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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 NOTICE, MOTION, AND MEMORANDUM IN SUPPORT OF ITS RULE 50 MOTION AND RENEWED MOTION FOR LEAVE TO FILE RULE 56 MOTION, BOTH ON DEFENSE OF LACK OF JURISDICTION FOR LACK OF RIPENESS**
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

TO : Plaintiffs, all parties, and their attorneys of record.

NOTICE.

PLEASE TAKE NOTICE that Defendant US Airline Pilots Association ("USAPA") will move this Court, to be heard in trial now in progress, for an order:

1) Under Rule 50 of the Federal Rules of Civil Procedure, granting judgment as a matter of law in a jury trial in favor of Defendant on its defense of lack of jurisdiction for lack of ripeness, and, in the alternative;

2) Under Rule 56, granting Defendant's renewed motion for leave to file summary judgment (Doc. # 215), and its motion for summary judgment (made in the alternative to its motion to dismiss, Doc. # 35), on the defense of lack of jurisdiction for lack of ripeness.

MOTION.

COMES NOW Defendant to move this Court, *intra* trial, for an order:

1) Granting in favor of Defendant judgment as a matter of law in a jury trial on the defense of lack of jurisdiction for lack of ripeness under Rule 50(a)(1)(B), and for an order;

2) Granting Defendant's renewed motion for leave to file a motion for summary judgment (Doc. # 215) and for summary judgment (Doc. # 35) on the defense of lack of jurisdiction for lack of ripeness, under Rule 56.

MEMORANDUM.

Defendant, US Airline Pilots Association ("USAPA"), by its undersigned

attorneys, submits this memorandum in support of its motion pursuant to Fed. R. Civ. P. 50(a) for judgment as a matter of law, and to renew its motion for leave to file summary judgment motion and for summary judgment pursuant to Fed. R. Civ. P. 56.[1]

1) Standard Of Law.

Fed. R. Civ. P. 50(a)(1)(B) provides that:

> If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:
>
> (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

Fed. R. Civ. P. 50(a)(2) provides as follows:

> A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

The same standard that applies to a motion for summary judgment brought pretrial pursuant to Rule 56 also applies to motions for judgment as a matter of law brought during or after trial pursuant to Rule 50. *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 150, 120 S. Ct. 2097 (2000) ("the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same'") (*citing Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250-251, 106 S. Ct. 2505 (1986)).

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[1] *Wolfgang v Mid-America Motorsports*, 111 F.3d 1515, 1521 (10th Cir. 1997) ("out of an abundance of caution, and good trial practice, counsel should renew summary

Pursuant to Rule 50, "the trial judge *must* direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson*, 477 U.S. at 250 (citation omitted) [emphasis added]; *El-Hakem v. BJY Inc*., 415 F.3d 1068, 1072 (9th Cir. 2005) (*citing Sanghvi v. City of Claremont*, 328 F.3d 532, 536 (9th Cir. 2003)); *Bielser v. Professional Systems Corp*., 321 F. Supp. 2d 1165, 1167 (D. Nev. 2004) (judgment as a matter of law is appropriate where there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party); *Stiner v. United States*, 524 F.2d 640, 641 (10th Cir. 1975) (*citing Palmer v. Ford Motor Company,* 498 F.2d 952 (10th Cir. 1974)); *DeSantis v. Parker Feeders, Inc*., 547 F.2d 357, 360 (7th Cir. 1976) *Gregory v. Massachusetts Mutual Life Ins. Co*., 764 F.2d 1437, 1440 (11th Cir. 1985)

2) Defendant Has Continually Asserted A Defense Of Lack Of Jurisdiction For Lack Of Ripeness.

From the beginning of this case Defendant has asserted the defense of no jurisdiction because of lack of ripeness: in its motion to dismiss (Doc. # 35; # 36 at 18:13), in its Answer, both by denial and by affirmative defense (Doc. # 88 at ¶¶ 15, 17 and 124), in its motion for leave to move for summary judgment (Doc. # 215), and in its Proposed Jury Pre-Trial Order (Doc. # 356 at ¶ B 2), and again in the Proposed Bench Pre-Trial Order (Doc. # 358 at ¶ B).

