred by the statute of limitations.

Furthermore, Plaintiff's conspiracy claims involve questions concerning the interpretation or application of the CBA, which should have been raised through the grievance and arbitration procedure under the CBA. For example, Count VIII alleges that "Southwest, at the direction of SWAPA, [Captain] Newton, and [Captain] Hawkes" removed Plaintiff from flight status, grounding her. *Id.* ¶217. Plaintiff alleges that she was "provided a different basis for her grounding each time she requested an explanation." *Id*. These allegations involve the interpretation or application of Section 2.C of the CBA, which addresses the procedures for grounding pilots. Section 2.C sets forth the requirement that "[a] written explanation detailing the specific reason for [a pilot's] removal will be provided to [the pilot] with a copy to the Association as soon as is practicable, but definitely no later than three (3) business days from the time of removal." CBA § 2.C. Thus, Plaintiff's allegations about her grounding are inextricably intertwined with the CBA and, in addition to being untimely, should have been raised through the grievance and arbitration procedure under the CBA.

C. Plaintiff's Defamation Claims (Counts IX, X, XI, and XII) Are Procedurally Barred As Either Preempted By The RLA or Time-Barred By The Statue of Limitations, And Each Count Is Deficiently Pleaded

1. Counts IX and X are preempted.

Counts IX and X are preempted because they involve minor disputes under the RLA. Courts frequently find the torts of slander and libel preempted by the RLA. *See e.g. Black v. Atl. Se. Airlines, Inc.,* 851 F. Supp. 465, 469 (N.D. Ga. 1994), *aff'd sub nom. Black v. Atl. S.E. Airlines,* 37 F.3d 638 (11th Cir. 1994) (slander claim preempted because it was based carrier's conduct in employment relationship, which is governed by CBA). Most notably, in *Fox v. S. Ry. Co.,* a carrier compiled and circulated a letter regarding the

investigation of an employee in compliance with notice requirements of a collective bargaining agreement. 764 F. Supp. 644, 650 (N.D. Ga. 1991). The employee sued for libel and slander. The court found that because the CBA addressed investigatory and discipline matters, the state claim was "inextricably intertwined" with the collective bargaining agreement and thus preempted by the RLA. *Id.* The court reasoned that "[a]ny contrary result would effectively chill the employer's ability to invoke the disciplinary article of the agreement, or even to notify the employee either of its intent to invoke the disciplinary article or of the charges against that employee, without risking subsequent liability for libel and/or defamation." *Id.*

Here, there is no question Plaintiff's Slander/ Slander Per Se (Count IX) and Libel/ Libel Per Se (Count X) claims are intertwined with the CBA. As in *Fox,* Plaintiff's claims appear to be based upon a Section 2.C letter that was allegedly written and published by SWA regarding Plaintiff's mental state and ability to be trusted with an aircraft. Am. Compl. ¶¶227-230, 237-240. The propriety of this alleged letter requires an interpretation of Section 2.C of the CBA. *See* Compl. ¶41; CBA § 20.C. Because Plaintiff's claim relating to the Section 2.C letter is intertwined with (and indeed, written pursuant to) the parties' CBA, this claim raises a minor dispute preempted by the RLA.

2. <u>Counts XI and XII are time barred.</u>

Counts XI and XII are also time-barred because the Amended Complaint was filed after the two-year statute of limitations for libel or slander claims. *See* § 95.11(4)(g), Fla. Stat.; *Ashraf v. Adventist Health Sys./Sunbelt, Inc.*, 200 So. 3d 173, 174 (Fla. 5th DCA 2016) ("Florida law establishes a two-year statute of limitations for actions for "libel and slander"). "A cause of action for defamation accrues on publication." *Wagner, Nugent,*

Johnson, et al. v. Flanagan, 629 So. 2d 113, 115 (Fla. 1994); *see Ashraf*, 200 So. 3d at 175 ("The statute of limitations begins to run at the time of publication, not when the plaintiff discovers the alleged defamatory material."); *see e.g., Chinnici v. WBI, Inc.*, 2015 U.S. Dist. LEXIS 43680 (M.D. Fla. Apr. 2, 2015) (dismissing time-barred defamation claims).

Plaintiff's Count XI and XII Slander / Slander Per Se and Libel / Libel Per Se claims are based on allegations that Captain Newton and Captain Hawkes, in their individual capacities and in their capacities as SWA senior employees, published statements about Ms. Janning ***before*** the August 10, 2020 incident and Plaintiff's contention that Captain Haak allegedly relied on these statements before the incident. *See* Am. Compl. ¶¶248-250; 258-260. Specifically, Plaintiff's Slander / Slander Per Se (Count XI) claim alleges "[Captain] Newton and [Captain] Hawkes stated that Ms. Janning was a 'slut' and a 'whore' orally to Cpt. Haak ***prior to the Incident on August 10, 2020."*** Am. Compl. ¶248 (emphasis added). Plaintiff's Libel / Libel Per Se (Count XII) claim alleges "[Captain] Newton and [Captain] Hawkes stated that Ms. Janning was a 'slut' and a 'whore' in writing to Cpt. Haak ***prior to the Incident on August 10, 2020.***" Am. Compl. ¶258 (emphasis added). It is unmistakable that August 10, 2020 is the last possible day for the alleged publication of the statements at issue in these claims.

Accordingly, Plaintiff had until August 10, 2022 to file claims for slander and libel. She did not. Plaintiff's original Complaint was filed on September 26, 2022. Plaintiff's Count XI and Count XII claims were not in the original Complaint and were first alleged against Southwest, Captain Newton, and Captain Hawkes on January 18, 2023. Plaintiff's claims are time-barred and should be dismissed.

