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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI, Plaintiffs, vs. US AIRLINE PILOTS ASSOCIATION, US AIRWAYS, INC., Defendants,	Case No. 2:08-cv-1633-PHX-NVW (Consolidated) **DEFENDANT USAPA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS SEVENTH AMENDMENT RIGHT TO A TRIAL BY JURY**
Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI, Plaintiffs, vs. Steven H. BRADFORD, Paul J. DIORIO, Robert., A. FREAR, Mark. W. KING, Douglas L. MOWERY, and John A. STEPHAN, Defendants.	Case No. 2:08-cv-1728-PHX-NVW

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I. SUMMARY

Plaintiffs filed their original complaint on September 4, 2008 (Dkt. No. 1), and one day later filed their jury demand "for all issues triable of right by a jury." (Dkt. No. 5). Defendant US Airline Pilots Association ("USAPA") filed its Answer to Plaintiffs' First Amended Complaint on December 1, 2008, which pursuant to Fed. R. Civ. P. 38(b) contained a jury demand "for all issues triable of right by a jury." (Dkt. No. 88 at 10:20). Plaintiffs and Defendant USAPA both demanded trial by jury.

On December 1, 2008, Defendant USAPA filed a Motion for Continuance seeking to extend the proposed trial date in this matter. (Dkt. No. 91). This motion made no reference to either party's right to a jury trial. Nevertheless, in their response to USAPA's Motion for Continuance, Plaintiffs inexplicably raised the issue of a jury trial by arguing that "although both parties have requested a jury trial, neither has a Seventh Amendment right to have a jury decide whether to order implementation of the Nicolau seniority list." (Dkt. No. 102 at 8:21).

Now, Plaintiffs attempt to argue that the relief they seek is purely equitable because the damages alleged in their complaint are merely "incidental or intertwined with the injunctive relief" thereby denying USAPA its Seventh Amendment right to a trial by jury. (Dkt. No. 120 at 9:8). First, this argument ignores the two-part Seventh Amendment analysis mandated by the Supreme Court. Second, this argument is belied by Plaintiffs' own filings, which all clearly demonstrate that the legal (monetary) remedies sought by Plaintiffs are not merely "incidental to or intertwined with injunctive relief" as they now claim. Rather, the equitable relief they seek is incidental to the monetary remedies that they continue to pursue.

As set forth herein, legal issues exist in this case for which USAPA cannot be denied a jury trial simply because Plaintiffs now characterize those issues as merely incidental to, or

insignificant in comparison to the equitable issues. Because "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence," this attempt by Plaintiffs to deny USAPA its Constitutional right to a trial by jury must be "scrutinized with the utmost care." *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry ("Terry")*, 494 U.S. 558, 564 (1990) (*quoting Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)).

II. ARGUMENT

A. The Right to Trial by Jury Exists in This Action

The Supreme Court, in its *Terry* decision, resolved a split in authority among the circuit courts, and determined that a right to trial by jury existed in the context of a duty of fair representation claim. The Court began its analysis by noting that the "Seventh Amendment provides that 'in Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.'" *Id*. at 565. The Court explained that "Suits at common law" as set forth in the Seventh Amendment, "refers to suits in which legal rights are to be ascertained and determined in contradistinction to those where equitable rights *alone* are recognized, and equitable remedies are administered." *Id*. (emphasis supplied).

The *Terry* Court then explained the two-part test to ascertain whether a claim qualifies as legal or equitable and therefore whether a party is entitled to trial by jury.

> To determine whether a particular action will resolve legal rights, we examine both the nature of the issues involved and the remedy sought. First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature. The second inquiry is the more important in our analysis.

Id. (internal citations omitted).

