Docket No. 09-16564

In the

UNITED STATES COURT OF APPEALS

for the

NINTH CIRCUIT

Don ADDINGTON, John BOSTIC, Mark BURMAN, Afshin IRANPOUR, Roger VELEZ, and Steve WARGOCKI, *individually and representing a class of persons similarly situated*,

Plaintiffs-Appellees

v.

US AIRLINE PILOTS ASSOCIATION, *an unincorporated association representing the pilots in the employment of US Airways Inc.*,

Defendant-Appellant

Appeal from Permanent Injunction and related rulings necessary thereto by the United States District Court for the District of Arizona.
No. 2:08-CV-1633 and 2:08-CV-1728 (consolidated)
Honorable Neil V. Wake, United States District Judge

ANSWERING BRIEF OF PLAINTIFFS-APPELLEES

Marty Harper (SBN 003416)
Kelly J. Flood (SBN 019772)
Andrew S. Jacob (SBN 022516)
POLSINELLI SHUGHART, P.C.
3636 N. Central Avenue, Suite 1200
Phoenix, AZ 85012
Tel: (602) 650-2008 Fax: (602) 264-7033
Attorneys for Appellees,
Don Adding ton, et al.

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List of Abbreviations Used

Add.....Appellant's Addendum to Opening Brief

ALPA .....Air Line Pilots Association

CBA .....collective bargaining agreement

DFR .....duty of fair representation

Doc.....district court document number

ER .....Appellant's Excerpt Of Record

NMB .....National Mediation Board

Op. Br.....Appellant's Opening Brief

RLA .....Railway Labor Act

SER .....Appellees' Supplemental Excerpt Of Record

USAPA .....US Airline Pilots Association

Jurisdictional Statement

Plaintiffs-Appellees Addington, *et al.* (collectively, "West Pilots"), disagree with USAPA's mischaracterization of jurisdiction. There is a ripe claim for breach of the DFR pursuant to the Railway Labor Act, 45 U.S.C. § 151, *et seq.* Neither the NMB nor the system board have jurisdiction.[1] This Court has jurisdiction only to review the permanent injunction, dated July 17, 2009, and related rulings necessary thereto, pursuant to 28 U.S.C. § 1292(a)(1). Because this Court does not have 28 U.S.C. § 1291 jurisdiction, other rulings are not subject to review. The appeal was timely noticed.

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[1] USAPA asserts otherwise in its Statement of Jurisdiction but makes no argument on point. A line of cases recognize that the courts have jurisdiction to hear DFR claims, and the NMB and system board do not. "[W]hether a case is within the exclusive jurisdiction" of the NMB, "depends upon the nature, not of the issues that may have to be decided, but of the substantive cause of action." *Ass'n of Flight Attendants, AFL-CIO v. Delta Air Lines, Inc.*, 879 F.2d 906, 915 (C.A.D.C. 1989). In addition, "the jurisdiction of the [System] Board … does not extend to employee-union conflicts." *Ferro v. Railway Exp. Agency, Inc.*, 296 F.2d 847, 851 (2d Cir. 1961).

Counterstatement of Issues Presented for Review

1) Whether a claim that USAPA wrongfully adopted and promoted its seniority proposal is ripe, notwithstanding that there was no final product of CBA negotiations?

2) Whether USAPA's adopting and promoting its seniority proposal without legitimate union objective constitutes a bad faith DFR violation?

3) Whether the jury was properly instructed on the elements of a bad faith DFR claim and had sufficient evidence to find a bad faith DFR violation?

4) Whether the scope and duration of the injunction are within the district court's broad discretion, given the extent of willful egregious conduct?

5) Whether this Court should review reception of evidence, judicial hostility, or class certification?

Counterstatement of the Case

A. Overview

A majority group of unionized pilots were dissatisfied with an arbitrated seniority integration. These pilots replaced their union with Appellant USAPA. They had USAPA follow a preordained plan to adopt and promote a seniority integration method that was rejected by the arbitrator as inequitable. The district court held that USAPA has bad faith DFR liability if, in adopting and promoting this seniority scheme, it acted solely for illegitimate union objectives. The jury found that USAPA was so motivated. The focus of this appeal should be on two issues: (1) whether USAPA violated the DFR if, indeed, it acted solely for illegitimate objectives; and (2) whether the district court's instructions on illegitimate union objectives allowed the jury to reach an intelligent verdict.

B. Factual background

(1) This Court should accept the district court's factual findings.

"Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous." *Pullman-Standard v. Swint*, 456 U.S. 273, 286-287 (1982). This Court accepts the district court's factual

findings "unless they strike it as wrong with the force of a five-week-old, unrefrigerated dead fish." *Prete v. Bradbury*, 438 F.3d 949, 968, n.23 (9th Cir. 2006). The district court set out detailed factual findings in its *Findings of Fact & Conclusions of Law & Order* (doc. 593) (1ER7-17). Because USAPA does not directly contest any of these findings, this Court should accept them all as true.

(2) The dispute concerns pilot seniority integration in an airline merger.

"[T]he process of combining two seniority lists during an airline merger raises stakes, emotions, and the risk of betrayal of principle to new heights." (1ER8:1-2.) Such was the case when America West and US Airways merged in 2005. (1ER8:2-6.) The America West pilots at the time of the merger are known as "West Pilots." (1ER8:6-7.) The US Airways pilots at that time are known as "East Pilots." (1ER8:8-9.) "As part of the merger, the two airlines planned to combine their operations into one, and as part of that process, the seniority lists of the two airlines would be integrated into a single list." (1ER8:9-11.) "[T]his process pitted the seniority interests of the East Pilots against the seniority interests of the West Pilots. Any

gain for one side would come at the expense of the other." (1ER8:12-14.) In other words, the process was a "zero-sum game."[2]

"At the time of the merger and now, the East Pilots have been the bigger group: about 5100 pilots compared to about 1900 West Pilots." (1ER8:15-17.) "The 1900 West Pilots were generally hired within a more recent time frame than the East Pilots." (1ER11:18-19.)

> The America West wages in place at the time of the merger were significantly more favorable than the US Airways wages. And all West Pilots were actively flying at the time of the merger, with hiring ongoing at the airline and a negligible history of furloughs. US Airways, on the other hand, found itself in the midst of bankruptcy proceedings with approximately 1700 of its pilots on furlough and no recall in sight. Many of the furloughed pilots had not flown for US Airways for years.

(1ER8:20-25.)

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[2] This Court has explained the concept of a "zero-sum game" in the context of satisfying creditor claims against an insolvent debtor. *In re El Toro Materials Co., Inc.*, 504 F.3d 978, 979 (9th Cir. 2007) ("Distributing money to satisfy claims is, in most cases, a zero-sum game: Every dollar given to one creditor is a dollar unavailable to satisfy the debt owed to others. For Paul to be paid in full, Peter must be short-changed.")

Until April 2008, both pilot groups were represented by ALPA. (1ER8:26-27.) ALPA, as the pilots' bargaining representative, and the two merging airlines entered into a Transition Agreement, which set forth a process to integrate pilot operations. (1ER9:12-14.) With few exceptions, this agreement places a fence between West Pilot operations and East Pilot operations until a single CBA for the entire group of pilots is negotiated and implemented. (1ER9:17-20.) Because negotiation of that single CBA has not been completed, the Airline continues to operate the West and East sides separately. (1ER9:25-26.)

Negotiation of the single CBA has been complicated by a dispute over "what seniority list the CBA will include." (1ER9:26-27.) The Transition Agreement specifies that "[t]he seniority lists of America West pilots and US Airways pilots will be integrated in accordance with ALPA Merger Policy and submitted to the Airline Parties for acceptance." (1ER10:2-5.) *See copy* ALPA Merger Policy (4ER704-719.) In turn, ALPA Merger Policy provides a step-by-step process to integrate seniority lists that gives consideration to minority interests and weighs a non-exclusive list of equities. (4ER629.) If negotiation

and mediation between the two sides fail, an arbitrator selected from a predetermined list conducts a "final and binding" arbitration to create an integrated seniority list. (1ER10:6-10.) An integrated seniority list created in this process is not subject to a separate ratification vote by the union membership; if it meets certain predefined criteria, it is accepted by the Airline for use in any single CBA negotiated with the union, subject to membership ratification. (1ER10:11-14; 1ER12:21-23.)

(3) The Nicolau Arbitration created a seniority list.

The two pilot groups were unable to negotiate or mediate an integrated seniority list. (1ER10:16-18.) The East Pilots thought that they "were entitled to seniority rights based upon their dates of hire, including East Pilots who were on furlough at the time of the merger." (1ER10:18-20.) The West Pilots "thought that these furloughees should be placed at the bottom of the list, with the remaining pilots merged into one list according to their relative positions on the original seniority lists for each of the merging airlines." (1ER10:20-23.)

The representatives of the two sides proceeded down the steps of ALPA Merger Policy, eventually selecting George Nicolau to chair a formal arbitration of their dispute. (1ER10:26-11:3.) The arbitration proceedings began in December 2006 and concluded in February 2007. (1ER11:3-4.)

> The Nicolau Arbitration panel issued its award (the "Nicolau Award") in the first week of May 2007. The award struck a compromise between the requests of both sides. It placed about 500 senior East Pilots at the top of the list, against the wishes of West Pilots, because of their special experience with wide-body international aircraft that America West was not operating before the merger. It placed approximately 1700 East Pilots who had been furloughed at the time of the merger at the bottom of the list because of their greatly diminished career expectations. Then it blended the remainder of the East Pilot list with the West Pilot list generally according to the relative position of the pilots on their original lists.

(1ER11:5-13.) *See copy* Nicolau Award. (4ER628-662.)

"Before, during, and after the arbitration, both sides understood that any arbitrated result would be final and binding as provided in ALPA Merger Policy, and that the Transition Agreement required implementation of the Nicolau Award along with any new single CBA." (1ER11:14-17.) "There is no persuasive evidence that any

East or West Pilot doubted the finality of the arbitration before it took place." (1ER11:19-20.)

"The Nicolau Award caused outrage among many East Pilots." (1ER11:21.) East Pilot representatives sought to have ALPA prevent implementation of the Nicolau Award. (1ER11:21-22.) "Emotions flared … while ALPA attempted to broker a compromise between the two pilot groups." (1ER11:23-24.) ALPA was unable to get either side to compromise. (1ER12:1-2.)

CBA negotiations with the Airline progressed contemporaneously with the efforts to create an integrated seniority list. (1ER12:3.) In May 2007, the Airline presented a comprehensive CBA proposal that "represented significant progress in negotiations and included a pay increase for both pilot groups worth $122 million per year" that "would mean a pay increase for East Pilots worth $108 million per year. This proposal has remained on the table." (1ER12:3-10.)