And, it has always been undisputed that when Plaintiffs commenced this

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judgment grounds in a Rule 50 motion for judgment as a matter of law ...").

action, there was no final contract; indeed there was not even a USAPA proposal for the integration of seniority lists.

3) Defendant Is Entitled To Judgment As A Matter Of Law On Their Defense Of Lack Of Jurisdiction For Lack Of Ripeness.

a) Plaintiffs Have Repeatedly Admitted and Stipulated That There Was No Deliberate Delay In Bargaining.

Repeatedly, before and during trial, both named Plaintiffs and their counsel admitted and stipulated that there was *no deliberate delay* in bargaining in a supposed attempt to 'delay implementation' of the Nicolau Award.

i) Admissions By Parties:

All six named Plaintiffs testified in their depositions that they understood that USAPA is pursuing the bargaining objective of obtaining a single collective bargaining agreement with an integrated seniority list. And *all* Plaintiffs testified that they have no evidence that would support the contention that USAPA has deliberately delayed negotiations toward a single collective bargaining agreement. (Addington 97:21 - 98:15 [no basis to believe that USAPA is trying to delay negotiations toward a single CBA]; Bostic 107:4-10 ["I don't know of any deliberately delayed attempts on USAPA's part"]; Burman 47:14-20 [does not have evidence that USAPA is trying to perpetuate separate operations]; Iranpour 67:7-12 [understands USAPA's current objective to be negotiating a single CBA with a date of hire seniority list]; Wargocki 159:3-10 [does not believe that USAPA is continuing the East

MEC's objective of permanent separate operations]; Velez 47:20 – 48:7 [does not believe USAPA's bargaining objective is to perpetuate separate operations]). Significantly, Plaintiffs Burman and Bostic provided this testimony after having attended the depositions of USAPA's chief negotiator, Paul Diorio, and negotiating consultant, Doug Mowery.

ii) Stipulations Or Judicial Admissions By Counsel:

First, as a threshold matter, what Plaintiffs actually pled in this case is devoid of the concept of delay. Indeed, their Amended Complaint nowhere mentions the word "delay." (Doc. # 86). Rather, what was alleged was just the opposite, i.e. that:

- "since June 2008, Defendant US Airways and USAPA have been negotiating one or more collective bargaining agreements to replace the West CBA and the East CBA." (Doc. # 86 at ¶ 74); and
- "In negotiating one or more collective bargaining agreements to replace the West CBA and the East CBA, Plaintiffs are informed and, therefore, allege that Defendant US Airways and USAPA *intend* to: (a) not implement integrated operations and/or (b) not adopt the Nicolau List." (Doc. # 86 at ¶ 75). [emphasis added]

Clearly, Plaintiffs' Complaint and case theory as pled is that the problem is not with delay of the final product but rather with *what will go into* the final product.[2]

Second, Plaintiffs' memorandum filed March 9, 2009 admitted that, "While USAPA seeks to delay this litigation, *it is working hard to finalize negotiations and*

[2] The same is true for the State claim, which also had no delay allegation whatsoever and affirmatively pled the opposite: "Since June 2008, Plaintiffs are informed and, therefore, allege that US Airways and East Pilots have been negotiating a single collective bargaining agreement that would not implement the Nicolau List." (Doc. # 1

approval of a date-of-hire single collective bargaining agreement with the company." (Doc. # 239 at 7:23) [emphasis added]. While statements in memoranda as opposed to pleadings generally do not rise to judicial admissions, where there are other indications of reliability, courts may, in their discretion, bind the parties to their respective admissions. *See, e.g., City Nat'l Bank v. United States,* 907 F.2d 536, 544 (5th Cir. 1990); *Purgess v. Sharrock*, 33 F.3d 134, 144 (2d Cir. 1994); *Keller v. United States,* 58 F.3d 1194, 1199 n. 8 (7th Cir. 1995)); *American Title Ins. Co. v. Lacelaw Corp.,* 861 F.2d 224, 226-27 (9th Cir. 1988); *Plastic Container Corp. v. Continental Plastics of Oklahoma, Inc.,* 607 F.2d 885 (10th Cir. 1979), *cert. denied,* 444 U.S. 1018, 100 S. Ct. 672 (1980) (citing *Cole v. Ross Coal Co.,* 150 F. Supp. 808, 809 (D. W.Va. 1957)).