1. The Nature of Issues Involved

The *Terry* Court noted that since an action for breach of the duty of fair representation "was unknown in 18th-century England" that a court deciding this issue "must therefore look for an analogous cause of action that existed in the 18th Century to determine whether the nature of [the] duty of fair representation suit is legal or equitable." *Id*. at 566.[1] The *Terry* Court was divided over the closest historical analog to the plaintiffs' hybrid breach of collective bargaining agreement and duty of fair representation claim. *Brownlee v. Yellow Freight System, Inc*., 921 F.2d 745, 747 (8th Cir. 1990) (noting that the *Terry* Court "found a close fit between a beneficiary's equitable suit against a faithless trustee and the fair-representation part of plaintiffs' claims. … [but that the Court] also concluded that the closest historical analog to the [breach of CBA] aspect of plaintiffs' claim was a breach of contract claim – an action at law"). Other Courts, following *Terry*, have determined that a suit claiming a breach of the collective bargaining agreement is more closely analogous to a breach of contract action. *Senn v. United Dominion Indus., Inc*., 951 F.2d 806, 813 (a claim "that the employer breached a Collective Bargaining Agreement is comparable to a breach of contract claim – a legal issue."); *Stewart v. KHD Deutz of America Corp*., 75 F.3d 1522 (11th Cir. 1996).

In the present action, the basis of Plaintiffs' claim against USAPA, as repeatedly alleged in their First Amended Complaint ("FAC" Dkt. No. 86), is that it was USAPA's

[1] The Ninth Circuit has recognized that it is proper "in the first part of the Seventh Amendment analysis . . . [to] consider not only whether an action is analogous to a common law claim known in the eighteenth century, but also to one known today." *Spinelli v. Gaughan*, 12 F.3d 853, 856 (9th Cir. 1993).

alleged breach of its duty of fair representation that caused US Airways to breach the former America West pilot collective bargaining agreement – and it was this *breach of contract* that allegedly caused "Plaintiffs and other West Pilots" injuries. (FAC ¶ 119).

- "USAPA has . . . [c]aused Defendant US Airways to *breach* collective bargaining duties owed to and established for the benefit of West Pilots." (FAC ¶ 76(b)) (emphasis supplied).
- "USAPA has . . . [p]romoted, encouraged and aided East Pilots to *breach their contract duties* owed to and established for the benefit of West Pilots." (FAC ¶ 76(d)) (emphasis supplied).
- "USAPA has caused and contributed to Defendant US Airways being in *breach* of the West CBA as modified by the Transition Agreement." (FAC ¶ 77) (emphasis supplied).
- "Because USAPA failed to give due consideration to West Pilot interests, it has a seniority policy that caused Defendant US Airways to *breach* its collective bargaining agreement with West Pilots." (FAC ¶ 111) (emphasis supplied).
- "Because USAPA is causing Defendant US Airways to *breach* its collective bargaining agreement with West Pilots, it has caused Plaintiffs and other West Pilots the injuries alleged in Counts One and Two." (FAC ¶ 112) (emphasis supplied).
- "By acting arbitrarily, for improper purpose and/or in bad faith, USAPA caused Defendant US Airways to *breach* its collective bargaining agreement with West Pilots." (FAC ¶ 118) (emphasis supplied).
- "Because USAPA caused Defendant US Airways to *breach* its collective bargaining agreement with West Pilots, it caused Plaintiffs and other West Pilots the injuries alleged in Counts One and Two." (FAC ¶ 119) (emphasis supplied).

Every instance of harm alleged by Plaintiffs, including the newly-introduced claim for payment of "fees and dues paid to USAPA by [the] class" (Dkt. No. 120 at 2:23), occurred as a result of the alleged breach of the CBA. Therefore, without the predicate CBA breach – even when triggered by an alleged DFR breach – there are no damages. Therefore, this action is closely analogous to a breach of contract claim, which has consistently been determined to be an action at law that, upon demand, requires a jury's participation. *Terry*,

494 U.S. at 570 (identifying a breach of contract claim as "a legal issue."); *Brownlee*, 921 F.2d at 748 (recognizing breach of contract claim as "an action at law."). This Seventh Amendment analysis is not altered because US Airways was dismissed from this action. "The Seventh Amendment analysis should not turn on the ability of the plaintiff to maintain his suit against both defendants, when the issues in the suit remain the same even when he can sue only the union. Consideration of the two issues in this hybrid action is therefore warranted." *Terry*, 494 U.S. at 570, n.6.

