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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 ON COUNT III**
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 the trial now in progress and after both sides have rested, for an order under Rule 50(a) of the Federal Rules of Civil Procedure, granting judgment as a matter of law in a jury trial in favor of Defendant on Plaintiffs' Count III, Breach of Duty Of Fair Representation;

MOTION.

COMES NOW Defendant to move this Court pursuant to Rule 50(a), *intra* trial and after both sides have rested but before the case is submitted to the jury, for an order granting in favor of Defendant judgment as a matter of law on the Plaintiffs' Count III, Breach of Duty Of Fair Representation, on the grounds that Plaintiff has been fully heard and there is no legally sufficient evidentiary basis to find for the Plaintiffs.

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.

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)).

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) The Evidence Will Not Support A Verdict For Plaintiffs.

This Court should grant Defendant judgment as a matter of law because:

First, Plaintiffs' Count III makes a *substantive* claim against USAPA. This is a claim of failure to represent Plaintiffs (including the class) while USAPA performed the (ongoing) function of collective bargaining. Plaintiffs pled, and have directed their trial evidence, towards one end: liability for failure to bargain towards the Nicolau list in a new, single CBA. Their remedy is an order resulting in a CBA that contains the Nicolau list, their preferred seniority integration terms.

Second, Plaintiffs have stipulated away any discrimination or arbitrary prong of the Duty. "We believe it's only on the bad faith side so we're not making a discrimination claim." (Tr. Apr. 28, 2009, vol. I, 130:3-4). And, before this on-the-record stipulation, Plaintiffs objected to a discrimination instruction because it would "set up a straw man that is easy for Defendant to defeat ..." (Doc. # 348 at p. 87:16). Consequently, as the masters of their case, Plaintiffs have left only the issue of bad faith before the Jury.

Third, the applicable law requires Plaintiffs to establish, by a preponderance of the evidence, that USAPA acted outside the wide range of reasonableness afforded a

union in bargaining and – in addition – that USAPA acted in bad faith towards Plaintiffs. *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991); *Bautista v. Pan Am. World Airlines, Inc*, 828 F.2d 546, 549 (9th Cir. 1987) ("In the context of representing its members at the bargaining table, a union must be allowed 'a wide degree of reasonableness' because it must be able to focus on the needs of its membership as a whole without undue fear of lawsuits from individuals disgruntled by the result of the collective process").

Fourth, Plaintiffs have no legally sufficient evidence that USAPA acted outside the wide range of reasonableness that the law affords it, moreover they have now entered into a binding judicial admission of the same. Plaintiffs admit that:

> "Plaintiffs do *not* allege USAPA acted outside of a wide range of reasonableness." (Doc. 441 at 21:13) [emphasis added].

At trial the vast majority of Plaintiffs' evidence was concentrated on the events predating April 18, 2008, when USAPA was certified and before the Duty applied to it. In sum, Plaintiffs' evidence focused exclusively on the 'background story' to explain how the Nicolau list that Plaintiffs claim they are entitled to came to be, and to set the stage for the undisputed fact that USAPA did not pursue Nicolau. After that, theirs is all an argument about motive. But there is no evidence for the Jury to rely on that USAPA's constitutional objective, or its proposal, is outside of the wide range of reasonableness. The only thing wrong with USAPA's proposal is that it is not the proposal that Plaintiffs *want*. Because there is no evidence or claim that USAPA acted

irrationally – while there is a judicial admission that it did – this is not an issue that should go the Jury (unless the Jury is instructed that it is undisputed that USAPA did act within reason).

Fifth, the only issue left – bad faith – suffers from lack of any evidence whatsoever. Plaintiffs have not met their burden; there is nothing the Jury could find bad faith on:

- There is no evidence of deception
- There is no evidence of fraud
- There is no evidence dishonesty
- There is no evidence of misleading anyone
- There is no evidence of ill motive or calculations that intend to *punish* or take *reprisals* against Plaintiffs
- The evidence that date of hire with conditions and restrictions was preferred by USAPA is itself not evidence of ill motive or bad faith because it was not solely motivated by catering to the majority and there is nothing wrong with a union seeking the approval of a majority of its members. *Rakestraw v. United Airlines, Inc*., 981 F.2d 1524, 1533 (7th Cir. 1992) (majority rule is the norm).