Here, the Court should bind Plaintiffs because the indications of reliability are overwhelming. Plaintiffs did not plead delay. They made repeated judicial admissions in briefs of no delay. They have made judicial admissions in the pleadings (albeit negative, i.e. admitting bargaining). And they have made judicial admissions on the record that are positive (i.e. admitting no delay in bargaining *any* section of the contract).[3]

Third, Plaintiffs' brief opposing Defendant's motion in limine No. 17 on April 13, 2009 admitted that, "Regardless, the *fact that Plaintiffs have not yet contended that*

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in Case No. 08-1733, at ¶ 102 (dismissed for failure to state a claim, Doc. # 118)).

[3] Indeed, this Court has *already recognized* that Plaintiffs are not alleging delay: "Similarly, Plaintiffs are not deficient for acknowledging in depositions that USAPA is not delaying negotiations (as previously asserted) but is currently negotiating toward a single CBA on terms inconsistent with the Nicolau Award." (Doc. # 248 at 10:14).

USAPA deliberately delayed negotiations of a single CBA is no basis to exclude such evidence if it is in the trial exhibits or can be obtained in trial testimony." (Doc. # 325 at 16:22) [emphasis added][4]

Fourth, in the April 16 Joint "Proposed Final Pretrial Order For Jury Trial" Plaintiffs' proposed the following as facts (in the section calling for facts that are subject to further rulings from the Court):

> 116. USAPA has been bargaining with the Airline toward the adoption of a new collective bargaining agreement. (Doc. # 356 at p. 17)
>
> 117. USAPA has not been bargaining with the Airline toward the adoption of a new collective bargaining agreement that would integrate operations utilizing the Nicolau Award. (Doc. # 356 at p. 17)

Fifth, Plaintiffs' Trial Brief On Contested Issues Of Law, filed April 16, utterly omits any claim of delay and instead focuses entirely on establishing Defendant's liability on conduct that pre-dated certification: "USAPA is liable for unfair representation because it: (1) was constituted to empower the majority to deprive the minority of an established right for the majority's benefit only; (2) promised, in an election campaign, to do so if it became the representative; ***and/or*** [*sic*] (3) did so after it becomes the representative." (Doc. # 355 at 2:6). In other words, delay in bargaining, in whole or in part, forms no part of Plaintiffs' contention. Indeed, the use of the disjunctive "or" in the Plaintiffs' statement is revealing. Clearly, Plaintiffs claim that

[4] Although speculative, Plaintiffs say that Defendant's "unfair representation has delayed integrated operations" (Doc. # 325 at 33:7), but at most that asserts only that the alleged failure to represent occasioned a delay, not that the unfair representation *was* the

liability is established on elements 1 and 2 alone – both of which it is undisputed occurred *before* USAPA was certified.[5] Of course, and as this Court has held and is now the law of the case, "Pre-certification conduct cannot be the basis for liability." (Doc. # 361 at 3:21).

Sixth, in open court and on the record, Plaintiffs' counsel stipulated during the Pre-Trial conference on Wednesday, April 22, 2009, that USAPA has not engaged in any intentional delay in the collective bargaining process: [Mr. Stevens] – "**We're not saying they delayed <u>any</u> section**. It's just that the seniority section they did didn't include Nicolau" (Tr. 41:13) [emphasis added]; see also, "I think Your Honor captured what the issue is." (Tr. 42:8).