On August 15, 2007, the East Pilots withdrew their representatives from the committee negotiating the new CBA with the Airline, halting those negotiations. (1ER12:11-13.) In October 2007, ALPA determined that there were no valid grounds to set aside

the Nicolau Award. (1ER12:13-15.) ALPA's president formally criticized East Pilot resistance to the Nicolau Award, stating that it was "time" for them "to comply with ... representational and legal obligations ..., reversing all prior efforts to bar or precondition the continuation of joint negotiations" of the new CBA. (1ER12:13-119.) *See copy* Ex. 19. (SER1-2.) "The East MEC never returned to negotiations." (1ER12:20.) ALPA submitted the Nicolau Award to the Airline in late 2007 and the Airline accepted the award on December 20, 2007. (1ER12:20-23.)

(4) USAPA was formed to abrogate the Nicolau Arbitration.

"Another story was unfolding during this course of events. On May 16, 2007, shortly after the issuance of the Nicolau Award, East Pilot Stephen Bradford wrote a letter to the ALPA Executive Board ... [that] voiced hostility to the Nicolau Award." (1ER12:25-28.) In this letter, Mr. Bradford wrote that "it was necessary" for the East Pilots to leave ALPA and form a new union in order to "write our own merger policy into our bylaws." (1ER13:1-2.) *See copy* Ex. 107. (SER3.) "He asserted that the East Pilots' majority status" in this

new union "would enable them" to impose their preferred method of integrating the seniority lists. (1ER13:3-4.)

> He and other East Pilots formed a committee to explore how to prevent implementation of the Nicolau Award by forming and certifying a new union with a different seniority objective. They received advice from a lawyer to take care with "the language you use in setting up your new union" and not to "give the other side a large body of evidence that the sole reason for the new union is to abrogate an arbitration."

(1ER13:4-9.) *See copy* Ex. 14. (4ER722.) Mr. Bradford and other East Pilots formed Appellant USAPA. (1ER13:10.) "On August 10, 2007, they announced that they held nearly enough popular support to force a representation election." (1ER13:10-12.)

> On November 29, 2007, the [NMB] certified a representation election." (1ER13:12-13.)

> USAPA's campaign purported to address other areas of pilot discontent, but it communicated a clear message to East Pilots that its seniority policy would be more favorable to them than the Nicolau Award. USAPA promised, [for example] that … it would negotiate for a date-of-hire seniority integration rather than the Nicolau Award.

(1ER13:13-17.) USAPA won the election and the NMB certified it as the collective bargaining representative for the entire group of pilots on April 18, 2008, with Mr. Bradford as its president. (1ER13:19-21.)

(5) USAPA embarked on a preordained course to prevent implementation of the Nicolau Award.

When elected, USAPA was on a preordained course to disregard the Nicolau Award. Five months later, "USAPA adopted and presented to the Airline" a seniority list "based upon each pilot's date of hire, with West Pilots generally falling to the bottom of the list." (1ER13:22-24.) Although this proposal purports to offer some protections to West Pilots, it would implement all furloughs strictly by date-of-hire. (1ER13:24-14:8.) "[I]mportantly, USAPA's proposal exposes the West Pilots to grave new economic perils [because] [a]ny furlough will take a disproportionate toll on West Pilots." (1ER14:14-16.) "If the very circumstances at the time of the merger were to recur under USAPA's seniority proposal, many of the West Pilots would lose their jobs to now-working East Pilots who were unemployed at the time of the merger." (1ER14:19-21.) For these and other reasons, USAPA's seniority proposal is "substantially less favorable to West Pilots than the Nicolau Award." (1ER14:9-11.)

The Airline has not responded to USAPA's seniority proposal. (1ER15:1.) "Any new CBA is now subject to USAPA's ratification process, which differs from ALPA's. Under USAPA's constitution,

ratification requires a majority vote of the entire union membership, not separate votes of the two pilot groups. This system deprives both pilot groups of their separate veto powers." (1ER15:2-6.)

(a) *USAPA was solely motivated to benefit the East Pilots.*

"USAPA's sole objective in adopting and presenting its seniority proposal to the Airline was to benefit East Pilots at the expense of West Pilots, rather than to benefit the bargaining unit as a whole." (1ER15:8-10.) "USAPA officers have promised to 'overturn' the Nicolau Award, and USAPA considers itself constitutionally bound never to implement it. Counsel for USAPA concedes that the union will never do so." (1ER15:13-15.) Doc. 574 at 1047 (hearing transcript). (SER5.) Other motivations advanced by USAPA "were simply pretextual." (1ER15:16-17.)

(b) *West Pilots suffered direct injury.*

"[E]conomic forces have caused the Airline to reduce flying." (1ER15:19-20.) "As a result, the Airline has announced plans to furlough 300 pilots, including approximately 175 West Pilots." (1ER15:21-22.)

> Approximately 140 West Pilots had been furloughed by the time of trial. The group of presently furloughed pilots includes Plaintiff Worgocki [sic], Plaintiff Bostic, and Plaintiff Iranpour. If a single CBA that incorporated the Nicolau Award were in place and operations integrated, none of the West Pilots would be furloughed at this time.

(1ER16:1-4.)

C. Procedural background

(1) West Pilots filed two actions to defend the Nicolau Award.

The West Pilots had no option but to institute litigation to defend the Nicolau Award. (1ER16:6-11.) USAPA selected the law firm that devised the scheme to abrogate the Nicolau Award to handle the defense of that scheme. Ex. 315 (5ER880.) In essence, therefore, this law firm was put in the position of defending itself for advising USAPA to take the actions that led to this lawsuit and defending USAPA for following that advice.

In this lawsuit, the West Pilots alleged a hybrid claim against USAPA and US Airways. (3ER492-515.) In a separate lawsuit, they alleged a direct claim against the East Pilots. (3ER607-628.) On November 20, 2008, the district court dismissed their claims against the airline in favor of the system board. Doc. 84. (1ER16:11-12.) On

December 24, 2008, it dismissed their direct claim against the East Pilots on the basis of RLA preemption. Doc. 118. (1ER16:17-186.)

USAPA also moved to dismiss the DFR claim, arguing a variety of points including challenges to jurisdiction. (1ER16:12-14,.) The district court rightly rejected these arguments. (1ER41:15-17.) *See also* n.1, *supra.*

(2) The district court recognized a valid bad faith DFR claim.

The DFR claim that remained alleged that USAPA wrongfully followed through on the East Pilots' objective to prevent implementation of the Nicolau Award, "without any corresponding benefit to the pilots as a whole." (3ER526:12-19.) Liability would attach if "USAPA's only actual motivation in adopting and presenting its seniority proposal was to benefit East Pilots at the expense of West Pilots." (1ER26:13-15.)

Two material issues, therefore, remained in the litigation after the court ruled on the motions to dismiss: (1) whether, *as a matter of law*, liability attached if USAPA's sole actual motivation for adopting and promoting its seniority proposal was to benefit East Pilots at the expense of West Pilots; and (2) whether, *as a matter of fact*, this was

USAPA's sole actual motivation. This matter is being tried in two stages. (1ER16:19-23.) In the first stage, a jury decided liability and, immediately thereafter, the court decided injunctive relief. (1ER17:10-13.) In the second stage, a jury will determine damages. (1ER55:20-22.)

(a) *The jury found liability*

USAPA articulated motives at trial that both court and jury treated as pretext. One such pretext was that it was motivated to overcome an impasse between West and East Pilots that was preventing progress in negotiation of a new CBA. (1ER32:11-12.) This argument failed because the evidence "well supports … that any asserted impasse was a pretext for bare favoritism of the East Pilots." (1ER32:17-18.) The jury's verdict, therefore, was that USAPA violated the DFR because it acted "solely to benefit one group of pilots at the expense of another." (1ER7:6-8.)

(b) *The district court provided injunctive remedy.*

Following a bench trial on remedy, the district court ordered injunctive relief that permanently enjoined and ordered USAPA to: (1) "make all reasonable efforts to negotiate and implement a single

[CBA] … that will implement the Nicolau Award seniority proposal …"; (2) "[m]ake all reasonable efforts to support and defend the … Nicolau Award in negotiations with US Airways"; and (3) "[n]ot negotiate for separate collective bargaining agreements for the separate pilot groups…." Doc. 594. (1ER2:21-3:3).

USAPA moved to stay enforcement of the injunction and to stay the damages litigation. Doc. 596. The district court denied USAPA's motion to stay enforcement of the injunction, finding that none of the four *Hilton* factors weighed in favor of a stay. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Doc. 610. (SER8-12.) To the contrary, the court found that enforcement was needed to preclude USAPA from "engag[ing] in the very activity that this Court has ruled unlawful: negotiating for a seniority list other than the Nicolau Award, and negotiating for separate CBAs for the two pilot groups." (SER11:14-16.) "To stay the injunction would allow USAPA to persist in this abuse of its representational function and resources." (SER11:21-22.) The district court also denied USAPA's request for a stay of the damages phase litigation. Doc. 606.

Legal Argument

The West Pilots' claim is that USAPA's "constituted purpose was to impose a date-of-hire scheme on the minority membership in disregard of an arbitrated compromise both sides agreed to and deemed fair in advance." Doc. 250. (3ER464:15-19.) They claim that USAPA "adopted and submitted its seniority proposal for a reason or reasons that are not legitimate union objectives," solely to benefit East Pilots at the expense of West Pilots. (2ER196:10-11.) The district court: (1) correctly found that this states a ripe DFR claim; (2) correctly found that this states a valid DFR claim; (3) properly instructed the jury on this claim and properly determined that substantial evidence supports the jury's liability verdict; and (4) provided a proper remedy. USAPA's challenges to the contrary should be dismissed. In addition, an assortment of other challenges brought by USAPA should be dismissed because they were improperly presented for review.

A. A claim that USAPA wrongly adopted and promoted its seniority proposal is ripe, notwithstanding that there was no final product of CBA negotiations.

USAPA denied the West Pilots their right of fair representation when it committed itself to date-of-hire seniority integration, without proper motive. No published decision has held, as USAPA argues, that a claim for such conduct cannot be ripe before the union completes CBA negotiations. Rather, a convincing line of cases holds to the contrary.

(1) Standard of review and analysis.

This Court reviews questions of ripeness *de novo*. *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 669 (9th Cir. 1995).

> "Ripeness," the Supreme Court has observed, "is peculiarly a question of timing." A claim is not ripe if it involves "contingent future events that may not occur as anticipated, or indeed may not occur at all." At the same time, a litigant need not "await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough."

