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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TEAMSTERS LOCAL UNION NO. 533 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Plaintiff,

v.

KEOLIS TRANSIT AMERICA, INC.,

Defendant.

Case No. 3:20-cv-517-RJC-WGC

MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT TO COMPEL IMMEDIATE ARBITRATION AND FOR INJUNCTIVE RELIEF PENDING ARBITRATION

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Defendant, Keolis Transit America, Inc. ("Keolis"), pursuant to Fed. R. Civ. P. 12(b)(1) and (6), hereby moves to dismiss Plaintiff Teamsters Local Union No. 533, Affiliated with the International Brotherhood of Teamsters' ("Plaintiff" or "Union") First Amended Complaint [ECF No. 9] ("Amended Complaint"). On its face, the Amended Complaint, which was interposed to avoid dismissal of the original complaint, still fails to allege facts sufficient to establish subject matter jurisdiction and also fails to state a claim for which relief may be granted. This Motion is based on the pleadings and papers on file herein, the Memorandum of Points and Authorities below, and any oral argument this Court should entertain.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Keolis operates the bus system for the Regional Transit Commission of Washoe County. Amended Complaint, ¶5. The Union represents certain Keolis bus operators, maintenance, dispatchers, and road supervisors. *Id.* Keolis undertook myriad actions in response to the COVID-19 pandemic to protect the health and safety of employees and passengers. This action stems from a labor dispute regarding face coverings. Keolis does not dispute that Governor Sisolak's Executive Directive 024 ("ED 024") covers its business; indeed, Keolis takes numerous steps to ensure compliance therewith. Rather, the dispute is over the Union's interpretation of ED 024, a copy of which is attached hereto as Exhibit A.[1] Specifically, as alleged in the Amended Complaint, the Union takes the position that ED 024

[1] The Court may take judicial notice of Exhibit A as this document is a public record and referenced in the Amended Complaint, and its consideration does not convert a motion to dismiss into a motion for summary judgment. *See Lee v. City of Los Angeles,* 250 F.3d 668, 689 (9th Cir. 2001).

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requires Keolis to adopt and maintain "mandatory mask rules" and, by extension, not to discipline Union members who "require" passengers to wear masks. *See id.* at ¶7, 8.[2] The Amended Complaint seeks, as a measure of relief, an injunction "requiring masks." *See id.* at Section V, Prayer For Relief ¶1. Yet, ED 024 exempts *eight* categories of persons from the mandatory provisions of the Directive's requirements, including (and most relevant hereto): (1) children under the age of nine; (2) individuals experiencing homelessness; and (3) individuals who cannot wear a face covering due to a medical condition or disability. *See* Ex. A at pg. 4-5, Section 7(1)-(8). Thus, ED 024's face covering directive is not, as the Union insists, universal. Nevertheless, the Union filed a grievance and demanded arbitration, claiming that the parties' collective bargaining agreement mandates that Keolis require masks, despite the Governor's explicit directive allowing for exceptions.

On September 11, 2020, without exhausting its remedies before the Arbitrator, the Union filed a Complaint [ECF No. 1] seeking to compel an earlier arbitration date and injunctive relief. *See* Complaint at Section IV, Prayer for Relief. On November 10, 2020 2020, Keolis timely filed a Motion to Dismiss [ECF No. 6] requesting that the Court dismiss the Complaint since it lacked subject matter jurisdiction and failed to state a claim. At the time the Motion to Dismiss was filed, the Union had not filed a motion seeking an preliminary injunction nor had it taken further steps to prosecute the action. The Union also requested Keolis waive service of a summons, which allowed Keolis sixty (60) days to respond to the Complaint. ECF No. 4.

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[2] For purposes of ED 024, the term "face covering" is used so as not to imply that medical-grade masks, like N95 masks, are required. *See* Ex. A at pg. 4, Section 4. Keolis will use the term "face covering" for this reason.