Counsel's statements constitute judicial admissions *binding* on this Court. *See*, *U.S. v. Bentson*, 947 F.2d 1353 (9th Cir. 1991) *cert. denied*, 504 U.S. 958 (1992) (on the record statement by counsel "straightforward judicial admission") (*citing United States v. Wilmer*, 799 F.2d 495, 502 (9th Cir. 1986) (attorney's statement during oral argument constitutes judicial admission), *cert. denied*, 481 U.S. 1004, 107 S. Ct. 1626 (1987); *Magallanes-Damian v. INS*, 783 F.2d 931, 934 (9th Cir. 1986) (absent egregious circumstances, parties are generally bound by admission of attorney); 9 J. Wigmore, Wigmore on *Evidence* §§ 2588, 2594 (Chadbourn revision, 1981) (oral judicial admission is binding); *American Title Ins. Co. v. Lacelaw Corp*., 861 F.2d 224, 226 (9th

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delay.

[5] Indeed, Plaintiffs' repeated use of the term "Bradford group" reveals that Plaintiffs still pursue their dismissed state claim against individuals, not the Defendant.

Cir. 1988) (a judicial admission is binding before both the trial and appellate courts); *Rhoades, Inc. v. United Air Lines*, 340 F.2d 481, 484 (3d Cir. 1965) ("an admission of counsel in the course of trial is binding on his client[.]").

Seventh, and finally, on the very eve of trial, Plaintiffs' memorandum filed on April 27 once again admitted that, "... Plaintiffs do not plan to prove that USAPA intentionally [*sic*] delayed CBA negotiations ... (Doc. # 407).[6]

b) Having Been Fully Heard In Trial, Plaintiffs Have Offered No Legally Sufficient Evidence To Support Ripeness.

In trial Plaintiffs offered no legally sufficient evidence that would support the contention that USAPA has deliberately delayed negotiations toward a single collective bargaining agreement – not in whole or in part – and not for any reason, especially for a reason of deliberately delaying 'implementation' of the Nicolau Award.

The only evidence Plaintiffs could be said to have offered was that select sections of the contract under negotiation were, during the course of bargaining, tentatively agreed to, or 'TAed,' but then subsequently reopened or 'unTAed.' Heretofore Plaintiffs have never alleged this as a means of delay, but even if they had this is not legally sufficient evidence of intentional delay rather it is evidence only of

[6] Nor did USAPA inherit the possibility of a contract 'ready to go' as was proven by the testimony of Plaintiffs' witness Russell Payne. Mr. Payne testified that the West MEC considered the position of the company for pay as embodied in the "Kirby Proposal" was "woefully inadequate" and that therefore there was no way to prognosticate, with any certainty if or when a single CBA would have been tentatively agreed to.

on-going, business-as-usual collective bargaining:

First, the Court's analysis of the delay issue when it denied the motion to dismiss was that Plaintiffs alleged that USAPA had delayed bargaining for "*the* single collective bargaining agreement" (Doc. # 84 at 13:2) [emphasis added], that is, the whole contract, not just a section of it.

Second, by definition a tentative agreement is not final and revisiting one TA or another before final agreement is stock of the trade for normal collective bargaining, a fact that is naturally inferred from the evidence of bargaining for tentative agreements in multiple sections.[7]

Third, there is no evidence even offered to indicate that revisiting a TA causes any delay in reaching a contract, let alone that the Defendant *intentionally* delayed reaching agreement about anything. The most that can be inferred is that a section that was 'unTAed' was not then ready to be finalized.

Fourth, the Company's Vice President of Labor Relations testified in his deposition that the right to reopen sections that were tentatively agreed to is "a right that both parties have in negotiations." (Hemenway Tr. 38:5-6). Mr. Hemenway explained that:

A tentative agreement is just that, it's a tentative agreement, and

[7]*See* Exhibit 121 at ADD0000689 (US Airways Vice President, Labor Relations stating that "previously closed sections may be re-opened to engage in trading of values to address overall pilot labor costs.").

> occasionally if something else changes in another part, that has some sort of spill-back effect, then either party may want to take a look at that previous tentative agreement.