2. The Nature of Relief Sought

The second part of the Seventh Amendment analysis focuses on the nature of the remedies sought by plaintiffs. The *Terry* Court explained that "[g]enerally, an action for money damages was 'the traditional form of relief offered in the courts of law.'" *Id*. at 570 (*citing Curtis v. Loether*, 415 U.S. 189, 196 (1974)); *see also Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 661 (6th Cir. 1996) ("It is accepted throughout this country that a monetary award, generally, is a form of legal relief"); *Smith v. Barton*, 914 F.2d 1330, 1337 (9th Cir. 1990) ("Money damages are the traditional form of relief offered in the courts of law."). While the *Terry* Court recognized that not all "monetary relief must necessarily be legal relief," it went on to explain that certain attributes "must be present before we will find an exception to the general rule and characterize damages as equitable." *Id*.

a. Restitutionary Damages

First, the Court explained that it had "characterized damages as equitable where they are restitutionary, such as in actions for disgorgement of improper profits." *Id*. (*citing Tull*, 481 U.S. at 424). However, the Court recognized that the relief sought against the Union by plaintiffs in *Terry* was not restitutionary in nature because it was "not money wrongfully held

by the Union, but wages and benefits [that plaintiffs] would have received from [the Company] had the Union processed the employees' grievances properly." *Id*. at 571. Analyzing this reasoning, the Fourth Circuit explained why such relief is not equitable, but more akin to compensatory legal damages:

> The [*Terry*] Court then indicated that, because the backpay being sought was *against the union* and not *against the company*, the backpay could not be characterized as restitutionary. The underlying reasoning is that while the union caused the damages incurred by the union members, the harm is measured by an outside factor, in this case the salary of the employees. The remedy is not backpay *per se*, but rather damages measured by the economic loss caused, which is an amount equal to pay lost. …
>
> [T]his amount is not backpay as such but rather compensatory damages measured by the amount of pay lost. . .

Pandazides v. Virginia Bd. of Educ., 13 F.3d 823, 832 (4th Cir. 1994) (italics in original).

i. The Lost Wages and Related Economic Damages Originally Claimed by Plaintiffs Are Not Restitutionary

The allegations in Plaintiffs' FAC make it clear that the monetary relief they seek against USAPA for lost wages and related economic harm, similar to the relief sought against the Union in *Terry*, is focused on lost wages or benefits that are not wrongfully held by USAPA, but rather would have been received from US Airways.

- "Material questions of law and fact arising from this action that are common to the Plaintiffs and other members of the putative West Pilot Class include . . . [w]hether Defendant USAPA owes *money damages* to all West Pilots who have *lost wages and benefits* as a consequence of being furloughed or demoted or missing promotions after April 18, 2008." (FAC ¶ 25(f)) (emphasis supplied).

- "USAPA has caused and contributed to Defendant US Airways being in breach of the West CBA as modified by the Transition Agreement. … As a consequence of Defendant US Airways' breach of the West CBA as modified by the Transition Agreement, one or more Plaintiffs and other similarly situated West Pilots have lost promotions and have lost other improvements in wages, benefits and working conditions." (FAC ¶¶ 77, 79).

Plaintiffs' allegations demonstrate that these compensatory damages they seek from USAPA are not "restitutionary" as described in *Terry*, and on this basis, cannot be characterized as "equitable" 494 U.S. at 570.