So what does the evidence show? All of it shows one thing: that USAPA acted consistent with its constitutional objective. And there is no claim, nor could there be under the law, that USAPA's constitutional objective is unlawful *per se*. This Court, too, has observed that there is nothing wrong with even *pure* date of hire. Date of hire is the 'gold standard' for merger seniority integration. *Eg*. *Truck Drivers and Helpers, Local Union 568 v. NLRB*, 379 F.2d 137, 143 (D.C. Cir. 1967). Consequently, there has

never been a case finding a violation of the Duty based on date of hire. *Laturner v. Burlington Northern, Inc.*, 501 F.2d 593, 599 (9th Cir. 1974) ("It has long been recognized that the use of such a method to integrate seniority rosters is an equitable arrangement for resolving the inevitable conflicts which arise whenever a merger occurs ... we thus view the implementation of a date of hire consolidation to be well within the "wide range of reasonableness [which] must be allowed a statutory bargaining representative in serving the unit it represents") (*citing Humphrey v. Moore*, 375 U.S. 335, 347 (1964)).

Sixth, the evidence in the record shows either actual benefit or at least *intended* benefit to the West Pilots and this negates any possibility of a finding of bad faith. Whether or not Plaintiffs find it *acceptable*, USAPA has put into the record evidence that its interpretation and implementation of its constitutional objective has been calculated to benefit Plaintiffs. This evidence consists of, in the short run, all the conditions and restrictions designed to protect Plaintiffs. And, in the long run, the evidence is that the Plaintiffs benefit from the same date-of-hire seniority that they now oppose when they benefit from East attrition. That USAPA's proposal is not the Nicolau list is not relevant to whether or not USAPA evidenced intent to benefit the Plaintiffs. The law does not require that Plaintiffs are made happy. That Plaintiffs want another proposal and did not get it, and may never get it, is not legally sufficient evidence that can support a finding that USAPA did not try to benefit them. And that *trying* is evidence of good faith.

Seventh, it is not material to whether Plaintiffs have met their burden to supply enough evidence to support a violation of the Duty that USAPA does not intend to bargain towards Nicolau. Simply put, USAPA was not under any legal obligation to implement Nicolau, either as a proposal or as part of a ratified contract. Indeed, Plaintiffs' claim, as pled and as tried, is that it was *bad faith* for USAPA not to bargain towards Nicolau regardless of whether or not it was, or could be, *bound* to do so. There is no breach of contract claim here (Plaintiffs ill-pled state claim premised on a common law contract was properly dismissed). Only ALPA ever had an identifiable duty to defend Nicolau and Plaintiffs do not contend otherwise, nor could they as a matter of law. USAPA was not a party to any binding arbitration. Plaintiffs have stipulated that the parties were the ALPA MEC Merger Representatives. And, whether Plaintiffs like it or not, it is beyond dispute that under both ALPA and USAPA individual pilots have an *absolute right* to vote down any contract that contained the Nicolau list (not only are individual pilots not in privity of contract, the Duty is not owed by them).

In short, while the Jury can interpret ALPA Merger Policy as a fact issue, it cannot determine that USAPA formed a contract with Plaintiffs or that it breached one. The Jury can only decide the fact-liability issues of the bad-faith Duty claim. But all the evidence and the judicial admission establish only that USAPA acted inside a wide range of reasonableness. And, for the reason that there is no legally sufficient evidence that amounts to bad faith as the applicable case law defines it in this context, there is but one conclusion to reach: Defendant is entitled to judgment as a matter of law.

Respectfully Submitted,

Dated: May 7, 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, Motion, And Memorandum In Support Of Its Rule 50 Motion On Count III
- 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:

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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 7, 2009, by:

/s/ Nicholas Paul Granath, Esq.