(Hemenway Tr. 38:6-10). Mr. Hemenway testified that the right to reopen is a "ground rule being observed … in the negotiations with USAPA currently." (Hemenway Tr. 38:11-13). The Company does not view USAPA's exercise of its right to reopen as a delay tactic, as Mr. Hemenway testified that "I don't see any evidence that USAPA is not working hard to make an agreement." (Hemenway Tr. 173:19-20).

c) The Jury Does Not Have Any Legally Sufficient Basis To Find For Plaintiffs On the Ripeness Issue.

The Jury has only this:

- The stipulated fact that there was no deliberate delay;
- USAPA's frank admission that there was no intent to bargain towards 'implementation' of the Nicolau Award (i.e. the inference being that a party does not delay what a party never intended to do in the first place);
- The undisputed fact that the contract remains open and subject to ongoing bargaining.

In short, this Court has before it substantial admissions and stipulations that USAPA did not delay because it never had any present intention of proposing or implementing the Nicolau list. No evidence offered in trial by Plaintiffs that equivocates on their stipulations can alter this simple, undisputed fact. The jury is left with – and this Court is left with – overwhelming evidence, including binding stipulations, that point in one direction only: that USAPA was and is negotiating for a

new contract without deliberate delay (or any delay). It is undisputed that USAPA did not intend to bargain for the Nicolau list. Therefore, it follows that there was no delay in doing what was never intended to be done. Hence it is hardly surprising that Plaintiffs would stipulate in open court, "we're not saying they delayed *any* section". (Apr. 22 at Tr. 4:13)

d) Under Law, Defendant Is Entitled To Judgment On Ripeness.

i) A DFR Claim Over A Collective Bargaining Agreement Requires A Final Product Of Bargaining To Satisfy Ripeness.

Under Article III of the United States Constitution, federal courts may adjudicate "only actual ongoing cases or controversies." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). As a result, federal courts may not entertain actions that are not yet ripe. And ripeness cannot be based on a contingent future event, e.g. what is merely 'intended.' "An issue is not fit for review if 'it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998).

As previously argued to this Court (*See*, Doc. # 36 at 12-13; Doc. #. 47 at 6-7), both the Supreme Court and the Ninth Circuit have consistently recognized that a DFR claim challenging a union's performance in the context of a collective bargaining agreement requires a *final product* of that bargaining in order to make the claim ripe:

> Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for

> the effective performance of their bargaining responsibilities ... For that reason, the *final product* of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a 'wide range of reasonableness,' *Ford Motor Co. v. Huffman, 345 U.S., at 338,* that it is wholly "irrational" or "arbitrary." [emphasis added]

ALPA v. O'Neil, 499 U.S. 65, 78 (1991). *See also Marquez v. Screen Actors Guild, Inc*., 124 F.3d 1034, 1037 (9th Cir. 1997); *Huff v. Int'l Union of Sec. Officers*, 2002 U.S. Dist. LEXIS 2003, at *17-18 (N.D. Cal. Jan. 31, 2002) (finding DFR cause of action based on proposed union affiliation "not yet ripe" and noting that it "would be entirely premature for the court to act in regard to an affiliation that has yet to be voted on by union members . . . [because] the affiliation may not be ratified."); *Federal Express Corp. v. Air Line Pilots Ass'n*, 67 F.3d 961, 964-65 (D.C. Cir. 1995) (an exchange between negotiators against the backdrop of ongoing negotiations does not create a case or controversy); *Dolan v. Ass'n of Flight Attendants*, 1996 U.S. Dist. LEXIS 3342 at *14 (N.D. Ill. 1996) (whether a "union has acted in an arbitrary, discriminatory, or bad faith manner by adopting a particular bargaining position is an issue that is not appropriate for a judicial decision."); *Fraternal Order of Police v. Yablonsky*, 867 A.2d 658, 663 (Pa. Commw. Ct. 2005) ("any controversy arising from the impact . . . on the negotiations or arbitration between the City and the FOP will not be ripe until after the bargaining and arbitration process is completed.").

