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December 4, 2009

VIA ECF

Ms. Molly Dwyer
Clerk of the Court
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Avenue
San Francisco, CA 94103-1526

Re: *Addington v. US Airline Pilots Association*
Case No.: 09-16564
Hearing Date: Dec. 8, 2009
Before: Tashima, Graber, Bybee

Dear Ms. Dwyer:

On December 2, plaintiffs filed additional argument under the guise of FRAP 28(j). USAPA provides the following response.

Plaintiffs' letter exemplifies their practice of plucking sentences out of context without regard to the facts or holding of a case. *Teamsters v. NLRB*, 825 F.2d 608 (1st Cir. 1987) addressed claim accrual – there was no discussion of ripeness. Moreover, the court's accrual analysis confirms USAPA's ripeness position that "knowledge of a party's predisposition to commit an unfair labor practice or suspicion that, when the moment is opportune, the knife thrust will follow, is not enough to galvanize [the claim]." Rather, the "statute begins to run only when the impermissible act or omission … actually takes place." *Id.* at 615-616.

In *Smith v. Hussmann*, 619 F.2d 1229 (8th Cir. 1980), an arbitration awarded promotions to skilled workers over senior workers. The union initiated a supplementary hearing for the purpose of modifying that award in favor of senior workers. *Id.* at 1234. Notably, the court rejected the argument that the union's seniority-based efforts could be deemed an

act of bad faith. *Id.* at 1239. Rather, the court found that the union acted arbitrarily by denying the plaintiffs the opportunity to participate in that process. *Id.* at 1241.

In the present case, there was no arbitrary exclusion. To the contrary, plaintiffs stipulated that nothing prevented West Pilots from becoming members in good standing and therefore participating in USAPA's political processes. (6ER1251). Ironically, West Pilots engaged in a coordinated scheme of self-exclusion from the union, evidence of which the district court precluded. (2ER325:7-15) (Tr. 3/31/09).

Plaintiffs cite *Lindsay v. APFA*, 581 F.3d 47 (2d Cir. 2009) arguing that bad faith may be defined expansively. However, the Second Circuit affirmed the district court's decision, which held that plaintiffs offered "no evidence that [the union's] decision to enter the LOA was 'fraudulent, deceitful, or dishonest,' and thus no finding of bad faith was warranted." *Marcoux v. American Airlines, Inc.*, 2008 U.S. Dist. LEXIS 55751, at *75 (E.D.N.Y. 2008). This only provides further support for USAPA's lack of bad faith evidence argument.

Respectfully Submitted,

s/ Lucas Middlebrook, Esq.
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CERTIFICATE OF COMPLIANCE.

I certify that:

Pursuant to Fed. R. App. P. 28(j), the attached response to plaintiffs' Fed. R. App. P. 28(j) letter contains 349 words

Date: December 4, 2009

s/ Lucas K. Middlebrook, Esq.
Lucas K. Middlebrook, Esq.

CERTIFICATE OF SERVICE

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US Court Of Appeals Docket No.: **09-16564**

I hereby certify that I caused the foregoing document, its attachments and supporting documents, to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on: December 4, 2009. I certify that all participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

I further certify that one true and correct electronic copy was sent to counsel for plaintiffs-appellees at the following electronic mail addresses:

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Date: December 4, 2009

s/ Lucas K. Middlebrook, Esq.
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