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In an implicit acknowledgement of the Complaint's shortcomings, and without any communication with Keolis or its counsel, on November 24, 2020, the Union filed an Amended Complaint along with an Opposition to the Motion to Dismiss. ECF Nos. 9 and 10, respectively. In its additions, the Union included a second claim for relief alleging that Keolis, *inter alia*, "has refused and continues to refuse to submit the outstanding dispute to arbitration" and "has repudiated the Agreement to Arbitrate by refusing to submit to a remote hearing of the underlying dispute." Amended Complaint, ¶¶24-25. Like the Complaint, Plaintiff's Amended Complaint lacks merit.

The Amended Complaint fails to show that this Court has subject matter jurisdiction and fails to state a claim upon which relief can be granted as follows:

First, the exclusive remedy for the Union is the grievance and arbitration process provided in the collective bargaining agreement, not an action with the district court.

Second, the injunction sought by Plaintiff does not fall within the narrowed status quo injunction recognized in the *Boys Markets* and *Buffalo Forge* cases.

Based on the arguments herein, the Union's Amended Complaint, seeking immediate arbitration and injunctive relief, fails as a matter of law and warrants dismissal under Fed. R. Civ. P. 12(b)(1) and (6).

II. RELEVANT COMMUNICATIONS WITH THE ARBITRATOR.[3]

"[T]he ***parties*** chose a neutral arbitrator, Arbitrator James Merrill, to hear the case and issue a final and binding decision." Amended Complaint, ¶14 (emphasis added). After selecting the arbitrator, Arbitrator Merrill offered available dates to hold the arbitration by

[3] In adjudicating a Rule 12(b)(1) motion to dismiss, as here, the Court may consider contravening evidence to the Complaint where the motion presents a factual challenge to

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video conference on October 6, 8, 27, or 28, 2020 or in-person on January 12, 14, 19, or 21, 2021. Exhibit B at 2. Keolis communicated to Arbitrator Merrill that it was available on the January dates provided. Keolis explained the need to have an in-person hearing because this was a case "where the credibility of witnesses, and the arbitrator's ability to assess their frankness and candor, will be critical" to the outcome of the arbitration. Exhibit C at 5. After this correspondence, Arbitrator Merrill confirmed the arbitration date of January 12, 2021. *Id*. Immediately prior to filing this action, the Union reasserted the request for a video conference. Exhibit C at 3-4. On or about September 14, 2020, Keolis stated its unavailability for the proposed October and November 2020 dates and again objected to a virtual arbitration for the reasons previously stated. Exhibit C at 2-3. Keolis requested that the arbitration remain on the agreed upon January 12, 2021 date. *Id.*

On September 18, 2020, the Union sent Keolis a letter asking if Keolis remains "agreeable to arbitrate the grievance before Arbitrator Merrill as currently scheduled on January 12, 2021[.]" Exhibit D at 1. In its letter response dated September 21, 2020, Keolis stated the following:

> Keolis has agreed to the in-person arbitration that is currently scheduled for January 12, 2021. It is our position that the successful resolution of the grievance at issue will depend heavily on the veracity of the witness' statements. As such an in-person arbitration is critical. Our position in this regard has not changed. That said, however, if the Union is proposing an alternative date for an in-person arbitration, Keolis will certainly consider that proposal to work in good faith towards a successful resolution of this matter.

Exhibit E at 1. Also in the September 21, 2020 letter, Keolis invited the Union to present a proposal as to any additional measures that Keolis could take to further ensure the health and

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jurisdiction. *Chesapeake Bay Foundation, Inc. v. Severstal Sparrows Point, LLC,* 794 F.

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safety of its drivers, which has remained its top priority during the COVID-19 pandemic. Exhibit E at 2. Keolis requested a response from the Union by September 25, 2020 regarding (1) any proposal by the Union for a date other than January 12, 2021 for an in-person arbitration; and (2) any proposal the Union has for how Keolis drivers can safely enforce ED 024. Exhibit E at 3. ***The Union did not respond to Keolis by September 25, 2020, or any time thereafter.***

On November 12, 2020, Arbitrator Merrill reached out to the parties after monitoring recent news relating to COVID-19 stating that the risk is too high to conduct the arbitration on January 12, 2021. Exhibit C at 2. Arbitrator Merrill provided the parties with 4 options: (1) agree to hold the arbitration via video conference on January 12, 2021; (2) postpone the January 12, 2021 hearing until county guidelines and the parties comfort level permits an onsite arbitration; (3) select a new arbitrator who is willing to hold an onsite hearing; or (4) settle the case. *Id*.