That Plaintiffs continue to seek these compensatory damages from USAPA is evident from their recent filings. (Dkt. No. 142 at 7:4) (confirming "[t]he fact that Plaintiffs [continue to] seek money damages."). Additionally, as part of the class-wide remedies now sought, Plaintiffs requested that the Court "Order that USAPA take specific affirmative steps to correct *injuries* caused by [the] violation [of the duty of fair representation]." (Dkt. No. 120 at 2:16) (emphasis supplied). It is only reasonable to conclude that the "injuries" that Plaintiffs seek to have "corrected" on behalf of the proposed class are the same damages that were pled in their FAC (and referenced herein) and that have been shown to be legal in nature.[2] Accordingly, Plaintiffs continue to seek a legal remedy available at common law – both on behalf of named Plaintiffs and as part of their proposed class-wide remedies.

ii. <u>The Dues Related Damages Claimed on Behalf of the Proposed Class Constitute a Legal Remedy</u>

Plaintiffs have thrown another wrench into their argument that there is no right to a jury trial in this matter by claiming a new category of damages in their motion for class certification relating to "restitution of fees and dues paid to USAPA" by the proposed West Pilot Class. (Dkt. No. 120 at 2:23). Plaintiffs have attempted to dress these damages up as restitutionary. However, the Supreme Court has cautioned that, "not all relief falling under the rubric of restitution is available in equity." *Great-West Life & Annuity Insurance Co. v.*

[2] In their FAC, Plaintiffs confirm that these "injuries" are legal remedies by stating that the "injuries that have accrued to date to Plaintiffs can be remedied with money damages." (FAC ¶ 120).

Knudson, 534 U.S. 204, 212 (2002). Rather, "restitution is a legal remedy when ordered in a case at law and an equitable remedy when ordered in an equity case, and whether it is legal or equitable depends on the basis for the plaintiff's claim and the nature of the underlying remedies." *Id*. at 213 (citations omitted).

> *In cases in which the plaintiff could not* assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant has received from him, the plaintiff had a right to restitution *at law* through an action derived from the common law writ of assumpsit. In such cases, the plaintiff's claim was considered legal because he sought to obtain a judgment imposing merely personal liability upon the defendant to pay a sum of money.

Id. (citations omitted) (italics in original). Plaintiffs' self-styled restitutionary request for payment of fees and dues is at best a claim for restitution at law. The claim does not assert title or right to possession of dues and fees paid to USAPA, but rather seeks a judgment imposing liability upon USAPA to pay a sum of money. Accordingly, it is a legal claim distinct from the equitable relief sought.

In this Court's January 15th Order, granting an extension in the class action briefing schedule, the Court concluded that "[a]s the Court understands the West Pilots' Motion for Class Certification, certification is not sought on damages claims relating to the plaintiffs' lost wages and other economic harm." (Dkt. No. 155 at 2:9).[3] However, this does not change the analysis herein because: 1) individualized monetary relief for the alleged dues-related damages stemming from Plaintiffs' original breach of CBA theory are accruing at the rate of thousands of dollars per month; and 2) there is no indication of an abandonment of the original wage-based damage claim sought by the named Plaintiffs. The case law is clear that

[3] If the Court has misperceived the Plaintiffs' intent, it is crucial that the Plaintiffs correct any such misperception forthwith.

where there is a joinder of legal and equitable claims – as there is here – and where there are common issues of fact, the normal practice is to first conduct a jury trial. The jury's verdict will conclusively settle these common issues, and thereafter, the issues unique to the equitable claim will be left to be decided by the bench.[4]

b. Monetary Awards Incidental to or Intertwined with Injunctive Relief

The second exception noted by the *Terry* Court to the general rule that money damages are legal remedies was that "a monetary award incidental to or intertwined with injunctive relief *may* be equitable." *Id*. at 571 (emphasis supplied).[5] It is this exception upon which Plaintiffs seemingly place heavy reliance in their argument that there is no right to a jury trial in this matter.[6] However, it would appear that Plaintiffs improperly attempt to carve out this exception in isolation from the entire Seventh Amendment inquiry. *See* 494 U.S. at 573 (finding right to jury trial after "[c]onsidering both parts of the Seventh Amendment inquiry").