United States v. Streich, 560 F.3d 926, 931 (9th Cir. 2009) (citations omitted). To determine ripeness, courts evaluate "both the fitness of the issues for judicial decision, and the hardship to the parties of withholding court consideration." *Id.*; *see also Yahoo! Inc. v. La Ligue*

Contre le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1211-12 (9th Cir. 2006).

(2) Because USAPA wrongly announced its unequivocal intention to cause concrete injury, this claim is ripe.

The West Pilots' claim satisfies both elements of the *Streich* analysis.

(a) *All material questions are fit for decision.*

The first element of the *Streich* analysis is fitness for decision. A question is fit for decision where it can be decided without considering "contingent future events that may or may not occur as anticipated." *Cardenas v. Anzai*, 311 F.3d 929, 934 (9th Cir. 2002) (*quoting Texas v. United States*, 523 U.S. 296, 300 (1998)). In this matter, all material factual and legal questions are fit for decision. The material factual question concerns USAPA's actual motivation for past actions. Future events will not determine that fact. This question, therefore, is fit for decision. The material legal questions concern the legitimacy of USAPA's motivation. Legal questions are usually fit for decision because they "require little factual development." *See Yahoo!*, 433 F.3d at 1212. The questions here require no factual development. They, therefore, are also fit for

decision. USAPA recognizes the fit-for-decision element of the analysis but does not apply it to the issues in this case. *See Op. Br.* at 18.[3] This claim, therefore, satisfies the fit-for-decision element of the *Streich* analysis.

(b) *If remedy were delayed, hardship would be substantial.*

The second element of the *Streich* analysis is hardship. If there is injury-in-fact and a remedy for that injury, it is intuitive that delay of such remedy causes hardship. Hardship analysis, therefore, is analysis of available remedy and injury-in-fact. *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978); *Pac. Legal Found. v. State Energy Resources Conserv. & Devel. Comm'n*, 659 F.2d 903, 910-11 (9th Cir. 1981). The existence of the

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[3] USAPA quotes *Dolan v. Ass'n of Flight Attendants*, 1996 WL 131729 (N.D. Ill. Mar. 20, 1996), an *unpublished* decision holding that whether a union violates the DFR by adopting a bargaining position is "not appropriate for judicial decision." *Op. Br.* at 19. *Dolan*, however, addresses very different circumstances. Moreover, it is unpublished, has never been cited by an appellate court, and cannot be cited in its own jurisdiction. *See* 7th Cir. R. 32.1(d). *Silvera v. Mutual Life Ins. Co. of New York*, 884 F.2d 423, 426 (9th Cir. 1989) (exception made to no citation rule where unpublished decision can be cited in its jurisdiction). Consequently, it has scant persuasive effect.

injunction under appeal belies any argument that no remedy is available. The focus of the hardship analysis here, consequently, is on injury-in-fact.

(c) *This claim is ripe before consummation of threatened injury.*

"Courts have long recognized that one does not have to await the consummation of threatened injury to obtain preventive relief." *Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003). Addressing ripeness, *Lujan v. Defenders of Wildlife* held that "[t]he person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." 504 U.S. 555, 573, n.7 (1992). In such matters, ripeness analysis involves two inquiries, whether the plaintiff has: (1) "a procedural right to protect [his or her] concrete interests," and (2) "some threatened concrete interest." *Id.* at nn.7, 8.

Both *Lujan* elements are satisfied here. *First*, the right at issue, the right of fair representation, is a procedural right. It arises from federal statute, the RLA. *Conley v. Gibson*, 355 U.S. 41, 42 (1957).

Second, the threatened concrete interest is the West Pilots' interest in a fully negotiated CBA using the Nicolau Award that is put to a ratification vote. This interest is threatened—intentionally threatened—by USAPA adopting and promoting a date-of-hire seniority scheme in place of the Nicolau Award. The West Pilots' claim, therefore, satisfies both elements of the *Lujan* threatened-concrete-injury ripeness analysis.

Federal courts apply the *Lujan* threatened-concrete-injury analysis to DFR claims. In one instance, the court held that an aggrieved party "does not have to await the consummation of threatened injury to obtain preventive relief." *Mount v. Grand Intl. Bhd. of Locomotive Engrs.*, 226 F.2d 604, 608 (6th Cir. 1955). A union's adoption and announcement of a seniority policy can be an unequivocal expression of intention to implement that policy. Hence, one court recognized that a DFR claim became ripe when the union *improperly* "adopted and announced a bargaining policy on seniority merger." *Truck Drivers & Helpers, Loc. Union 568 v. NLRB*, 379 F.2d 137, 145 (D.C. Cir. 1967).

USAPA unequivocally stated that it "will never bargain for implementation of the Nicolau Award." (1ER43:3-4.) That was an unequivocal statement of intention to cause concrete injury sufficient to establish ripeness. This Court, therefore, should affirm—on the basis of threatened concrete injury—that the West Pilots state a ripe claim.

(d) *The injury can be denial of a procedural right.*

There is also ripeness here on the basis of injury to a statutory procedural right. The district court recognized this in its November 20, 2008, order. Doc. 84. (1ER15:19-21.) In so doing, it applied the close relationship between denial of procedural rights and ripeness that has long been recognized by federal courts. Indeed, this relationship was recognized in *Marbury v. Madison*, which held "that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." 5 U.S. 137, 163 (1803). Federal courts particularly provide a remedy whenever the right invaded is statutory. They recognize a strong policy that the courts must not permit "a sacrifice or obliteration of a right which Congress had created." *Switchmen's Union of No. Am. v. NMB*, 320

U.S. 297, 300 (1943). The rationale for this doctrine fits very well to a claim alleging injury to the right to have a union fairly represent a worker's interests.

The right to fair representation applies to all phases of representation, including the phase of "bargaining with the employer." *Teamsters Loc. No. 391 v. Terry*, 494 U.S. 558, 563 (1990). Hence, a claim for "loss of fair representation" in the context of bargaining asserts a ripe claim "without any requirement of a showing of further injury." *Bertulli v. Independent Ass'n. of Continental Pilots*, 242 F.3d 290, 295 (5th Cir. 2001). The claim here falls squarely within this doctrine. The allegation is that USAPA is wrongfully negotiating with the Airline, in violation of the DFR. This claim, therefore, has ripeness on the basis of injury to a statutory procedural right.

(3) USAPA conflates accrual of limitations with ripeness. A claim can be ripe before limitations begin to run.

Neither *Ramey* nor other published decisions offered by USAPA show that this claim lacks ripeness. None of these decisions hold that a union must complete CBA negotiations before a claim can be ripe. Indeed, some hold to the contrary. A decision that superficially

supports USAPA's position, *Breeger*, is unpublished and otherwise too flawed to be at all persuasive.

Ramey v. District 141, IAMAW, 378 F.3d 269 (2d Cir. 2004), must be read carefully because it addresses limitations, not ripeness, and it identifies an exception to the general rule that a claim accrues for purpose of ripeness at the same time it accrues for purpose of limitations. *Cf. Gemtel Corp. v. Community Redevelopment Agency of City of Los Angeles*, 23 F.3d 1542, 1545 (9th Cir. 1994) (applying rule). *Ramey* explains this exception by drawing an analogy to "a party's anticipatory repudiation of a contractual duty." *Id.* at 279.

In the contract repudiation context, *Ramey* explains, ripeness and limitations need not accrue at the same time. The aggrieved party has a choice. It can elect to treat the claim as ripe at the time of repudiation and proceed on an action for remedy or it can wait for concrete injury and assert a claim then. It can do so, even where the statute of limitations would have expired by the time of concrete injury if it was timed from the repudiation. *Id.* Hence, for purpose of ripeness, an action accrues at repudiation; for purpose of limitations, it need not accrue before concrete injury.

DFR repudiation, the *Ramey* court explained by analogy to contract repudiation, occurs with a "union's announcement of its intent to advocate against its members' interests." *Id.* *Ramey*, quoting *Franconia Assoc. v. United States*, 536 U.S. 129, 144 (2002), explained that "the time of accrual depends on whether the injured party chooses to treat the anticipatory repudiation as a present breach." *Id.* (alteration marks omitted). According to *Ramey*, therefore, the West Pilots had a ripe claim as soon as USAPA unequivocally announced its intention to breach its DFR. *Ramey*, therefore, supports the West Pilots' position on ripeness. USAPA's argument to the contrary is wrong.

USAPA relies on decisions, other than *Ramey*, that also fail to support its position. Two of these decisions merit only brief discussion. *Federal Express Corp. v. Air Line Pilots Ass'n*, 67 F.3d 961, 964 (D.C. Cir. 1995), does not apply to ripeness of a DFR claim because it addresses a dispute between an airline and a union. *Gallindo v. Stoody Co.*, 793 F.2d 1502, 1509-1510 (9th Cir. 1986), does not apply to the issue of ripeness because it addresses limitations.

Gullickson v. Southwest Airlines Pilots' Ass'n, 931 F. Supp. 1534, 1541 (D. Utah 1995), also does not address ripeness. Rather, it merely recognizes that the principle of ratification applies to DFR claims. USAPA offers no authority for the proposition that a potential for ratification negates ripeness. If it did, then a host of non-DFR claims would never be ripe because they are open to ratification "at any time." *See*, *e.g.*, *Restatement (First) of Restitution* § 68, cmt. c (1937) ("A person entitled to affirm a transaction can do so at any time ...."); *Restatement (Third) of Agency* § 4.02, cmt. b (2006) ("[R]atification extinguishes claims...."). USAPA's argument that the possibility of future ratification negated ripeness, *Op. Br.* at 20, cannot be right. If it was, no claim by principal against agent would be ripe. That cannot be.

Brooks v. Air Line Pilots Ass'n, Int'l, 630 F. Supp. 2d 52 (D.D.C. 2009), decides ripeness by applying prudential considerations that are materially different than the considerations in this matter. The *Brooks* court chose to defer hearing a DFR claim on the basis that the claim raised a discrete issue that would likely soon be mooted by the outcome of a pending grievance. The district court here weighed

different prudential considerations, explaining that this dispute does not raise a discrete issue that would be resolved elsewhere. (1ER47:18-20.) *Brooks*, therefore, does not show any error here by the district court.

Breeger v. USAPA, Case No. 3:08CV490-RJC-DSC (W.D.N.C. Apr. 23, 2009), is not persuasive because it is neither on point nor well reasoned. (Add. 13). The *Breeger* plaintiffs alleged unfair representation based on failure to adhere to a union constitutional provision. They alleged that USAPA wrongly refused to "disturb the relative position" of a group of East Pilots on the East Pilot seniority list, contrary to its constitutional commitment to date-of-hire. *Id.* at 2-3 (Add. 14-15). A union's constitution, however, does not strictly define its DFR. *See Retana v. Apartment, Motel, Hotel & Elevator Operators*, 453 F.2d 1018, 1024-1025 (9th Cir. 1972) (not defined by the "union's 'internal' policies and practices"). Hence, *Breeger* should be distinguished because it is not a true DFR case.