On November 16, 2020, Keolis responded to Arbitrator Merrill thanking him for his thoughtfulness and recognizing the current state of the COVID-19 pandemic. Exhibit C at 1. Keolis further relayed to Arbitrator Merrill that it has tried to reschedule the hearing in good faith but such attempts have gone unanswered by the Union. *Id.* Ultimately, Keolis told Arbitrator Merrill that it "is amenable to postponing the January 12, 2021 [arbitration date] until the county guidelines and our collective comfort levels permit an onsite hearing." *Id.* Despite the Arbitrator's request for a response and Keolis' willingness to explore alternative options, ***the Union never responded to the Arbitrator's November 12, 2020 e-mail either***. Thus, although the Union has (unsuccessfully) attempted to secure this Court's jurisdiction

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Supp. 2d 602, 612 (D. Md. 2011).

over the dispute by moving the goal posts to the January 12th arbitration date that Keolis ***had already agreed to when the Union filed suit***, the Union is simultaneously failing to take the necessary steps to communicate with Keolis and Arbitrator Merrill.

III. LEGAL STANDARD

A court may properly dismiss a claim for lack of subject matter jurisdiction, "when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). Article III, § 2 of the United States Constitution limits the jurisdiction of the federal courts to matters that present actual "cases and controversies," therefore, "an actual controversy must be extant at all stages of review." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013). "If an intervening circumstance deprives the plaintiff 'of a personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Id.* at 72 (quoting *Lewis v. Continental Bank Corp.,* 494 U.S. 472, 477-78 (1990)). "A party invoking the federal court's jurisdiction has the burden of proving the actual existence of subject matter jurisdiction." *Thompson v. McCombe,* 99 F.3d 352, 353 (9th Cir. 1996) (citing *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.,* 813 F.2d 1553, 1559 (9th Cir. 1987)); *see also McCullough v. Graber*, 726 F.3d 1057, 1059 (9th Cir. 2013)("If a court is unable to render 'effective relief,' it lacks jurisdiction…")(quoting *Pub. Util. Comm'n of the State of Cal. v. Fed. Energy Reg. Comm'n*, 100 F.3d 1451, 1458 (9th Cir. 1996)).

Likewise, a court may dismiss a claim for failure to state a claim upon which relief can be granted. *North Star Int'l v. Ariz. Corp. Commission,* 720 F.2d 578, 581 (9th Cir. 1983). In reviewing a dismissal for failure to state a claim, courts accept all material allegations in the complaint as true and construe them in the light most favorable to plaintiff.

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Id. at 580. Dismissal is warranted if it appears to a certainty that plaintiff would not be entitled to relief. *NL Industries, Inc. v. Kaplan,* 792 F.2d 896, 898 (9th Cir. 1986).

IV. PLAINTIFF'S AMENDED COMPLAINT SHOULD BE DISMISSED.

A. The Grievance Arbitration Process In The Collective Bargaining Agreement Is The Exclusive Remedy For The Union To Resolve Disputes.

1. The Grievance Arbitration Process Has Not Been Exhausted.

1. The Court does not have jurisdiction under Section 301 of the Labor Management Relations Act to grant the relief requested by Plaintiff in the Amended Complaint because the grievance arbitration process provided in the collective bargaining agreement is the sole means by which the Union and employer must resolve disputes. *See generally,* 29 U.S.C. § 185.