In *Dolan*, the Northern District of Illinois was presented with a claim similar to that presented by Plaintiffs. The plaintiffs in *Dolan* brought suit against their union for violation of the duty of fair representation and alleged that "the union's *intention* to

bargain for the closure or capping of United's foreign domiciles [would] deny them fair representation during collective bargaining." *Dolan*, 1996 U.S. Dist. LEXIS 3342 at *7 (emphasis added). Here, the Addington Plaintiffs have actually pled "intend" as well. (Doc. # 86 at ¶ 75)

After the filing of plaintiffs' complaint in *Dolan*, but prior to the court's decision, the union had negotiated and reached a tentative agreement with the airline relating to the provisions being opposed by plaintiffs. *Id*. at *8. All that remained for this change to be implemented was membership ratification of the agreement. *Id*. However, following the reasoning that it is only the *final product* of the bargaining process that can result in a duty of fair representation breach, the court dismissed the case on the ground that it was not ripe for adjudication.

> [T]he duty of fair representation is intended to protect minority employees from adverse terms and conditions of employment resulting from arbitrary, discriminatory, or bad faith conduct by the union. *However, the duty of fair representation is not intended to protect minority employees from an adverse bargaining position alone that may or may not lead to adverse terms and conditions of employment.* Significantly, to find otherwise would require this court to judge whether each and every bargaining position adopted by the union is an arbitrary, discriminatory, or bad faith action. Such a judgment, however, would be extremely difficult to make in light of the "wide latitude that [union] negotiators need for the effective performance of their bargaining responsibilities." *Air Line Pilots Association*, 499 U.S. at 66. Thus, *whether the union has acted in an arbitrary, discriminatory, or bad faith manner by adopting a particular bargaining position is an issue that is not appropriate for judicial decision.*

Id. at *14 (emphasis added).

Similar to *Dolan* is the just issued "Memorandum And Recommendation And

Order" (Doc. # 23) in the matter of *Breeger vs. USAPA*, Case No 3:08CV490-RJC-DSC (W.D.N.C. Apr. 23, 2009) (on file in this case at Doc. # 402) ("a DFR claim is ripe at the earliest, when negotiations between the union and employer have reached a conclusion").[8]

In the case at bar, this Court initially rejected Defendant's argument that the case was not ripe, but it did not do so based on the law. Rather, this Court's rejection was based solely on its view at the time that the Plaintiffs were somehow alleging that USAPA was "deliberately delaying" the negotiation of a single collective bargaining agreement and thereby triggering immediate harm. (Doc. # 84 at 13:2-5). Notably, however, the Court's initial observation was not supported with citation to anything in the record. Nor was the Court's only other pretrial comment on the ripeness issue supported by citation: "Though ripeness may present a need for further analysis later on, a motion for summary judgment on this point is not in order." (Doc. # 253 at 2:12). Moreover, this Court has separately observed that Plaintiffs, through their deposition testimony, have acknowledged the *lack* of delay. (Doc. # 248 at 10:14).

Now, at this point after Plaintiffs' case in chief, there is no longer any *factual* dispute on the ripeness issue whatsoever. Plaintiffs have conceded there is no intentional or deliberate delay. And, Plaintiffs have been fully heard in jury trial and

[8] Because Plaintiffs in *Breeger* have filed a statement indicating they have no objection to the Recommendation, Defendant expects the District Court to adopt the Recommendation shortly.

left no sufficient evidentiary basis contradicting their stipulation. Without evidence, Plaintiffs are left with pure argument – but the law is not on their side.

ii) Plaintiffs' Argument That Their Claim Is Procedural Rather Than Substantive Is Specious For Lack Of Legal Authority And Because Their Remedy Plainly Seeks To Have This Court Dictate Terms Of A Final Contract.

A) Plaintiffs Lack Any Authority For the Proposition That Their DFR Claim is a Procedural Claim.

Plaintiffs' contention is that their claim is ripe based on their argument that the right to fair representation is a "procedural right [ ] protected by statute, the loss of which is itself an injury without any requirement of a showing of further injury," citing only *Bertulli v. Independent Assn. of Continental Pilots*, 242 F.3d 290, 295 (5th Cir. 2001). (Doc. # 407 at 2:10-13).

