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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 MOTION FOR RECONSIDERATION OR ALTERNATIVLEY RENEWED RULE 50 MOTION ON 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 the trial now in progress and after both sides have rested, for reconsideration of Defendant's motion (Doc. # 418) or alternatively for renewal of Defendant's Motion (Doc. # 418) 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 its defense of lack of jurisdiction for lack of ripeness.

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 reconsideration of Defendant's motion (Doc. # 418) or alternatively for renewal of Defendant's Motion (Doc. # 418) 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 its defense of lack of jurisdiction for lack of ripeness.

MEMORANDUM.

Defendant, US Airline Pilots Association ("USAPA"), by its undersigned attorneys, submits this memorandum in support of its motion:

Although Plaintiffs' brief did not cite it, the Court denied Defendant's Rule 50 motion on ripeness based on the Court's interpretation of *Ramey v. District 141, IAMAW*, 378 F.3d 269 (2d Cir. 2004). Specifically the Court pointed to footnote 4 on

page 279 of *Ramey*. The Court should reconsider because unlike the case at bar, in *Ramey* there was a finalized and ratified contract that preceded the lawsuit, and the Court in *Ramey*, either in footnote 4 or anywhere else, did not discuss the issue of ripeness.

The plaintiffs in *Ramey* commenced suit on July 30, 1999. *Ramey v. District 141, IAMAW*, 2002 U.S. Dist. LEXIS 26670, *16 (E.D.N.Y. Nov. 4, 2002), *aff'd* 378 F.3d 269 (2d Cir. 2004). Defendants moved for summary judgment in part on the grounds that the action was barred by the statute of limitations, an argument that was rejected by both the District Court and the Second Circuit.

Defendants argued that the statute of limitations began to run in 1993, when plaintiffs first learned that the union had taken the position that, for purposes of "bidding and bumping," the plaintiffs' seniority would be governed by their later Trump date of hire, not their earlier Eastern date of hire. *Ramey*, 2002 U.S. Dist. LEXIS 26670 at *11.

Alternatively, plaintiffs argued that the statute began to run at the latest on December 14, 1998, "when plaintiffs were informed via the Snyder letter of the union's position regarding the upcoming integration of the former Trump Shuttle mechanics fully into its national mechanic workforce." *Id*. at *20.

Plaintiffs argued that no breach had actually occurred until such time as the Shuttle Transition and Integration Agreement was formalized on May 13, 1999. *Id*. at *14, 20. That agreement gave complete control over the issue of seniority to the union

representing the plaintiffs. *Id*. at 14.

The District Court held that the cause of action accrued upon the execution of the May 13, 1999 Agreement.[1] According to the court, "although the union's position in 1993 was consistent with its ultimate position in 1999 when the merger was finally consummated, there is no evidence that the union had done anything final with regard to plaintiffs' seniority until the time of the execution of the May, 1999 integration agreement." *Id*. at 22. The court noted that "there was no actual change in the classification seniority of the shuttle mechanics prior to the signing of the transition agreement in May 1999." *Id*. Thus, the District Court held that "the correct date from which to trigger the running of the statute would be the date of the adoption of the agreement determining plaintiffs' seniority rights." *Id*. In terms of ripeness, the court stated that "it appears that plaintiffs would have had no cause of action before that time because, until that time, there was no merger and no union action on which to base a cause of action." *Id*.

Although ripeness was not an issue in *Ramey*, it is clear that the plaintiffs' duty of fair representation claim **was ripe because it was brought two months <u>after</u> the signing of the Shuttle Transition and Integration Agreement**, which affected plaintiffs' seniority rights. In contrast, the plaintiffs' claims in the case at bar are not

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[1] The District Court stated that "a cause of action with regard to a claimed objectionable action by a union in entering an agreement on behalf of its members as to seniority has been held to accrue when the union ratifies that agreement" (*citing Gvozdenovic v. United Air Lines, Inc*., 933 F.2d 1100, 1106 (2d Cir. 1991)). *Ramey*, 2002 U.S. Dist. LEXIS 26670 at *19.

ripe because there has been no signed or ratified agreement on seniority yet. Plaintiffs literally brought suit alleging that "USAPA intend[s] not to implement ... the Nicolau list" (Doc. # 86 at ¶ 75).

The District Court's ruling in *Ramey* with respect to the union's statute of limitations argument was affirmed by the Second Circuit, which explained that a union announcement of its intention to act cannot constitute a breach of the duty of fair representation:

> **We have never held that a breach occurs when a union announces an intention, even if it does so unequivocally, to advocate against the interests of its members in the future.** Rather, we have held that the breach occurs when the union acts against the interests of its members. To hold otherwise would invite plaintiffs to sue whenever a union official announces a position with which they disagree. This runs counter to our general policy favoring internal resolution of labor disputes (as long as the disputes in question remain internal), *Ghartey, 869 F.2d at 164* (*citing* policy favoring "non-judicial resolution of labor disputes"), and would needlessly clog our court system with litigation over whether a union's position is "final enough" to establish a cause of action. Further, requiring union members to sue whenever a union representative announces plans with which they disagree would put the members in the difficult position of being in an adversarial position against their union -- the very same union that simultaneously must represent their interests. 3 *Childs v. Pennsylvania Federation Bhd. of Maintenance Way Employees, 831 F.2d 429, 435 (3d Cir. 1987)* (noting the danger associated with filing a lawsuit of antagonizing a union that must continue to represent a plaintiff's interests). **For these reasons, we do not require, or even permit, union members to bring a suit against their union simply because the union has announced its future intention to breach its duty.** *Ramey*, 378 F.3d at 278-79 (emphasis added).

In *dicta*, the Second Circuit stated that "[i]n some limited circumstances, a suit for a preliminary injunction may be brought based on such an announcement." *Id*. at

279 n.4. However, in the case at bar, the trial is not a preliminary injunction proceeding (the Court has already denied that relief), and the Second Circuit did not explain what those "limited circumstances" might be. Neither the District Court nor the Second Circuit found such "limited circumstances" to exist in *Ramey*. Moreover, the footnote is not an exception so large as to 'eat the rule.' For example, a situation could be imagined where a CBA had been negotiated and ratified but was merely days or hours away from a signing party and therefore ripe. But clearly the Second Circuit did not intend the footnote to mean that the rule that a substantive claim against a union in performing the function of bargaining is not ripe until there is, in the words of the Supreme Court, a "final product" is void. If it had the opinion would not be full of exhortations like "... we do ... even permit, union members to bring a suit against their union simply because the union has announced its future intention to breach its duty." *Ramey*, 378 F.3d at 278-79 (emphasis added).

Plaintiffs' case is in every way a suit over what has not yet happened: a contract formed without the Nicolau list in it. It does not suffice to say that the harm arises now because 'we know that Nicolau won't be in it" because that does not state a colorable DFR claim. While the legal claim is violation of the Duty, the Duty is not violated simply because some members expect their favored terms not to be included. The injury on a DFR claim is only when the union acts arbitrarily or discriminatorily or in bad faith. *In the context of bargaining the union doe not act in either of those manners until there is a final contract*. Plaintiffs' case is a text book example for why the final

product rule exists.

It is time for this Court to apply the law and dismiss it. To do so is no prejudice to Plaintiffs. When the contract is made, like the plaintiffs in *Ramey*, they will have six months to bring their claim.

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 Motion For Reconsideration Or Alternatively Renewed Rule 50 Motion On 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:

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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.