iii. The Equitable Relief Sought by Plaintiffs is Incidental to the Separate Money Damages That They Claim

Plaintiffs' request for damages in this action, including their request for class-wide dues-related damages, is not incidental to the equitable relief that they seek – to the contrary – it is the inverse that exists here. This is evident from the remedies sought in their own pleadings, where the equitable relief they seek is incidental to the separate legal damages that they claim:

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[4] *See* Discussion herein at pp. 11-12.

[5] While recognizing this exception, the *Terry* Court did not have occasion to expand upon its application because plaintiffs in that case, at the time of the Court's decision, were seeking only compensatory damages. 494 U.S. at 572.

[6] *See* Plaintiffs' Opposition to USAPA's Motion for Continuance (Dkt. No. 102 at 9:7).

- Plaintiffs seek a determination as to whether "Defendant USAPA owes money damages to all West Pilots who have lost wages or benefits as a consequence of being furloughed or demoted or missing promotions after April 18, 2008" (FAC ¶ 25(f)).

- "The injuries that have accrued to date to Plaintiffs can be remedied with money damages" (FAC ¶ 120).

- "Plaintiffs, therefore, are entitled to injunctive relief *in addition to* money damages." (FAC ¶ 123) (emphasis added).[7]

- "Plaintiffs seek an "Order directing restitution of fees and dues paid to USAPA by class" (Dkt. No. 120 at 2:23).

In addition to this monetary relief sought to remedy past harms allegedly occasioned by a breach of the CBA that resulted in non-implementation of the Nicolau list, Plaintiffs also seek an injunction, aimed at negotiation and implementation that would prevent these alleged wrongs from occurring in the future. Therefore, this is not a situation where damages are merely secondary to the injunctive relief sought. Rather, just as Plaintiffs have pled, the injunctive relief requested is actually incidental to the damages sought – and under these circumstances, the right to a jury trial remains.[8]

In *Wooddell v. Int'l Bhd. of Elec. Workers, Local 71*, 502 U.S. 93 (1991), less than two years after its *Terry* decision, the Supreme Court was called upon again to determine whether an individual had a right to a jury trial in an action that alleged, among other things, breach

[7] This is also not a situation where Plaintiffs have decided to alter the remedy they were originally seeking to avoid a jury trial. No attempt has been made to amend their Complaint to remove the request for separate monetary relief. Additionally, Plaintiffs have now, without seeking leave of this Court to amend their complaint, added yet another separate category of monetary damages in their motion for class certification relating to the payment of union dues. (Dkt. 120 at 2:23).

[8] That the injunctive relief in this case is actually incidental to the damages sought is further supported by comparing the remedy that was being sought by Plaintiffs in the recently dismissed duplicative *Bradford* case – where injunctive relief was clearly at the forefront of the action. (*See* 08-cv-1728, Dkt. No. 13 ¶ 88).

of the duty of fair representation. Similar to this action, the petitioner's complaint sought injunctive relief as well as money damages for lost wages and benefits. 502 U.S. at 95. Noting that its decision in *Terry* controlled the case, the Court required a jury trial after it agreed with petitioner's argument "that, although he seeks injunctive relief as well as damages, the injunctive relief is incidental to the damages, and not vice versa . . ." *Id*. at 97; *see also Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735 (D.C. Cir. 1995) (holding, in action stating both legal and equitable claims, that plaintiff's "prayer for back pay is a request for legal money damages and not equitable relief. … [plaintiff] was therefore entitled to a jury trial on his claim").

iv. The Right to Trial by Jury Cannot be Abridged by Characterizing the Legal Claim as Incidental to the Equitable Relief Sought