3. Counts IX, X, XI, and XII are not adequately pleaded.

A statement may give rise to right of action for either libel or slander—not both—depending on whether it is written or oral. Moreover, to plead a claim for libel or defamation *per se*, Plaintiff must identify alleged statements "that tend to degrade [her], bring [her] into ill repute, destroy confidence in [her] integrity," *Axelrod v. Califano*, 357 So. 2d 1048, 1050 (Fla. 1st DCA 1978), or "which impute to another characteristics or conditions incompatible with the proper exercise of one's business, trade, profession or office." *Spears v. Albertson's, Inc.*, 848 So. 2d 1176, 1179 (Fla. 1st DCA 2003) (citation omitted). Plaintiff purports to bring Slander / Slander Per Se and Libel / Libel Per Se claims but her pleading fails to meet Florida's pleading requirements. Plaintiff fails to delineate facts supporting her claims for slander and libel, and the allegations in the Complaint do not state cognizable claims under any theory. *See Barrett v. City of Margate*, 743 So. 2d 1160, 1163 (Fla. 4th DCA 1999) ("It is insufficient to plead opinions, theories, legal conclusions or argument.").

i. Counts IX and X

Florida law requires a plaintiff state her pleadings with sufficient particularity to allow the defendants to prepare their defenses. But Plaintiff failed to meet her burden. For example, in Counts IX, Plaintiff alleges that SWA "shamed" her and "published numerous oral statements to numerous parties asserting" a false claim. Am. Compl. ¶226. In Count X, Plaintiff similarly alleges that SWA "shamed" her and "published numerous written statements to numerous parties asserting" a false claim. Am. Compl. ¶236. These barebone allegations fail to give SWA sufficient notice of which alleged statements she claims support her claims, whether those statements were written or oral,

when the statements were made, and to whom those statements were allegedly made. *See* Am. Compl. ¶237.

Generally, "[t]o state a claim for defamation, a plaintiff must plead that the defendant published a false statement about plaintiff to a third party." *Sirpal v. Univ. of Miami*, 684 F. Supp. 2d 1349, 1360 (S.D. Fla. 2010) (citation omitted); *see also Daytona Beach News v. Firstamerica D*, 181 So. 2d 565, 568 n. 1 (Fla. 3d DCA 1966) (("[a]t common law a separate cause of action arises each time the alleged libel is revealed to a third party.") (citation omitted)). Plaintiff's vague allegations lack requisite detail regarding the identity of the "numerous parties" to whom the alleged statements were made. Plaintiff's generic references to "numerous oral statements" and "numerous written statements" likewise fail to put SWA on notice of the alleged content of these supposed statements. *See Buckner v. Lower Florida Keys Hosp*, 403 So. 2d 1025, 1027 (Fla. 3d DCA 1981) (finding defamation pleading deficient where plaintiff alleged remarks were made to "numerous third parties on numerous occasions.").

Putting aside the fact that Plaintiff's allegations are woefully vague, they fail to state a claim under any libel or slander theory. Plaintiff generally alleges that SWA published "events and negative information regarding" Plaintiff "to at least twenty-five employees at Southwest." Am. Compl. ¶67. Again, Plaintiff does not say who made the statements, to whom they were published, when they were made, and whether the statements were written or verbal. Even assuming Plaintiff is referring to SWA's "2C Letter" issued pursuant to the CBA (Am. Compl. ¶¶227, 237), Plaintiff's claims against SWA fail because SWA's employees are not third parties. *See Buckner v. Lower Fla. Keys Hosp. Dist*., 403 So. 2d 1025, 1027 (Fla. 3d DCA 1981) ("to properly plead a publication of a defamatory

matter, it must be found that a statement was communicated to some third party in order to be actionable"). Plaintiff amended her Complaint to allege that the statements were also made "outside both companies," but Plaintiff fails to plead any details to support this newly alleged fact. (Am. Compl. ¶¶230, 240). Instead, this barebone allegation appears to have been added to the Amended Complaint in an effort to avoid this Motion to Dismiss but the fact does not cure Plaintiff's failure to meet her pleading obligations.

ii. Counts XI and XII

Beyond being time-barred, Counts XI and XII are also deficient because Plaintiff fails to plead basic facts and SWA, Captain Newton, and Captain Hawkes cannot defend against the claims as pleaded. For example, in both counts, Plaintiff vaguely alleges that Captain Newton and Captain Hawkes, in individual capacities and in official capacities as senior officers of SWA, "had openly discussed, with several Southwest personnel and other individuals, the claim that Ms. Janning was a 'slut' and a 'whore.'" Am. Comp. ¶246, 256. Plaintiff however fails to allege any facts supporting the distinction between Captain Newton and Captain Hawkes' individuals and official capacities or to allege specifically when (besides before August 10, 2020) or where the statements were made.

Additionally, except for identifying Captain Haak, Plaintiff fails to identify to whom the alleged statements were published. Plaintiff also alleges that the statements were published "orally" and "in writing." *Compare* Am. Compl. ¶248, *with* ¶258. Plaintiff's allegations are either contradictory or set forth two separate instances of publication—one oral and one written—but the Complaint is vague and lacks the requisite detail.

Put simply, because Plaintiff has failed to sufficiently allege facts supporting Counts IX, X, XI, and XII and thus the Court should dismiss these claims.

IV.

CONCLUSION

For the reasons stated above, Defendants Southwest Airlines Co. and Michael Hawkes respectfully request that this Court dismiss Counts I, II, VII, VIII, IX, X, XI, and XII of the Complaint and for any other relief that is necessary to protect Southwest Airlines Co. and Michael Hawkes' rights and interests.

Dated: February 28, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed electronically and served by email from the Court's E-Filing Portal System on all counsel or parties of record on this 28th day of February, 2023.

/s/ Catherine H. Molloy
Attorney