Breeger is unpersuasive for three additional reasons. *First*, the court was not briefed on material case law. *See Breeger* at 5 ("The parties have not cited, and the undersigned is unaware of, any

published federal authority addressing whether a union's conduct may give rise to a ripe DFR claim prior to the conclusion of negotiations with the employer.") (emphasis in original) (Add. 17). *Second*, *Breeger* "makes no mention of *Ramey*," a decision that is close on point. (1ER46:26-27.) *Third*, its analysis fails to reconcile the holding in *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, that fair representation suits may properly challenge "the negotiations leading to [CBAs]." 756 F.2d 1262, 1273 (7th Cir. 1985). As an unpublished decision having such defects, *Breeger* should have no persuasive effect.

B. USAPA's adopting and promoting a seniority proposal without legitimate union objective constitutes a DFR violation.

(1) Standard of review.

USAPA's challenge in Section II of its brief, *Op. Br.* at 23-41, seeks review of the legal basis of the district court's denial of a Rule 12(b)(6) motion to dismiss. In reviewing such orders, this Court "accept[s] all well-pleaded factual allegations in the complaint as true, and determine[s] whether the factual content allows the court to draw the reasonable inference that the defendant is liable for the

misconduct alleged." *Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1052, n.2 (9th Cir. 2009).

(2) There are three independent DFR standards.

(a) *Bad faith is one of the three DFR standards.*

A Rule 12(b)(6) analysis begins with the elements of the claim. The parties do not agree on those elements because they dispute the nature of the DFR. The nature of the DFR is defined by a three component standard—that a union must "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*, 386 U.S. at 177. Federal courts state these three components "in the disjunctive," to indicate that there "are three separate and distinct possible routes for establishing a union's breach of its duty." *LaCortiglia v. Aluminum Co. of America*, 976 F.Supp. 707, 711 (N.D. Ohio 1997). *See Simo v. Union of Needletrades, Indus. & Textile Employees, Southwest Dist. Council*, 322 F.3d 602, 617 (9th Cir. 2003) (Each "represents a distinct and separate obligation.").

Although federal courts distinguish three components to the DFR, they often describe the components with language that blurs those distinctions. For example, *Gregg v. Chauffeurs, Teamsters & Helpers Union Loc. 150*, 699 F.2d 1015 (9th Cir. 1983), described the arbitrary component of the duty as acting "without rational basis." *Id.* at 1016. *Johnson v. United States Postal Service*, 756 F.2d 1461 (9th Cir. 1985), described the same arbitrary component as action that is "egregious, unfair and unrelated to legitimate union interests." *Id.* at 1465. The former description is the common meaning of "arbitrary." The latter description is closer to the meaning of "bad faith." Yet, both courts were defining arbitrary DFR breach.

As further demonstration that the bad faith and arbitrary components of the DFR are distinctive, the Supreme Court explains that whether or not a union's actions are arbitrary, they "are subject always to complete good faith and honesty of purpose." *Humphrey v. Moore*, 375 U.S. 335, 343 (1964). The converse also is true, another court indicates, because "the union's actions must not only show 'good faith and honesty of purpose,' but must also be within a 'wide range of reasonableness,' which includes 'a prohibition against 'arbitrary'

conduct.'" *Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171, 1176 (7th Cir. 1995). Hence, federal courts uniformly recognize that satisfaction of the arbitrary DFR standard is no defense to a claim of violation of the bad faith standard.

The analytic viewpoints used for the arbitrary and bad faith standards are also different. "Whereas the arbitrariness analysis looks to the objective adequacy of the Union's conduct, the discrimination and bad faith analyses look to the subjective motivation of the Union officials." *Simo*, 316 F.3d at 988; *see also Nemsky v. ConocoPhillips Co.*, 574 F.3d 859, 866 (7th Cir. 2009) (same). Hence, this Court should focus on USAPA's actual motives when analyzing the West Pilots' bad faith DFR claim.

(b) *USAPA mischaracterizes the arbitrary DFR standard.*

USAPA's argument tries to collapse all three DFR standards into arbitrary conduct. USAPA argues, with no support, that "regardless of the presence of motive, a rationally-based rule will not give rise to DFR liability." *Op. Br.* at 51. In other words, USAPA argues, successful defense against an arbitrary DFR claim defeats a bad faith

DFR claim. That is just not true. USAPA offers no authority to support this. All the authorities addressed above hold otherwise.

USAPA makes this argument to take advantage of the great deference that courts give to a union when making an objective analysis of a DFR claim. The objective-arbitrary analysis is quite forgiving. "[A] union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' as to be irrational." *Air Line Pilots Assn. Intl. v. O'Neill*, 499 U.S. 65, 67 (1991) (citation omitted); *see*, *e.g.*, *Nemsky*, 574 F.3d at 867 (evidence allowed summary judgment on arbitrary standard but precluded summary judgment on bad faith standard). The West Pilots, however, do not make that kind of claim. They make a bad faith claim decided by subjective analysis. Perhaps USAPA evades addressing that claim because the evidence of wrongful motivation here is so strong.

(3) The West Pilots make an improper motive DFR claim.

USAPA challenges the West Pilots' claim on the basis that it is a "discrimination" claim and invalid because (so they allege) the West

Pilots waived such a claim. *Op. Br.* at 29. It would not matter if there was some kind of waiver because the West Pilots surely did not waive their claim that USAPA acted solely with an improper motive. Under established authorities, this equates to a bad faith DFR claim. USAPA does not argue that a bad faith claim was waived.

The nature of a claim is determined by the final pretrial order and jury instructions. *See Wilson v. Muckala*, 303 F.3d 1207, 1215 (10th Cir. 2002) ("When an issue is set forth in the pretrial order, it is not necessary to amend previously filed pleadings because the pretrial order is the controlling document for trial."). Both the final pretrial order (2ER269) and the jury instructions (2ER192) demonstrate that the West Pilots make an improper motive / bad faith claim. The final pretrial order, for example, recognizes that the West Pilots claim USAPA breached the DFR because its actions (described in a variety of ways) were "unrelated to any legitimate union objective." (2ER301:8-302:3.) The district court's summary instruction to the jury directed the jury to decide this claim, as follows:

> If you decide that USAPA was not actually motivated by a legitimate union objective in adopting and promoting its seniority proposal and did so only to enhance the rights of East Pilots at the expense of West Pilots, then you must find for Plaintiffs. If you decide that USAPA was actually motivated by a legitimate union objective in adopting and promoting its seniority proposal, then you must find for USAPA.

(2ER199:18-22.) Both the final pre-trial order and the jury instructions, therefore, describe an improper motive DFR claim. No supposed waiver of a "discrimination" claim would waive this claim.

(4) The West Pilots state a claim for bad faith DFR breach.

The bad faith component of the DFR requires that a union exercise its statutory powers and contractual rights for legitimate objectives. On April 18, 2008, USAPA acquired statutory power and contractual rights to renegotiate seniority integration. That power and those rights, however, could not be exercised *solely* for illegitimate union objectives. The West Pilots use evidence of USAPA's pre-certification conduct to argue that the illegitimate objectives that motivated USAPA before April 18, motivated it after April 18, when it owed them a duty to exercise its powers and rights for legitimate union objectives. The West Pilots never claim that

USAPA owed them a duty to exercise its powers and rights for legitimate union objectives prior to its April 18, 2008 certification.

(a) *USAPA's statutory power to renegotiate seniority integration could not be exercised solely for illegitimate union objectives.*

A long line of federal decisions underpins the principle that a union breaches its DFR where it uses its statutory power as the exclusive bargaining agent to renegotiate seniority *solely* motivated to enhance the rights of one group within the bargaining unit at the expense of some other group within the bargaining unit. *See Gainey v. Bhd. of Ry. & S. S. Clerks, Freight Handlers, Exp. & Station Emp.*, 313 F.2d 318, 323 (3d Cir. 1963) (reviewing a line of cases, and concluding that "the common thread running throughout these opinions is the improper, usually bad faith, motivation for the course taken"). Four decisions are discussed that apply this principle.

Bernard v. Air Line Pilots Ass'n, Int'l, 873 F.2d 213 (9th Cir. 1989), addresses pilot seniority integration after the merger of Alaska Airlines and Jet America. With the merger, ALPA became the certified bargaining representative for the smaller Jet America pilot group. *Id.* at 217. Regardless, ALPA failed "even to recognize that it

represented the Jet America pilots." *Id.* The evidence showed that ALPA's only motivation was to protect the interests of the Alaska Airlines pilots. *Id.* Because this was ALPA's sole motive, ALPA breached the bad faith DFR standard.

Truck Drivers, Loc. Union 568 v. NLRB, 379 F.2d 137 (D.C. Cir. 1967), applies DFR principles. The court explains "that union action taken solely for considerations of political expediency, and unsupported by any rational argument whatsoever, is in violation of representational responsibilities." *Id.* at 142. This decision, therefore, recognizes that an improper motive can be the basis of a valid bad faith DFR claim.

Hardcastle v. W. Greyhound Lines, 303 F.2d 182 (9th Cir. 1962), also recognizes that a union violates the DFR if it acts with improper motivation. Although this court finds in favor of the union, it recognizes that there would have been a valid DFR claim if plaintiffs alleged facts from which the court could "infer the possible presence of a bad faith motive." *Id.* at 188.

Finally, *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524 (7th Cir. 1992), reviews two cases that hinge on questions of union

motivation. One case involves the seniority integration of pilots from TWA and Ozark Airlines. The other involves seniority demotion of a group of United Airlines pilots who crossed picket lines six years earlier.

In the first case, when TWA and Ozark merged, they made no commitment to follow ALPA Merger Policy.[4] *Id.* at 1527. Post-merger TWA and the former TWA pilots did not want to follow ALPA Merger Policy. *Id.* Only the Ozark pilots wanted to do so. *Id.* Indeed, from a contract viewpoint, TWA "was free … to acquire Ozark's planes and put TWA's pilots to work in their cockpits." *Id.* at 1553. ALPA deviated from its merger policy because it had no means to enforce the policy. *Id.* ALPA thought it had to deviate from its merger policy so that it could preserve some employment for the Ozark pilots. *See id.* This was an actual, legitimate union objective. *See id.* In its analysis of the TWA/Ozark dispute, *Rakestraw* recognizes that a union's power must be exercised in good faith.