The entire Seventh Amendment analysis set forth herein demonstrates that there are legal issues that exist in this case. Given that these legal issues exist, Supreme Court precedent is clear that it would be improper to deny USAPA the right to have a jury decide those issues based on nothing more than a last-ditch attempt by Plaintiffs to characterize the legal issues in this matter as only incidental to or intertwined with the equitable issues.[9]

A line of Supreme Court decisions spanning approximately ten years, demonstrate that more issues in mixed law and equity cases, such as this one, should be tried to a jury.[10]

[9] It is also perplexing to consider that when Plaintiffs filed their complaint they must have believed, as evident by their jury demand, that they were entitled to a jury trial. Despite not removing their request for damages and adding an additional category of damages as part of the proposed class remedy, Plaintiffs now apparently believe they are not entitled to a trial by jury.

[10] *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Ross v. Bernhard*, 396 U.S. 531 (1970).

The Sixth Circuit has explained the result that was produced from this line of Supreme Court cases.

> Where legal and equitable claims are joined in the same complaint, and where there are common issues of fact, the normal practice is to try both claims to a jury. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 3 L. Ed. 2d 988, 79 S. Ct. 948 (1959); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479, 8 L. Ed. 2d 44, 82 S. Ct. 894 (1962); *Ross*, 396 U.S. at 537-38. In this way, the jury's verdict will conclusively settle these common issues, and only issues peculiar to the equitable claim will be left to be decided by the judge. In the usual case, the parties to the legal and equitable claims will be identical. The *Ross* line of cases requires that the legal claim be tried first, to the jury.

Brownlee, 921 F.2d at 749. The Supreme Court has subsequently reaffirmed this principle:

> If a 'legal claim is joined with an equitable claim, the right to a jury trial on the legal claim, including all issues common to both claims, remains intact. The right cannot be abridged by characterizing the legal claim as "incidental" to the equitable relief sought.'

Tull v. United States, 481 U.S. 412, 425 (1987) (*quoting Curtis v. Loether*, 415 U.S. 189, 196 n.11 (1974)); *see also Leannah v. Alliant Energy Corp.*, 2008 U.S. Dist. LEXIS 92353 at *5 (E.D. Wis. Oct. 28, 2008) ("even if the monetary damages are incidental to the equitable relief sought, if the court determines those monetary damages qualify as legal relief, then the court is obliged to grant plaintiffs' demand for a jury trial on all issues of fact pertinent to that claim."). The same reasoning must be applied to this case so as not to abridge USAPA's Seventh Amendment right to its properly demanded jury trial.

B. The *Ramey* Decision Does Not Support Denial of a Trial by Jury in This Case

Plaintiffs have relied upon select quotations from *Ramey v. District 141, Int'l Ass'n of Machinists & Aerospace Workers*, 473 F. Supp. 2d 365 (E.D.N.Y. 2007), in an attempt to analogize that case to the present situation to support their new argument against a jury trial in this matter. (Dkt. No. 102 at 9:11-10:16). However, the procedural history of the *Ramey*

case and the factual and legal landscape that evolved during the course of eight years of litigation, make it unique and therefore not a model by which the issue of the right to a jury trial can be decided in this matter.

1. The Damages at Issue in *Ramey* are Distinguishable

It is clear from the following extended quotation from the *Ramey* decision, that the damages at issue in that case are distinguishable from those presently claimed by Plaintiffs.