However, *Bertulli* cannot possilby support Plaintiffs' theory. First, *Bertulli* does not even concern the issue of ripeness. The issue in *Bertulli* was whether the plaintiffs lacked standing, not whether the claim was ripe.

Second, *Bertulli* is distinguishable because the facts show that the plaintiffs' claims in that case were ripe. The *Bertulli* plaintiffs claimed that:

> they were injured when they lost seniority after the Pilots' Association and Continental Airlines agreed to restore the seniority of eleven pilots who had lost their seniority when they participated in a strike in 1983-85. The plaintiff class is composed of all Continental pilots whose seniority fell as a result of the action by the Pilots' Association … Each class member's seniority rank fell by between one and eleven.

Id. at 294. Thus, in *Bertulli*, the alleged loss of seniority actually occurred *before* the

claim was brought. In stark contrast that is not the case here: Plaintiffs literally pled "intend to." (Doc. # 86 at ¶ 75). In this case, there is no "case or controversy" because negotiations on a single collective bargaining agreement have not yet concluded, and a contract has not been ratified by the pilots. Unlike *Bertulli*, in which a seniority-related agreement had been entered into and implemented, in this case, Plaintiffs have not suffered a loss of seniority because there is *no final product of bargaining*.

B) The Remedy Plaintiffs Seek Is To Have This Court Dictate The Substantive Terms Of The Collective Bargaining Agreement.

Under the bright light of trial, what Plaintiffs seek as a remedy has now been exposed. (Doc. # 358 § 2.a starting at page 4; Doc. # 395 at 12:25). There can no longer be any doubt about the nature of that remedy. Plaintiffs seek a Court order forcing the union to bargain only for their preferred terms of seniority integration, i.e. to impose the Nicolau list (Doc. # 395 at 12:25 – 13:2). Plaintiffs also seek to couple this dictated term of contract with an order stripping from the majority of pilots in the bargaining unit their union-constitution, federally guaranteed right to vote to reject the court-imposed terms of contract. In a word, Plaintiffs seek a remedy that directly results in a "final product" of collective bargaining. Consequently, and unavoidably, Plaintiffs' claim is "procedural" in label only.[9]

[9] A court order resulting in substantive terms of contract not only makes Plaintiffs' claim in fact a substantive one, but it also puts the Court in the position of exceeding its authority under longstanding and well established federal labor law. (*See* cases cited in Doc. # 379 at p. 17-18).

III. Conclusion

Based on the above facts, USAPA submits that judgment as a matter of law should now be entered in its favor. There are no genuine issues as to any material fact, and USAPA is entitled to judgment as a matter of law, dismissing Plaintiffs' duty of fair representation claim in Count III of their Amended Complaint on the grounds that this Court lacks jurisdiction because the claim is not ripe. USAPA respectfully requests that, pursuant to Fed. R. Civ. P. 50(a)(1)(B), the Court now grant judgment as a matter of law, or summary judgment, in favor of the Defendant and dismiss the Complaint in its entirety. Plaintiffs have had their day in court but their case is fatally wanting for lack of jurisdiction; respectfully, not to grant this motion is reversible error.

Respectfully Submitted,

Dated: May 1, 2009

By: ***/s/ Nicholas P. Granath, Esq.***

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CERTIFICATE OF SERVICE

This is to certify that on the date indicated herein below true and accurate copies of the foregoing documents and their attachments, *to wit*,

- Defendant USAPA's notice of, motion, and memorandum in support of its rule 50 motion and renewed motion for leave to file rule 56 motion, both on defense of lack of jurisdiction for lack of ripeness
- Certificate of Service

were electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all admitted counsel who have registered with the ECF system, including but not limited, to:

Marty Harper MHarper@Polsinelli.com	Don Stevens DStevens@Polsinelli.com	Andrew S. Jacob AJacob@Polsinelli.com
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Further, I certify that paper hard copies shall be provided to The Honorable Neil V. Wake, District Court Judge, 401 W. Washington Street, SPC 52, Phoenix, AZ 85003.

On May 1, 2009, by:

/s/ Nicholas Paul Granath, Esq.