[4] In contrast here, US Airways, America West, and both pilot groups agreed, under the Transition Agreement, to follow ALPA Merger Policy.

Specifically, this part of *Rakestraw* stands for the proposition that where a union exercises the power to deviate from its seniority merger policies, its actual motivation for doing so will determine whether it breached the DFR.

In the United Airline dispute the issue is whether ALPA had a legitimate motive to pressure the airline to demote the seniority of these pilots. *Id.* at 1529. The actual motive was legitimate, *Rakestraw* holds, because it was legitimate to be motivated to strengthen the union's position in future negotiations. *Id.* at 1532. Demoting pilots who crossed picket lines in the past deters other pilots from doing the same in the event of a future strike. *Id.* Here, too, *Rakestraw* indicates the importance of the legitimacy of a union's actual motives. Specifically, this part of *Rakestraw* stands for the proposition that where a union exercises the power to renegotiate seniority, its actual motivation for doing so will determine whether it breached the DFR.

Both parts of *Rakestraw*, therefore, are consistent with the doctrine that a union's statutory powers must be exercised with "complete good faith and honesty of purpose." *Humphrey*, 375 U.S. at

343. It does USAPA no good to show that it had powers to deviate from ALPA merger policy or that it had power to renegotiate seniority. *See Op. Br.* at 31-36 (making such argument). It does USAPA no good because the West Pilots do not challenge whether USAPA has such powers. Rather, the West Pilots challenge whether USAPA exercised such powers in bad faith.

(b) *USAPA's contractual rights to renegotiate seniority integration could not be exercised solely for illegitimate union objectives.*

The *Rakestraw* analysis applies just the same to contractual rights as it does to statutory powers. USAPA argues that it was free to act for improper motives because its power to renegotiate seniority was not restricted by the Transition Agreement. *Op. Br.* at 38-41. A basic principle of DFR doctrine, however, is that RLA carriers and unions cannot expand their powers by agreement beyond what is allowed by law. *Steele*, 323 U.S. at 195 (RLA did not permit "agreement which provided that not more than 50% of the firemen in each class of service in each seniority district of a carrier should be Negroes"). Whatever the terms of a contract, therefore, a union's powers must still be exercised only with "complete good faith and

honesty of purpose." *Humphrey*, 375 U.S. at 343. Hence, any purported contract right USAPA has to renegotiate seniority does not detract from the West Pilots' claim.

(c) *The West Pilots used evidence of USAPA's precertification conduct only to prove its post-certification motivation.*

Courts allow inference of motive from non-actionable conduct. In the antitrust context, for example, one court holds that "pre-limitations conduct as part of an ongoing scheme was relevant for the purpose of interpreting postlimitations conduct." *United States v. Yashar*, 166 F.3d 873, 878 (7th Cir. 1999). The West Pilots point to USAPA's precertification conduct as evidence of USAPA's precertification motivation. They argue from inference that USAPA had similar motivation after certification. Precertification "statements, conduct and other related circumstances" are relevant, the West Pilots argue, "to determine [USAPA's] motives for post-April 18, 2008, actions." Doc. 441. (2ER212:19-21.) The West Pilots do not claim that USAPA breached the DFR before the NMB certified it as

the exclusive bargaining agent. USAPA's arguments to the contrary are not at all well founded.[5]

USAPA cannot benefit from arguing that the jury was misled or confused by such evidence. This must fail because the jury received instruction that ought to have kept it from being misled by evidence of precertification conduct:

> You may not base any verdict in favor of Plaintiffs upon a finding that USAPA breached its duty of fair representation before April 18, 2008. You may still consider the circumstances before USAPA was certified and USAPA's actions before then in determining whether USAPA violated its duty of fair representation on or after April 18, 2008.

(2ER195:24-196:3). This Court, therefore, should reject USAPA's argument that the jury improperly based its verdict on precertification conduct. *See Op. Br.* at 36-38.

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[5] USAPA quotes an informal October 29, 2008, colloquy between counsel and the district court that, taken out of context, seems to claim precertification DFR breach. *Op. Br.* at 31. The most important sentence from this colloquy is: "We are not in the wide range of reasonableness, the *O'Neill* case." (6ER1099:15-16). In the give and take of an initial hearing, counsel was merely explaining that the West Pilots' claim was based on bad faith, not on arbitrariness. Counsel referred to precertification conduct only as an example of evidence that would prove USAPA's motive.

C. The jury was properly instructed on elements of bad faith DFR, and had sufficient evidence to find bad faith DFR violation.

(1) Standard of review and analysis.

A jury's verdict "must be considered in light of the judge's instructions to the jury." *Toner for Toner v. Lederle Laboratories, a Div. of American Cyanamid Co.*, 828 F.2d 510, 512 (9th Cir. 1987). "A jury's verdict must be upheld if it is supported by … evidence adequate to support the jury's conclusion." *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002). Review of the jury's verdict, therefore, requires review of both formulation of jury instructions and sufficiency of evidence. The standards for each such element of review follow.

(a) *The Court reviews formulation of jury instructions for abuse of discretion.*

"A party is not entitled to have the jury instructed in the particular language of his choice." *Brooks v. Cook*, 938 F.2d 1048, 1053 (9th Cir. 1991). "Jury instructions must fairly and adequately cover the issues presented, must correctly state the law, and must not be misleading." *Dang v. Cross*, 422 F.3d 800, 804 (9th Cir. 2005) (alteration mark omitted). "Instructions need not be faultless, but

they must insure that a jury understand the issues in a case and not be misled in any way." *Ragsdell v. Southern Pacific Transp. Co.*, 688 F.2d 1281, 1282 (9th Cir. 1982).

This Court "review[s] *de novo* jury instructions that are challenged as a misstatement of law." *Hangarter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1005-06 (9th Cir. 2004). Otherwise, it reviews "formulation of jury instructions … for abuse of discretion." *White v. Ford Motor Co.*, 312 F.3d 998, 1012 (9th Cir. 2002).

If the Court finds any error in instructions, it must determine if such error was prejudicial. *Dang*, 422 F.3d at 805. "[P]rejudicial error results when, looking to the instructions as a whole, the substance of the applicable law was not fairly and correctly covered." *Id.* (alteration mark omitted). Error is not prejudicial "if the instructions as given allowed the jury to determine intelligently the issues presented." *Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1398 (9th Cir. 1984); *see also Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 212 (9th Cir. 1988) (same).

(b) *The Court reviews a jury verdict for substantial evidence.*

This Court reviews a jury verdict to determine whether it is supported by substantial evidence. *See Hangarter*, 373 F.3d at 1008. To do this, "the court must draw all reasonable inferences in favor of the nonmoving party, keeping in mind that credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* at 1005 (citation, alteration and quotation marks omitted). It "must disregard evidence favorable to the [appellant] that the jury is not required to believe." *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1227 (9th Cir. 2001). It "may not substitute its view of the evidence for that of the jury." *Id.*

(2) The district court properly formulated jury instructions.

The jury's verdict hinged on its understanding of what constitutes a legitimate union objective. The instructions ensured that the jury had an intelligent understanding of this standard.

The district court instructed the jury that USAPA "violated its duty if it adopted and submitted its seniority proposal for a reason or

reasons that are not legitimate union objectives."[6] (2ER196:10-11.) It explained that a union's "actions must be taken in good faith and with an honest purpose."[7] (2ER196:16-17.) It cautioned the jury that outcome was "not enough, in and of itself," to establish DFR breach. (2ER196:19-21.) Rather, it explained, the jury's focus should be on USAPA's actual intent. "The law allows a union to reconcile differences between two groups of workers, as long as its actions … are not taken solely to benefit one group of workers over another but rather with an intent to benefit the bargaining unit as a whole."[8] (2ER196:23-25.) The district court explained that the jury could infer

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[6] *See Johnson v. United States Postal Service*, 756 F.2d 1461, 1465 (9th Cir. 1985) (holding conduct "unrelated to legitimate union interests" violated duty of fair representation).

[7] *See Humphrey*, 375 U.S. at 343 (Union must always act with "complete good faith and honesty of purpose.")

[8] *See Rakestraw*, 981 F.2d at 1535 ("The change must rationally promote the aggregate welfare of employees in the bargaining unit."); *id.* ("[A] union may not juggle the seniority roster for no reason other than to advance one group of employees over another."); *Barton Brands, Ltd. v. NLRB,* 529 F.2d 793, 798-99 (7th Cir. 1976) ("[D]ecisions may not be made solely for the benefit of a stronger, more politically favored group over a minority group.").

USAPA's actual motivation from evidence such as the extent to which USAPA "considered the interests of all the employees in the bargaining unit before adopting its seniority proposal, as well as any promises USAPA may have made during its election campaign." (2ER197:2-4.) It also explained that the union is expected to consider the interests of all represented employees during CBA negotiations.[9] (2ER197:13-14.)

The district court clarified four points in its instructions to ensure that the jury could reach an intelligent verdict. *First*, it instructed, in regard to decisions that favor seniority of some at the expense of others, that the union's duty is breached when none of its motives are legitimate union objectives. Illegitimate objectives, the court explained, make a DFR breach only where they are the union's sole objectives. (2ER196:24-197:7.)

Second, the district court instructed that certain enumerated motives were inherently *not* legitimate union objectives. These

[9] *See Vaca*, 386 U.S. at 177 (referring to "the exclusive agent's … 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.")

included: (1) changing the outcome of an intra-union conflict that was already resolved by agreed-upon procedures; (2) preference for any particular seniority system; (3) preference for the concerns of the majority; (4) dissatisfaction with ALPA practices or policies; and (5) dissatisfaction with the Nicolau Arbitration. (2ER197:26-198:24.)

Third, the district court explained that the jury need not accept USAPA's articulated reasons as its actual reason; it instructed that the burden was on the West Pilots to show that USAPA's articulated reason was pretext:

> You are not to consider USAPA's wisdom. However, you may consider whether USAPA's stated reason is the true reason or merely a pretext. Plaintiffs have the burden to persuade you by a preponderance of the evidence that USAPA took action against Plaintiffs for improper reasons.

(2ER199:4-7.)

Fourth, the district court cautioned the jury that its role was *not* to weigh the relative merits of the different positions on seniority integration methods:

> The parties have strong differences of opinion on which method of seniority integration or proposal is to be preferred. You are not asked to decide whether the Nicolau Award or the Defendant's seniority proposal is to be preferred. You are not

> asked to decide whether Mr. Nicolau properly conducted the arbitration or reached a preferable result.

(2ER199:11-14.)