> It may be tempting to view the damages element as primary in this case because of the way the case evolved. Plaintiffs largely declined the result of the Court's grant of injunctive relief when defendant was able to achieve it, and we have since been occupied with determining whether and under what theories plaintiffs may recover damages. However, it is clear both from the language of the complaint and the parties' conduct prior to the issuance of the injunction that injunctive relief was plaintiffs' primary goal in this action. It was commenced in 1999, and the layoffs and furloughs that plaintiffs claim support the award of damages presently at issue simply were not at issue then. All that mattered, or at least what mattered most to plaintiffs, was restoration of their seniority status. Mr. Nelson's [plaintiffs' counsel] argument, essentially that the changing factual landscape required plaintiffs to modify the focus of the relief sought, particularly because the majority of plaintiffs are no longer employed by US Airways and therefore did not benefit from the injunctive relief awarded, cannot convert this action as it was originally brought from one seeking equitable relief, with incidental damages, to an action at law requiring a jury trial on the remaining issues.

Ramey, 473 F. Supp. 2d at 373. As the *Ramey* court noted, when plaintiffs in that matter originally brought their action, the layoffs and furloughs that supported an award of damages had not occurred and were not an issue. Given the changing factual landscape, the injunctive relief relating to seniority restoration granted in *Ramey* did not benefit all of the plaintiffs, and therefore money damages were sought in order to make the injunctive relief whole. That is not the case here.

Unlike *Ramey*, Plaintiffs themselves recognize that legal issues exist in this matter as to whether "USAPA owes money damages to all West Pilots who have lost wages or benefits

as a consequence of being furloughed or demoted or missing promotions after April 18, 2008." (FAC ¶ 25(f)). Additionally, "US Airways . . . [furloughed] one or more Plaintiffs" on October 1 and November 1, 2008, and this was pled in Plaintiffs' FAC. (FAC ¶¶ 94-95). Therefore, unlike *Ramey*, the alleged injuries that Plaintiffs claim to support an award of damages in this case have been sought by them from day one and continue to be pursued. The equitable relief they seek was always "in addition" to those damages. (FAC ¶¶ 120, 123) ("injuries that have accrued to date to Plaintiffs can be remedied with money damages . . . Plaintiffs, therefore, are entitled to injunctive relief in addition to money damages."). Plaintiffs have brought an action at law, which requires a jury trial.

2. The Legal Framework Existent in *Ramey* is Distinguishable

From a legal standpoint, the Eastern District of New York in *Ramey*, was not confronted, as this Court is, with the question as to whether to deny a party the right to a jury when common questions of fact exist with respect to the legal and equitable issues. When the Eastern District of New York made its decision in the *Ramey* case regarding whether or not a jury was to hear the issue of damages, the common fact issue of liability had already been heard and decided upon by a jury.

> I should note that although this case was bifurcated for trial and a jury addressed the question of liability, the issue of whether the claims in the case required a jury trial was not addressed prior to the post-trial submissions on damages. The parties simply assumed without discussion that the initial phase of the bifurcated case would be tried to a jury. The Court's determination of the sequence of proceedings therefore does not raise a question of estoppel as in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959), and its progeny, and neither of the parties have advanced such an argument.

473 F. Supp. 2d at 373.

As set forth herein, *Beacon Theatres* and "its progeny" stand for the principle that where legal and equitable claims are joined in the same complaint, and where there are common issues of fact, the normal practice is to try both claims to a jury.[11] Given this Supreme Court directive, the parties in *Ramey* "simply assumed without discussion that the initial phase of the bifurcated case would be tried to a jury." *Id*. Therefore, unlike in *Ramey* where, consistent with Supreme Court precedent, a jury had already heard the common issues of fact on the legal claim when the court made its decision to deny a jury on damages, Plaintiffs are asking this Court to abridge USAPA's Seventh Amendment right altogether – an outcome much more severe than what was presented in *Ramey*. *See Beacon*, 359 U.S. at 511 ("only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims").

C. Plaintiffs' Request for Damages as Part of Their Proposed Rule 23(b)(2) Mandatory Class Raises Additional Seventh Amendment Issues That Require Close Scrutiny

Plaintiffs have brought a motion to certify a Rule 23(b)(2) mandatory injunction class, but at the same time continue to seek the individualized legal damages claimed in their FAC as well as a new category relating to the payment of union dues. (Dkt. No. 120). This raises issues that require close scrutiny with respect to the proposed class members' Seventh Amendment rights.