2. As a general rule, employees must attempt to exhaust the grievance and arbitration procedures established by the collective bargaining agreement before seeking judicial enforcement of their rights. *Vaca v. Sipes,* 386 U.S. 171, 184 (1967) ("[s]ince the employee's claim is based on breach of collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced" and he "must at least attempt to exhaust exclusive grievance and arbitration procedures established by bargaining agreement"). In other words, while Section 301 provides jurisdiction to district courts to hear suits by and against labor organizations, it is well established that an individual may not sue under this section unless he or she has first had recourse to the grievance procedures under the collective bargaining contract. *Dill v. Greyhound Corp.,* 435 F.2d 231, 237 (6th Cir. 1970)("Under federal law, grievance procedures required under the agreement must be exhausted before direct legal redress may be sought").

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3. Plaintiff has not yet exhausted the grievance and arbitration procedures in the collective bargaining agreement. As evidence of this, Plaintiff admits to having filed a grievance on June 26, 2020. Amended Complaint, ¶12. After the parties jointly selected Arbitrator Merrill, the arbitration was scheduled on January 12, 2021. Amended Complaint, ¶14. On November 12, 2020, Arbitrator Merrill sent e-mail correspondence to the parties regarding his concern in holding the January 12, 2021 hearing in person due to the risk posed by COVID-19. Exhibit C at 2. In the same correspondence, Arbitrator Merrill provided 4 options for the parties regarding the scheduling of the arbitration dates. *Id.* Keolis did not outright refuse to arbitrate the matter, as the Union has stated. Amended Complaint, ¶16. Rather, Keolis responded to Arbitrator Merrill agreeing and recognizing the risk in conducting the in-person arbitration, particularly in light of the importance for the arbitrator to assess witness candor, credibility, and frankness. Exhibit C at 1. Despite the Union acknowledging receipt of this email correspondence from Arbitrator Merrill, ***the Union has not responded to Arbitrator Merrill's alternative options in proceeding with the arbitration***.

4. Instead of dealing directly with Keolis or the Arbitrator, the Union has sought this Court's intervention. Notably, in addition to the grievance procedure, the collective bargaining agreement also has an expedited arbitration procedure. A requirement of the expedited arbitration procedure in the collective bargaining agreement is that both parties' must agree to the procedure. Instead of working towards an agreeable expedited arbitration procedure, the Union attempts to circumvent this agreement language by filing this action to compel an earlier arbitration hearing date for a virtual arbitration without Keolis' consent and without Arbitrator Merrill's involvement.

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5. As it relates to the Union's allegation of federal question jurisdiction (Amended Complaint, ¶ 3), this does not disrupt the requirements under the collective bargaining agreement or the LMRA, which requires the Union to exhaust its remedies under the grievance process first.

6. To the extent there are allegations of a failure to bargain, the proper course of action for the Union would be to file an unfair labor practice charge *not* filing an action in the district court as it did here. *See generally,* 28 U.S.C. § 160.

7. With the grievance not yet having been arbitrated – through no fault of Keolis – it follows that Plaintiff has not exhausted the required procedures outlined in the collective bargaining agreement that would give the district court subject matter jurisdiction. Thus, Plaintiff's Amended Complaint should be dismissed.

2. The Union's Amended Complaint Does Not Fall Within Either Exception to the Exhaustion Rule.

8. There are two exceptions to the exhaustion rule: (1) when the conduct of the employer amounts to a repudiation of the contractual remedial procedures; and (2) when an employee is prevented from exhausting his contractual remedies by a wrongful refusal to process the grievance. *Vaca*, 386 U.S. at 185. The relief sought in Plaintiff's Amended Complaint falls into neither exception.

9. In the Amended Complaint, the Union alleges that Keolis "has repudiated the Agreement to Arbitrate by refusing to submit to a remote hearing of the underlying dispute and refusing to reassign the arbitration" to another arbitrator. Amended Complaint, ¶25. Keolis further claims that "Keolis has made it impossible to reach arbitration to address the violations." *Id*. Keolis denies any and all such allegations; what is more, these allegations

are not sufficient to support its implication that its case falls within one of the exceptions to the exhaustion rule.