In other words, the district court directed the jury to first determine USAPA's *actual motive* for adopting and promoting its date-of-hire seniority proposal and then to determine whether that motive was a *legitimate* union objective. (2ER199:18-22.) The court also identified certain illegitimate objectives. Taken together, these instructions allowed the jury to make an intelligent determination of the issues. USAPA does not demonstrate otherwise.

(3) The district court properly instructed on legitimate union objectives.

As a matter of sound policy, legitimate union objectives must "promote the interests of the bargaining unit as a whole." (2ER196:21-23.) This policy complements the "no-free-rider" rule that all members of a bargaining unit must share the expense of union activities intended to promote legitimate objectives. *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984). The district court's interpretation of legitimate objective is well reasoned and consistent with that body of law.

The no-free-rider policy rests on a "presumption that nonmembers benefit equally with members" when a union has legitimate objectives. *Id.* This presumption links legitimacy of union objectives to the goal of bettering the bargain with the employer. For example, where a union's objective is to get better pay or concessions from the employer, the law presumes that the collective bargaining unit will benefit as a whole. The presumptions of the no-free-rider rule are justified. The union has a legitimate objective.

In contrast, where a union's objective is to allocate or reallocate advantages inside the union, with no expectation of obtaining better pay or concessions from the employer, the law does *not* presume that the collective bargaining unit will benefit as a whole. The presumptions of the no-free-rider rule are *not* justified. The union does *not* have a legitimate objective.

The difference between the two situations identified above is that vis-à-vis the benefits of the bargain with the employer, one is a "zero-sum game" and the other is not. A zero-sum game, by definition, cannot provide an external benefit to the bargaining unit. A non-zero-sum game, on the other hand, can potentially provide an

external benefit to the bargaining unit, depending on whether the bargaining unit or the employer "wins" the game.

In *Rakestraw*, the district court called the United Airlines seniority reordering a "zero-sum game." 981 F.2d at 1529. The Seventh Circuit reversed because, under the circumstances of that case, there was more to consider than an internal reordering of seniority. Seniority reordering had an external effect that benefitted the entire bargaining unit because it strengthened the union's future bargaining leverage. Hence, there was a legitimate union objective.

In *Bernard*, the seniority integration was a zero-sum game because there was nothing to consider other than the relative interests of the members of the bargaining unit. Between the Alaska Airlines pilots and the Jet America pilots one would gain and one would lose. ALPA had no basis to expect an improvement in the bargain with the employer resulting from the method it chose to integrate seniority. Hence, there was no legitimate union objective.

The doctrine of legitimate union objective and the no-free-rider rule rest on a reciprocal rationale. If the union has a reasoned basis to expect that a particular action might lead to an improvement in

the bargain with the employer, the union is acting for a legitimate objective and it is fair that all members of the bargaining unit share the expense. If the union does *not* have a reasoned basis to expect that a particular action might lead to an improvement in the bargain with the employer, the union is *not* acting for a legitimate objective and it is *not* fair that all members of the bargaining unit share the expense.

The district court's instructions to the jury on legitimate union objectives are consistent with the forgoing principles. In each instance there is no reasonable basis to expect that achieving the union's objective would lead to a better bargain with the employer. The district court, therefore, correctly determined that each such objective was not a legitimate union objective.

(a) *Date-of-hire preference is not a legitimate objective.*

As a general rule, seniority integration is a zero-sum game. Absent other considerations, one method of seniority integration or another does not get a better bargain from the employer. The district court, therefore, correctly instructed the jury that a general preference for any particular seniority system, "standing alone," is

not a legitimate union objective. (2ER198:2-3.) The court was correct, as well, that "[t]here is no authority for a magic rule that date-of-hire stops all inquiry on the DFR, in disregard of circumstances." (1ER30:16-17.) Because USAPA offers no authority or explanation that justifies a different analysis, this Court should affirm.

(b) *Revisiting the arbitration is not a legitimate objective.*

Revisiting a seniority integration arbitration is no different than insisting on a "do-over" in the schoolyard. This could be a legitimate union objective only if, for some unusual reason, the Airline offered a better bargain in exchange for revisiting the arbitration. There is no evidence that any such offer was made or expected. USAPA had no reason to expect that revisiting the arbitration would do anything more than reorder advantages within the bargaining unit. The district court, therefore, properly instructed the jury that this was not, by itself, a legitimate union objective. Because USAPA offers no

authority or explanation that justifies a different analysis, this Court should affirm.[10]

(4) The district court did not omit any material instructions.

USAPA argues (wrongly) that in the DFR context "bad faith" means "fraud, deceitful action or dishonest conduct." *Op. Br.* at 42. USAPA also offers no authority that this language must be used in jury instructions. It offers no authority that this language carries a significantly different meaning than "bad faith." Indeed, USAPA's position is unsupported and unreasonable. As the district court observed, the language "fraud, deceitful action or dishonest conduct"

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[10] USAPA misconstrues facts and law in its argument on this point. *First*, it is not true that the pilots refused to ratify a CBA using the Nicolau Award. They were never presented with such a CBA because the East Pilots refused to continue Joint Negotiations. (1ER32:6-15.) *Second*, it is not true that the district court instructed the jury that the "seniority integration dispute was 'already resolved.'" *Op. Br.* at 49. Rather, it instructed the jury that the "Nicolau Award was a final and binding resolution of the conflicting interests." (2ER198:13.) *Finally*, argument that only the System Board can interpret any aspect of a CBA is contrary to the doctrine of hybrid claim jurisdiction. *See Steele v. Louisville & N. R. Co.*, 323 U.S. 192, 206-07 (1944).

"add[s] nothing to the analysis" of bad faith. (1ER39:24-26.) There was no error, therefore, omitting this language from the instructions.

If, as USAPA argues, instructions must use "fraud, deceitful action or dishonest conduct," then the Ninth Circuit's model jury instruction on DFR is invalid. *9th Cir. Model Civ. Jury Instr.* § 13.1 (2007) (copy in appendix). Section 13.1 instructs on "bad faith" DFR violation without using the phrase, "fraud, deceitful action or dishonest conduct." If Section 13.1 is a proper instruction, USAPA's argument must be wrong. Because there is no reason for this Court to regard Section 13.1 as improper, it should reject USAPA's position.

USAPA argues that use of the language "fraud, deceitful action or dishonest conduct," in many decisions indicates that bad faith DFR claims are limited to instances where there is "intentionally misleading conduct." *Op. Br.* at 42. This too is unsupported. If bad faith DFR claims were so limited, then a line of cases have been wrongly decided. For example, *Spellacy v. Airline Pilots Ass'n, Int'l,* 156 F.3d 120, 126 (2d Cir. 1998), would have been wrongly decided because it explained that "[a] union acts in bad faith when it acts with an improper intent, purpose, or motive." Although *Spellacy*

addresses "misleading conduct," it does not do so to limit the scope of bad faith DFR claims in the manner urged by USAPA. Rather, it uses this language to indicate that bad faith "encompasses" misleading conduct. *Id.* Hence, *Spellacy* did *not* hold that bad faith DFR requires misleading conduct.

Finally, USAPA has no authority that "fraud, deceitful action or dishonest conduct" have a narrower meaning than "bad faith." To the contrary, dictionary definitions indicate that the meaning of this language encompasses and extends beyond the meaning of "bad faith." *See* BLACK'S LAW DICTIONARY.[11] According to the definitions in BLACK'S, bad faith is a component of dishonest conduct. The

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[11] The definitions from BLACK'S are as follows:

> ***fraud*** is "[a] knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment,"
>
> ***deceit*** is "[t]he act of intentionally giving a false impression,"
>
> ***dishonest act*** is defined by reference to "***fraudulent act***," which is defined as "[c]onduct involving bad faith, dishonesty, a lack of integrity, or moral turpitude."

Id.

dictionary meaning of "fraud, deceitful action or dishonest conduct," therefore, is "bad faith" and something more.

In sum, no authority required the district court to use "fraud, deceitful action or dishonest conduct" in its instruction. Rather, the district court had discretion to "formulate" its bad faith DFR instructions using language that in its judgment would best guide *this* jury in the context of *this* case. *See White*, 312 F.3d at 1012. The district court, therefore, had ample discretion to decline to use USAPA's formulation of a bad faith instruction.

(5) There was substantial evidence of illegitimate objectives and no convincing evidence of a legitimate objective.

Because USAPA's argument that bad faith requires evidence of "misleading conduct" is unsupported, its sole objection to sufficiency of evidence is based on an unsupported premise. Indeed, a line of cases recognizes that bad faith DFR breach can be based on lack of legitimate objectives, without evidence of misleading conduct. *E.g.*, *Air Wisconsin*, 909 F.2d at 217; *Bernard*, 873 F.2d at 217; *Barton Brands*, 529 F.2d at 797.

The relevant question, therefore, is whether there was substantial evidence for this jury to find that USAPA did not have a

legitimate objective. In answering this question, the Court "must disregard evidence favorable to" USAPA that the jury was "not required to believe." *Johnson*, 251 F.3d at 1227. USAPA articulated only one purportedly legitimate objective, "to break the logjam created by ALPA policy." *Op. Br.* at 36. The Court need not reach the issue of whether this is a legitimate objective unless the jury was required to accept this as USAPA's actual objective. The first question then is whether the jury was required to accept that this was, in fact, USAPA's actual objective.

The district court found, "[t]he evidence of a supposed impasse requiring sacrifice of the West Pilots to angry East Pilots … did not persuade the jury or the Court that an actual impasse existed." (1ER32:11-13.) Substantial evidence showed that USAPA intended to disregard the Nicolau Award long before there was any logjam or impasse. *See* Ex. 14 (4ER722) and Ex. 315 (5ER 876) (admissions that USAPA was created months before any impasse for this specific purpose). The jury, therefore, had substantial evidence that USAPA's articulated logjam / impasse motive was pretext. With such evidence, the jury was not required to accept USAPA's articulated objective.

In deciding whether the evidence was sufficient to support the jury's verdict, this Court must disregard evidence favorable to USAPA that the jury was not required to accept. This Court, therefore, must disregard USAPA's articulated objective. All that remains is evidence of objectives that the district court properly determined were illegitimate. This evidence is sufficicent to find that USAPA did not have a legitimate objective. Because USAPA offers no other challenge to the sufficiency of the evidence, this Court should affirm that substantial evidence supports the jury's liability verdict.

D. The scope and duration of the injunction are within the district court's discretion, given USAPA's egregious misconduct.

(1) Standard of review and analysis.