Rule 23(b) can be divided into two general categories of class actions – mandatory classes and opt out classes. "Rule 23(b)(1) and (2) are referred to as 'mandatory' classes due to the fact that they do not require that a court provide individual members of the class with notice and the opportunity to 'opt out' of the class action." *Coleman v. General Motors*

[11] *See* infra, page 12

Acceptance Corp., 296 F.3d 443, 447 (6th Cir. 2002). On the other hand, Rule 23(b)(3) class actions are "referred to as an 'opt out' class due to the special requirements set forth in Rule 23(c)(2) that all potential members of the class be provided reasonable notice and the opportunity to decline participation in the action. *Id*. at 448 (*citing* Fed. R. Civ. P. 23(c)(2)).

> [T]he defining characteristic of the "mandatory classes" is the homogeneity of the interests of the member of the class; the more individualized determinations come into play, the more divergent the interests of the members of the class become. The (b)(3) class, we said, was created for members with divergent interests, and provides the protections of notice and the opportunity to opt out. Further, **class treatment of the claims for money damages implicates the Seventh Amendment and due process rights of individual class members**. Because of these concerns, close scrutiny is necessary if money damages are to be included in any mandatory class in order to protect the individual interests at stake and ensure that the underlying assumption of homogeneity is not undermined.

Reeb v. Ohio Department of Rehabilitation & Correction, 435 F.3d 639, 649-50 (6th Cir. 2006) (citations omitted) (emphasis supplied). The "Supreme Court has repeatedly expressed concern over the constitutionality of certifying a mandatory class that includes claims for money damages." *Coleman*, 296 F.3d at 447 (*citing Ortiz v. Fibreboard Corp*., 527 U.S. 815, 846 (1999) (noting that certification of a mandatory class that includes money damages potentially compromises the Seventh Amendment and due process rights of individual claimants)); *Molski v. Gleich*, 318 F.3d 937, 948 (9th Cir. 2003) (recognizing same).

D. Once it is Determined That a Right to Trial by Jury Exists, Plaintiffs Cannot Unilaterally Withdraw Their Jury Demand

"Once a demand for jury trial has been properly made . . . it 'may not be withdrawn without consent of the parties.'" *Solis v. County of Los Angeles*, 514 F.3d 946, 954 (9th Cir. 2008) (*citing* Fed. R. Civ. P. 38(d)). Federal Rule of Civil Procedure 39(a) "sets forth the

manner in which this consent may be granted." *Id*. (*citing Reid Bros. Logging Co. v. Ketchikan Pulp Co*., 699 F.2d 1292, 1304 n.20 (9th Cir. 1983)). "It requires consent [to withdraw] to be made 'by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record." *Id*. (*citing* Fed. R. Civ. P. 39(a)(1)). Therefore, if this Court determines that there is a right to a trial by jury, Plaintiffs are foreclosed from arguing, in any manner, that they can unilaterally withdraw their demand for a jury without USAPA's consent.

III. CONCLUSION

Based on the pleadings, evidence, arguments, record, and any argument, live testimony, or evidence to be presented in the hearing, USAPA respectfully submits that it has a right to a jury trial on all issues triable of right by a jury, and respectfully requests that its Rule 38(b) demand for same be upheld.

Respectfully Submitted,

Dated: January 16, 2009 By:

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CERTIFICATE OF SERVICE

This is to certify that on the date indicated herein below a true and accurate copy of the foregoing pleading, *to wit*,

- Defendant USAPA's Memorandum of Points & Authorities in Support of its Seventh Amendment Right to a Trial by Jury;
- Certificate of Service

were electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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And further that paper hard copies were provided to The Honorable Neil V. Wake, District Court Judge, 401 W. Washington Street, SPC 52, Phoenix, AZ 85003.

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