10. As it relates to the alleged repudiation, courts have found that determining repudiation "should depend on the character of [the party's] so-called 'repudiation' and the reasons given for it." *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionary Workers Int'l, AFL-CIO, et al.,* 82 S.Ct. 1347, 1351 n. 10 (citing 6 Corbin, Contracts § 1443). A party who flatly repudiates the arbitration requirement should have no right to the stay of a court action brought by the other party. *Id.* But a party who merely does not perform, even though unjustified, is not per se a 'repudiation.'" *Id.*

11. Similarly, a party does not have to exhaust their remedies under a collective bargaining agreement when it is prevented from exhausting its contractual remedies by a wrongful refusal to process the grievance. *Vaca*, 386 U.S. at 185.

12. Here, the Union has not alleged sufficient facts to show that it meets either of these exceptions to show this Court has jurisdiction over the claims in its Amended Complaint. Keolis has not flatly repudiated the arbitration clause in the collective bargaining agreement, failed to perform under the clause, or wrongfully refused to participate in the grievance process. Instead, Keolis has meaningfully participated by choosing an arbitrator, working with the chosen arbitrator to conduct a fair and safe arbitration, seeking proposals from the Union to further the grievance process and to determine there are other ways to comply with ED 024. Despite Keolis' attempts in good faith, the Union fails to respond and thwarts its own grievance process.

13. In cases, as here, where the grievance procedures in the collective bargaining agreement are meant to be exclusive, they must be treated as such. *See Alford v. General*

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Motors Corp., 926 F.2d 528, 531 (6th Cir. 1991) ("if a collective bargaining agreement contains exclusive and final procedures for the resolution of employee grievances, an employee will be prohibited from bringing an action under § 301 absent an allegation that his union breached its duty of fair representation"). Accordingly, since Plaintiff alleged no facts to excuse its failure to exhaust the exclusive grievance and arbitration procedures, the Amended Complaint should be dismissed.

B. Plaintiff's Request For Injunctive Relief Does Not Qualify As A Status Quo Injunction Under *Boys Markets* and *Buffalo Forge.*

14. The Amended Complaint further fails to state a claim for relief because Plaintiff's additional and/or alternative remedy to immediate arbitration (albeit on dates that already lapsed) is an injunction that cannot be issued on the facts alleged.

15. Specifically, the Union's request for an injunction falls outside the limited exception for a status quo – or reverse *Boys Market* – injunction because it does not seek to maintain the status quo. Rather, Plaintiff's request for injunctive relief seeks to have the Court impose procedures that have not been bargained for –permitting Union members to require "universal" face coverings even when ED 024 does not require it and obscuring from discipline those employees who seek to require passengers to wear a mask who may be otherwise exempt.

16. The Norris-LaGuardia Act ("NLGA"), 29 U.S.C. § 101 *et seq.*, "deprives federal courts of the jurisdiction to grant injunctive relief in labor disputes, except in limited circumstances." *Niagara Hooker Emps. Union v. Occidental Chem. Corp.*, 935 F.2d 1370, 1375 (2d Cir. 1991) (citing 29 U.S.C. § 101).

17. The U.S. Supreme Court has recognized a narrow exception to the general prohibition against issuance of injunctive relief in cases involving labor disputes, which is

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that courts are permitted to enjoin conduct that would interfere with and frustrate the arbitral process. *See Boys Markets*, *Inc. v. Retail Clerks Union, Local 770,* 398 U.S. 235 (1970); *Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO,* 428 U.S. 397, 407 (1976).

18. Under the *Boys Markets* and *Buffalo Forge* cases, a union may be entitled to a status quo injunction pending arbitration only when:

> any arbitral award in favor of the union would substantially fail to undo the harm occasioned by the lack of a status quo injunction …. The arbitral process is not rendered "meaningless," however, by the inability of an arbitrator to completely restore the status quo ante or by the existence of some interim damage that is irremediable…. By requiring more than a minimal showing of injury for the issuance of an injunction, the standard also guards against undue judicial interference with the employer's ability to make business decisions.