This Court "review[s] the scope of injunctive relief for an abuse of discretion." *Sharp v. Weston*, 233 F.3d 1166, 1173 (9th Cir. 2000); *see also Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1021-22 (9th Cir. 1985) ("requires a clear abuse of discretion for a modification or reversal"). "To succeed in [its] attack on the injunction, [USAPA] must show that there was no reasonable basis for the district court's decision." *Adray v. Adry-Mart, Inc.*, 76 F.3d 984, 990 (9th Cir. 1995).

It is well-recognized that a district court has the power to make its "injunctions effective by ancillary provisions, in aid of the injunction, which may require the defendant to do something." *Lester v. Parker*, 235 F.2d 787, 789-90 (9th Cir. 1956). A court can "frame its injunctive decrees in such manner as to prevent their frustration." *Id.* at 790. Indeed, "federal courts have the equitable power to enjoin otherwise lawful activity if they have jurisdiction over the general subject matter and if the injunction is necessary and appropriate in the public interest to correct or dissipate the evil effects of past unlawful conduct." *United States v. Holtzman*, 762 F.2d 720, 726 (9th Cir. 1985). "To ensure relief is effectual, otherwise permissible practices connected with the acts found to be illegal must sometimes be enjoined." *Garrison v. Baker Hughes Oilfield Operations, Inc.*, 287 F.3d 955, 961-62 (10th Cir. 2002) (citations and quotation marks omitted).

(2) The injunction enforces, not imposes, contract terms.

USAPA raises two challenges to the injunction. Neither challenge should persuade this Court that the district court abused its discretion. Absent abuse of discretion, this Court should affirm.

First, the injunction does not violate the federal policy against interference with freedom of contracting. *Contra. Op. Br.* at 58-59 (arguing otherwise). *See H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970). This policy prevents courts from *imposing* contract terms; it does not prevent them from *enforcing* existing contractual duties—even duties to make contracts. *See Tex Tan Welhausen Co. v. NLRB*, 434 F.2d 405, 407 (5th Cir. 1970) ("*Porter* rules only the situation where the Board imposes contract provisions upon the parties. By ordering the Companies to incorporate into a written contract provisions to which the parties previously agreed, the Board followed well-settled law."); *see also H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 525 (1941) (same principles). Under *Porter*, therefore, federal courts can order an RLA carrier or union to negotiate in good faith to implement terms they previously accepted. *Pan Am Corp. v. Delta Air Lines, Inc.*, 175 B.R. 438, 502 (S.D.N.Y. 1994) (holding that "[t]he parties to a 'binding preliminary commitment' are contractually obligated to negotiate in good faith toward a final agreement that incorporates the major terms to which they had previously agreed.").

USAPA was bound by the Transition Agreement and the Nicolau Arbitration when it succeeded ALPA as the bargaining representative on April 18, 2008. *See Ass'n of Flight Attendants, AFL-CIO v. USAir, Inc.*, 24 F.3d 1432, 1434 (C.A.D.C. 1994) (Existing CBA "will continue to govern the rates of pay, rules, and working conditions").[12] The injunction merely orders USAPA to comply with the obligations in those agreements to: (1) bargain in good faith to create a single CBA using the Nicolau Award; and (2) present that CBA, in good faith, for a membership ratification vote. This does not violate *Porter*.

Second, the scope and willfulness of USAPA's underlying misconduct supports mandating the negotiation of a single CBA. *Contra Op. Br.* at 59. Under settled law, courts may remedy the full scope of misconduct arising from concerted action. *See Restatement*

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[12] "[A] change in representation does not alter or cancel any existing agreement made in behalf of the employees by their previous representatives.'" *Id.* at 1438 (*quoting 1st Annual Rpt. NMB*, 23-24 (1935)). "[A]greements are between the employees and the carrier, and … the change of an employee representative does not automatically change the contents of an agreement.'" *Id.* (*quoting 42d Annual Rpt. NMB* 39 (1976)).

(Second) of Torts § 879 (1979).[13] The scope of injunctive remedy "turns on what is practical and equitable." *In re Baker & Drake, Inc.*, 35 F.3d 1348, 1352 (9th Cir. 1994). Evidence of particularly egregious conduct and intention to subvert the intent of the court justifies an "especially aggressive prophylactic injunction." *Creative Computing v. Getloaded.com LLC*, 386 F.3d 930, 937 (9th Cir. 2004).[14]

The district court found that "evidence shows not only USAPA's wrongful motives but also willingness to conceal those motives and to bring about its seniority objectives by subterfuge." (2ER51:22-55:15.) With such evidence, the district court has substantial justification to

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[13] The comment to § 879 explains as follows:

> a. One whose tortious conduct is otherwise one of the legal causes of an injurious result is not relieved from liability for the entire harm by the fact that the tortious act of another responsible person contributes to the result… .

Id. at § 879 comment a.

[14] The defendant in *Creative Computing* is not unlike USAPA:

> Getloaded's belligerent violation of the temporary restraining order and preliminary injunction during the litigation … justified an especially aggressive prophylactic injunction.

Id.

order affirmative conduct to prevent USAPA's "frustration" of the court's intentions. *Lester*, 235 F.2d at 790. Anything less would fail "to correct or dissipate the evil effects of past unlawful conduct." *Holtzman*, 762 F.2d at 726. The district court, therefore, had discretion to fashion the injunction as it did.

(3) A permanent injunction is properly permanent.

USAPA cites no authority for its proposition that a "permanent" injunction must have a built-in dissolution clause. *Op. Br.* at 62. If injunctions were required to have such clauses they would not be called "permanent." Permanent injunctions need not have such clauses because, under well-established authority, they are open to "modification or dissolution" upon a demonstration "that a significant change in facts or law warrants revision or dissolution of the injunction." *Sharp*, 233 F.3d at 1170.

> Inasmuch as an injunctive decree is drafted in light of what the court believes will be the future course of events, a court must continually be willing to redraft the order at the request of the party who obtained equitable relief in order to insure that the decree accomplishes its intended result.

11A Wright, Miller & Kane, *Fed. Prac. & Proc.* Civ. 2d § 2961 (2009). This Court, therefore, should reject this point of appeal.

E. The district court conducted a fair trial.

USAPA challenges the "fairness" of several district court rulings. On each such point, it either fails to adequately present an issue for review or its challenge fails on the merits. Moreover, USAPA never explains how it was prejudiced. If USAPA seeks reversal on the basis of judicial hostility or bias, it fails to properly raise those issues for review.

(1) USAPA did not properly appeal rulings on reception of evidence. Regardless, there was no abuse of discretion.

(a) *Standard of review and analysis.*

This Court "review[s] evidentiary rulings for an abuse of discretion." *U-Haul Intern., Inc. v. Lumbermens Mut. Cas. Co.*, 576 F.3d 1040, 1043 (9th Cir. 2009). This standard also applies to review of rulings on foundation. *United States v. Pang*, 362 F.3d 1187, 1191-92 (9th Cir. 2004). A trial court is reversed "only when the appellate court is convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances." *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000).

> As long as it appears from the record as a whole that the trial judge adequately weighed the probative value and prejudicial

> effect of proffered evidence before its admission, we conclude that the demands of Rule 403 have been met.

Boyd v. City and County of San Francisco, 576 F.3d 938, 943 (9th Cir. 2009) (internal quotation marks and citations omitted); *see also Trevino v. Gates*, 99 F.3d 911, 922 (9th Cir. 1996) ("The district court has considerable latitude….").

(b) *USAPA did not specifically and distinctly argue evidentiary error.*

"Parties must not … incorporate by reference briefs submitted to the district court … or refer this Court to such briefs for the arguments on the merits of the appeal." 9th Cir. R. 28-1(b). Hence, this Court "will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief." *Dream Games of Arizona, Inc. v. PC Onsite*, 561 F.3d 983, 995-96 (9th Cir. 2009). USAPA does not properly present the district court's rulings on reception of evidence for review. It merely refers to the record. *See Op. Br.* at 52-54. The rules require far more. *See* FRAP 28(a)(9). This Court, therefore, should disregard USAPA's contentions that the district court improperly admitted or excluded evidence.

(c) *A key piece of evidence, Exhibit 14, was properly admitted.*

West Pilots address the admission of Exhibit 14 (4ER722-723) because USAPA's contention, *Op. Br.* at 54, that the district court had no basis to admit this exhibit is so wrong. In fact, the court had ample basis to allow this exhibit into evidence. Doc. 386. (2ER320-321.) (SER32-35.)

"Authentication can … be accomplished through judicial admissions such as stipulations, pleadings, and production of items in response to subpoena or other discovery request." 31 Wright & Gold, *Fed. Prac. & Proc.* Evid. § 7105 (2009). In its trial court brief, USAPA identifies Exhibit 14 as a document that "summarizes a meeting between the author of the document, USAPA's former president, Stephen Bradford, and a prospective law firm." (2ER255:10-12.) That is all the West Pilots claimed Exhibit 14 was. (SER32:24-26.), This admission, therefore, established that foundation. Fed. R. Evid. 901(a).

It is well-established that "voluntary disclosure of the content of a privileged attorney communication constitutes waiver of the

privilege." *Weil v. Investment/Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 23-24 (9th Cir. 1981). "In determining whether the privilege should be deemed to be waived, the circumstances surrounding the disclosure are to be considered." *United States v. de la Jara*, 973 F.2d 746, 749 (9th Cir. 1992).

The district court found that Exhibit 14:

> was akin to other documents widely disseminated by … [USAPA] that discussed the same general attorney communications. There is nothing but speculation behind the idea that a wrongdoer obtained and published the document. Failure to adequately protect against further dissemination by addressees is a more likely cause of the document's circulation and ultimate publication.

(2ER321:8-13.) Because this is a well-considered application of privilege doctrine and USAPA offers no explanation otherwise, this Court should reject USAPA's challenge to admission of Exhibit 14.

(2) Class certification is not subject to review on this interlocutory appeal. Regardless, the district court complied with Rule 23.

This is a § 1292(a)(1) interlocutory appeal of an injunction. As such, the Court also has "jurisdiction to review the legal and factual decisions made by the district court that … are inextricably bound up with the injunction." *Bates v. United Parcel Service, Inc.*, 465 F.3d

1069, 1075-76 (9th Cir. 2006) (citations and quotation and alteration marks omitted); *see also Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 824 (9th Cir. 2002) (same). It does not have jurisdiction to review anything that falls outside this definition.

An issue is bound up with the injunction when it affects the "question of the injunction's propriety" or "the merits of this case." *EEOC v. Recruit U.S.A., Inc.*, 939 F.2d 746, 757 (9th Cir. 1991). In other words, an issue is bound up with an injunction where reversal on that issue would affect the validity or scope of the injunction. Class certification here does not meet this standard.

"[A]n injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—if such breadth is necessary to give prevailing parties the relief to which they are entitled." *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987). Injunctive relief often benefits persons other than named plaintiffs. *See Zepeda v. INS*, 753 F.2d 719, 728 (9th Cir. 1984) (recognizing, to illustrate this rule, that facilities must be desegregated for all to vindicate the right of one person to use desegregated facilities).

The right here is to have a fair opportunity to work under a CBA that uses the Nicolau Award. The same injunctive relief is needed to provide that opportunity for the six named plaintiffs as for all West Pilots. If this Court were to reverse class certification, therefore, the named plaintiffs would be entitled to the same injunctive relief suing in their individual capacities that they obtained as class representatives. Hence, the injunction would stand. Consequently, class certification is not bound up with the injunction. Based on that, it is not subject to review on this appeal.

Regardless, USAPA's challenge to class certification would fail on the merits if it were reviewed. USAPA argues only that the district court "fail[ed] to conduct the sort of rigorous analysis and detailed findings required by Rule 23." *Op. Br.* at 56.[15] USAPA offers no standard, however, to determine when analysis is sufficiently rigorous and findings are sufficiently detailed. The Ninth Circuit has

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[15] USAPA also complains that the district court "ignored" evidence of the adequacy of the representative plaintiffs. *Op. Br.* at 56. USAPA, however, fails to explain how the district court's two and a half page discussion of this issue "ignored" this evidence. (3ER474:24-477:7.)

found violation of this standard only where the order granting or denying certification was exceedingly terse—never longer than 140 words. *Loc. Jt. Exec. Bd. Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152 (9th Cir. 2001) (140 words); *Inda v. United Air Lines, Inc.*, 565 F.2d 554, 563 (9th Cir. 1977) (79 words); *Price v. Lucky Stores, Inc.*, 501 F.2d 1177, 1179 (9th Cir. 1974) (30 words).

In stark contrast to the orders in cases where there was violation of Rule 23's requirement of rigorous analysis and detailed findings, the district court's order here was twelve-pages long and provided a detailed analysis of every relevant Rule 23 factor. Doc. 248. (3ER467-478). If this Court reviews class certification at all, therefore, it should affirm that the district court complied with Rule 23.

(3) USAPA did not properly appeal judicial hostility.

USAPA accuses the district court of hostility as a basis for reversal. *See* 28 U.S.C. § 144. This Court dismisses a claim of judicial hostility if it "was not timely raised" below. *Weiss v. Sheet Metal Workers Loc. No. 544 Pension Trust*, 719 F.2d 302, 304 (9th Cir. 1983). Along similar lines, it requires "exceptional

circumstances" before it will "consider for the first time on appeal whether the trial judge should have disqualified himself under 28 U.S.C. § 455." *Id.* "[R]ecusal issues must be raised at the earliest possible time after the facts are discovered." *First Interstate Bank of Arizona, N.A. v. Murphy, Weir & Butler*, 210 F.3d 983, 989 (9th Cir. 2000). Because USAPA failed to raise judicial hostility below and failed to demonstrate exception circumstances, this Court should not review claims of judicial hostility or bias.

If this Court were to take the extraordinary step of allowing USAPA to raise judicial hostility for the first time on appeal, it must dismiss because USAPA does not identify any extra-judicial factors.

> [J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion. Almost invariably, they are proper grounds for appeal, not for recusal. Even hostile judicial remarks made during the course of a trial will not ordinarily support a challenge to the judge's partiality.

United States v. Sutcliffe, 505 F.3d 944, 958 (9th Cir. 2007) (citation, alteration and quotation marks omitted) (relying on *Liteky v. United States*, 510 U.S. 540, 555 (1994)). "As with § 144, the provisions of § 455(a) & (b)(1) require recusal only if the bias or prejudice stems from an extrajudicial source and not from conduct or rulings made

during the course of the proceeding." *Toth v. Trans World Airlines, Inc.*, 862 F.2d 1381, 1388 (9th Cir. 1988); *see also Clemens v. U.S. Dist. Court for Central Dist. of Cal.*, 428 F.3d 1175, 1178 (9th Cir. 2005) (same). This Court, therefore, should dismiss this point of appeal.

Conclusion

For the reasons set forth herein, this Court should dismiss all points raised in USAPA's appeal.

DATED: October 26th, 2009

Respectfully submitted,

/s/ Andrew S Jacob

Marty Harper
Kelly J. Flood
Andrew S. Jacob
Polisinelli Shughart, P.C.
Attorneys for Plaintiffs-Appellees

Certification of Compliance

Certification of compliance to Fed. R. App. 32 (a)(7)(c) and Circuit Rule 32-1 for case number CIV 09-16564

I certify that: **(check appropriate option(s))**

__X__1. Pursuant to FRAP 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is

◙ Proportionately spaced, has a typeface of 14 points or more and contains 13,986 words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

or is

□ Monospaced, as 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

_____2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

□ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

□ This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

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_____ 3. Briefs in Capital Cases.

□ This brief is being filed in a capital case pursuant to the type-volume limitations set forth in Circuit Rule 32-4 **and is**

□ Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 21,000 words; reply briefs must not exceed 9,800 words),

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_____ 4. Amicus Briefs.

□ Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionately

spaced, has a typeface of 14 points or more and contains 7,000 words or less,

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□ Monospaced, has 10.5 or fewer characters per inch and contains not more than either 7,000 words or 650 lines of text,

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□ **Not** subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed. R. App. P. 32(a)(1)(5).

/s/ Andrew S. Jacob

October 26, 2006 _____

Date Signature of Attorney

Proof of Service

I am over the age of eighteen years of age, not a party to this action, and employed by Polsinelli Shughart, P.C.

On October 26, 2009 I caused *Answering Brief of Plaintiffs-Appellees* to be electronically filed with the Clerk of the Ninth Circuit Court of Appeals. In addition, I properly served what was electronically filed by mail by causing a true and correct copy to be placed in a sealed envelope, with postage prepaid, deposited with the United States Postal Service on this day following ordinary business practices addressed to opposing counsel at the last address given, as follows:

Lee Seham
Stanley J. Silverstone
Lucas K. Middlebrook
Nicholas P. Granath
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
445 Hamilton Avenue, Suite 1204
White Plains, NY 10601

Nicholas J. Enoch,
LUBIN & ENOCH, PC
349 North 4th Avenue
Phoenix, AZ 85003-1505

I declare under penalty of perjury under the laws of Arizona that the foregoing is true and correct and this declaration was executed on October 26, 2009 at Phoenix, AZ.

/s/ *Andrew S. Jacob*

Appendix

13.1 EMPLOYEE CLAIM AGAINST UNION AND/OR EMPLOYER—LABOR MANAGEMENT RELATIONS ACT (LMRA) § 301 (29 U.S.C. § 185)

In order to prevail, the plaintiff must prove each of the following by a preponderance of the evidence:

1. that the plaintiff was discharged from employment by the employer;

2. that such discharge was without "just cause"; and

3. that the union breached its duty to fairly represent the plaintiff's interests under the collective bargaining agreement.

The plaintiff must prove all three of the above whether [he] [she] is suing the union, the employer, or both. In this case, the plaintiff is suing [[the union] [the employer] [both the union and the employer]].

If you find that the plaintiff has proved each of the elements on which the plaintiff has the burden of proof, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove any of these elements, your verdict should be for the defendant.

Under the law, an employer may not discharge an employee governed by a collective bargaining agreement, such as the one involved in this case, unless "just cause" exists for the employee's dismissal. The term "just cause" means a real cause or basis for dismissal as distinguished from an arbitrary whim or caprice; that is, some cause or ground that a reasonable employer, acting in good faith in similar circumstances, would regard as a good and sufficient basis for terminating the services of an employee.

A union has a duty under the law to represent fairly the interests of its members in protecting their rights under a collective bargaining agreement. However, an individual employee does not have an absolute right to require the employee's union to pursue a grievance against the employer. A union has considerable discretion in controlling the grievance and arbitration procedure. The question is not whether the employee is satisfied with the union representation or whether that representation was perfect.

Breach of the duty of fair representation occurs only where a union acting in bad faith or in an arbitrary or discriminatory manner fails to process a meritorious grievance. So long as the union acts in good faith, it may exercise its discretion in determining whether to pursue or process an employee's grievance against the employer. Even if an employee's grievance has merit, the union's mere negligence or its exercise of poor judgment does not constitute a breach of its duty of fair representation.

Comment

This jury instruction applies when an employee or former employee files a suit against either the union or employer. It also applies in a hybrid suit against the employer and union. A plaintiff may decide to sue one defendant and not the other, but must prove the same case whether the suit is against one defendant or both. *Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry*, 494 U.S. 558, 564 (1990) (explaining that most collective bargaining agreements accord finality to grievance procedures established by the agreement).

To support a breach of the duty of fair representation claim, the plaintiff must prove that the employer's action violated the terms of the collective bargaining agreement and that the union breached its duty to act honestly and in good faith and to avoid arbitrary conduct. *Id.* at 563; *see also Hines v. Anchor Motor Freight*, 424 U.S. 554, 564 (1976) (union is always subject to complete good faith and honesty of purpose in the exercise of its discretion); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

A union is not liable for merely negligent conduct. *See United States Steelworkers of Am. v. Rawson*, 495 U.S. 362, 372-73 (1990); *Slevira v. Western Sugar Co.*, 200 F.3d 1218, 1221 (9th Cir.2000). Breach of the duty of fair representation occurs only when a union's conduct is arbitrary, discriminatory, or in bad faith. *See id.* For example, "[a] union breaches its [duty of fair representation] if it ignores a meritorious grievance or processes it in a perfunctory manner." *Conkle v. Jeong*, 73 F.3d 909, 916 (9th Cir.1995) (citing *Vaca*, 386 U.S. at 191).

A union's actions are arbitrary "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be 'irrational.'" *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991). *See also Conkle*, 73 F.3d at 915-16 (holding that a union's decision is arbitrary if it lacks a rational basis); *Johnson v. United States Postal Serv.*, 756 F.2d 1461, 1465 (9th Cir.1985) (holding that reckless disregard may constitute arbitrary conduct); *Tenorio v. NLRB*, 680 F.2d 598, 601 (9th Cir.1982) (defining arbitrary as the "egregious disregard for the right of union members").

To establish that a union acted in "bad faith," a plaintiff must provide "substantial evidence of fraud, deceitful action, or dishonest conduct," *Humphrey v. Moore,* 375 U.S. 335, 348 (1964), or evidence that the union was motivated by personal animus toward the plaintiff. *See Conkle*, 73 F.3d at 916 (including personal animus as basis for finding of bad faith).