American Postal Workers Union v. United States Postal Service, 16 Fed. App'x 589, 590-91 (9th Cir. 2001). This "frustration of arbitration" requirement for a status quo injunction has been analyzed by courts identical to the usual requirement of demonstrating irreparable harm. *Id*. at 591 (citing *Local Lodge No. 1266 v. Panoramic Corp.,* 668 F.2d 276, 286 (7th Cir. 1981)).

19. As *Niagara Hooker* explained, the purpose of the limited reverse *Boys Markets* exception is to empower courts to preserve the status quo in a narrow set of circumstances while arbitration is pending *without* "interfer[ing] with the prerogatives of management." *Niagara Hooker Emps. Union*, 935 F.2d at 1377.

20. *Niagara Hooker* and subsequent cases make plain just how "narrow" the "reverse *Boys Markets*" exception is. In *Niagara Hooker*, for instance, the court acknowledged that the company's implementation of the drug testing program pending arbitration would cause "interim damage" to some of those tested, but nevertheless concluded

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that it would "not frustrate the arbitral process or render it futile" and, thus, did not justify an injunction. *Id.* at 1379.

21. Requests for "reverse *Boys Markets*" injunctions have been denied for similar reasons in cases where an employer sought to implement new contractual health care benefit terms, *see Local Union No. 884, United Rubber, Cork, Linoleum, & Plastic Workers of Am. v. Bridgestone/Firestone, Inc.*, 61 F.3d 1347 (8th Cir. 1995); where the U.S. Postal Service sought to require letter carriers to spend less time in the office and more time on the street, *see Nat'l Ass'n of Letter Carriers v. U.S. Postal Serv.*, 419 F. Supp. 3d 127 (D. D.C. 2019); where an employer sought to implement a policy requiring all employees to receive influenza vaccination as a condition of employment, *see United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. Essentia Health*, 280 F. Supp. 3d 1161 (D. Minn. 2017); where an employer sought to lay off workers, *see Commc'ns Workers of Am. v. Verizon New York Inc.*, No. 02-CV-4265 (RWS), 2002 WL 31496221, at *1 (S.D. N.Y. Nov. 8, 2002); and where an employer was alleged to have improperly terminated health insurance coverage after closing a hotel, *see Local 217 Hotel & Rest. Emps. Union v. MHM, Inc.*, 805 F. Supp. 93 (D. Conn. 1991).

22. More recently, in *New York State Nurses Ass'n v. Montefiore Med. Ctr.*, 457 F. Supp. 3d 430, 431–34 (S.D. N.Y. 2020), the New York State Nurses Association ("NYSNA"), a nurses' union, filed a lawsuit and an emergency motion seeking an injunction requiring Montefiore Medical Center ("Montefiore"), a private hospital, to take certain steps to mitigate the risk that Montefiore nurses would contract COVID-19. Among other things, NYSNA asked the district court to compel Montefiore to increase the availability of personal protective equipment ("PPE"), such as protective respirators and gowns; to make coronavirus

testing available on demand; and to take other steps to preserve employees' physical and emotional health, including respecting their requests for statutorily-protected leave or accommodations. *Id.* The district court granted Montefiore's motion to dismiss and denied the union's request for emergency injunctive relief, reasoning:

> [The court is] compelled to conclude that it lacks subject-matter jurisdiction to grant NYSNA the injunction it seeks. Put simply, as Montefiore argues, NYSNA does not seek to preserve the status quo. Instead, it seeks to create a new status quo that gives the Union everything (and more) it requests in the grievance... Such relief "would not be in 'aid' of arbitration but ... would be in lieu of it." Accordingly, granting it would turn the purpose of a reverse *Boys Markets* injunction — to protect the integrity of the arbitral process — on its head. And it would "unduly interfere" with the hospital's "ability to make business decisions" at a time when the judicial interference could be particularly problematic.

Id. at 433 (internal citations omitted).

23. Similarly, the Union is not seeking to *prohibit* Keolis from engaging in any prospective conduct. To the contrary, it seeks to require Keolis allow the Union's members to enforce a "universal mask" requirement despite the fact that ED 024 provides otherwise, and not discipline Union members when they seek to discriminate against passengers who meet one of the Directive's unenumerated exceptions.

24. As a result, the Union's proposed injunction seeks to *alter* as opposed to *preserve* the status quo. The requested injunction is the same ultimate relief it seeks in the grievance. Thus, in essence, the Union is asking this Court to substitute its judgment for that the Arbitrator.

25. Further, the possibility that a Union member may contract COVID-19 from a passenger without a face covering is not sufficient to render the arbitral process meaningless so as to warrant federal court intervention in a labor dispute. First, ***there are numerous***

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categories of people who are permitted to ride public transportation without face coverings by virtue of the Executive Directive. Second, as the *Niagara Hooker* Court held, the arbitral process "is not rendered meaningless by the inability of an arbitrator to completely restore the status quo ante or by the existence of some interim damage that is irremediable." *Niagara Hooker Emps. Union*, 935 F.2d at 1378 (internal quotation marks and alterations omitted). Third, on the existing record — that is, given the measures that Keolis has been taking, under extraordinary circumstances, to protect employees and given the fact that the Union has taken no steps to expedite this action or move for affirmative interim relief— it cannot be said the risk of the current status quo is such that it renders the arbitral process meaningless.

26. Moreover, the conduct alleged by the Union in the Amended Complaint does not amount to "a frustration of the arbitral process" that would warrant a status quo injunction. To the contrary, it is the Union who seems to be frustrating the arbitral process. While the Union requested earlier arbitration dates and agreed to conduct the arbitration via video, it has failed to respond to communications by Arbitrator Merrill and Keolis in an attempt to explore alternative options for the arbitration hearing. For instance, the Union failed to respond to Arbitrator Merrill's alternate options to move the case along. Further, in its September 21, 2020 letter, Keolis requested that the Union provide any proposals for dates other than January 12, 2021 to conduct an in-person arbitration and proposals for how Keolis drivers can safely enforce ED 024. Exhibit E at 3. The Union did not respond by the stated deadline or anytime thereafter to Keolis' attempts to further the matter. At all other times, Keolis has responded and attempted to work with Arbitrator Merrill and the Union in good faith. Keolis and the Union have already agreed upon an arbitrator and arbitration date are

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exploring new arbitration dates or alternatives through the applicable grievance and arbitration process set forth in the collective bargaining agreement. The Union's request that this Court force, via an injunction, Keolis and the parties' selected arbitrator to compel the arbitration would disrupt the status quo and the applicable terms in the bargaining agreement.

27. What is more, the Union is not just requesting an injunction compelling Keolis to arbitration. The Union demands an injunction compelling Keolis to arbitrate on a certain date in a certain manner, which necessarily involves compelling the *arbitrator* (who has not even received an email response from the Union) to do something on a particular date and time, potentially with no or little notice depending on the timing of the resolution. Ultimately, the Union's complaints against Keolis seem to be less about refusing to participating the arbitration process – which Keolis has not done – and more about the Union not conducting the arbitration in the way it unilaterally wants.

28. Accordingly, Plaintiff's Amended Complaint should be dismissed for failure to state a claim upon which relief can be granted.

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V. CONCLUSION

WHEREFORE, for the foregoing reasons, Keolis respectfully requests this Court issue an order dismissing Plaintiff's Amended Complaint against it with prejudice.

Dated this 8th day of December, 2020.

Respectfully submitted,

/s/ Diana G. Dickinson

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PROOF OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada 89169. On December 8, 2020, I served the within document(s):

MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT TO COMPEL IMMEDIATE ARBITRATION AND FOR INJUNCTIVE RELIEF PENDING ARBITRATION

☒ By **CM/ECF Filing** – Pursuant to FRCP 5(b)(3) and LR 5-1, the above-referenced document was electronically filed and served upon the parties listed below through the Court's Case Management and Electronic Case Filing (CM/ECF) system:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on December 8, 2020, at Las Vegas, Nevada.

/s/ Joanne Conti
Joanne Conti