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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Don ADDINGTON, *et al.*,

Plaintiffs,

vs.

US AIRLINE PILOTS ASSN., *et al.*,

Defendants.

CASE NO.
2:08-CV-1633-PHX-NVW
2:08-CV-1728-PHX-NVW
(Consolidated)

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S RULE 56 SUMMARY JUDGMENT MOTION ON PLAINTIFFS' DAMAGES CLAIMS

(ORAL ARGUMENT REQUESTED)

Don ADDINGTON, *et al.*,

Plaintiffs,

vs.

Steven H. BRADFORD, *et al.*,

Defendants.

Plaintiffs Don ADDINGTON, John BOSTIC, Mark BURMAN, Afshin IRANPOUR, Roger VELEZ, and Steve WARGOCKI, respond in opposition to USAPA's Rule 56[1] motion and memorandum for summary judgment on damages. (Docs. 487, 488.) USAPA cannot escape from liability by claiming that it did not itself cause Plaintiffs to be furloughed or demoted. Rather, USAPA is jointly and severally liable because it participated with others in concerted action designed to prevent timely implementation of the Nicolau Award. The Court, therefore, should deny USAPA's motion for summary judgment on damages.

This Response is supported by Plaintiffs' Controverting Separate Statement of Facts and the Memorandum of Points and Authorities below.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Overview

The liability jury found that USAPA breached its DFR. (Doc. 453.) There is ample evidence for a damages jury to find that this was part of a course of concerted wrongful conduct. Evidence shows that USAPA, Mr. Bradford and other East Pilots acted in concert to prevent the Airline's integration of pilot operations using the Nicolau Award. It also shows that Mr. Bradford and other East Pilots used USAPA as a "tool" in furtherance of that design. Finally, it shows that USAPA itself acted in furtherance of that design when it breached its DFR. USAPA, therefore, is jointly and severally liable for the harm flowing from these concerted actions.[2]

[1] All reference to "Rules" are to the Federal Rules of Civil Procedure.

[2] Plaintiffs may seek joint and several liability even though they did not specifically request it in their complaint. *See* Rule 54(c); *Z Channel Limited Partnership v. Home Box Office, Inc.*, 931 F.2d 1338, 1341 (9th Cir. 1992).

Two things are undisputed: (1) negotiation of a new CBA had to be completed before the Airline could integrate pilot operations; and (2) the Airline was ready and willing to complete this negotiation and integrate pilot operations using the Nicolau Award. (SOF ¶¶ 8, 35.)[3] There is ample evidence for a jury to find that Mr. Bradford and other East Pilots acted in concert to stop this negotiation. Had they not delayed negotiation of a new CBA and not done related wrongful acts: (1) negotiation of a new CBA would have continued in good faith; (2) a CBA using the Nicolau Award would have been negotiated and ratified long before October 2008; and (3) when the Airline furloughed and demoted pilots, it would have done so according to the Nicolau Award seniority order. Consequently, the furloughs and demotions would not have fallen on the named Plaintiffs.[4]

II. Legal Argument

A. Mr. Bradford and other East Pilots wrongfully delayed the timely integration of pilot operations (using the Nicolau Award), which caused Plaintiffs to be furloughed and demoted.

(1) *Pilot integration should have occurred within three years.*

A jury would have ample evidence to find that integration of pilot operations would be completed within three years. (Id. ¶ 23.) For example, the Airline's Vice President of Labor Relations, Al Hemenway, testified that it takes two to three years to integrate pilot operations when two ALPA airlines merge.

> [T]he Transition Agreement, was executed on September 23rd, 2005.... At that point in time, ... the company's expectation was that it would take two to three years to fully integrate the carriers in terms of FAA operating certificates, all the background

[3] "SOF" refers to Plaintiffs' Controverting Statement of Facts.

[4] The evidence is even more convincing in relation to the furloughs and demotions that occurred as late as May 2009.

> procedures, and all the single agreements, all of the technological issues, two to three years.

(Id.) Michael Cleary, the current USAPA President, made the same estimate. (Id.) A jury taking this evidence in "the light most favorable" could find that, absent wrongful conduct, the Airline would have integrated pilot operations by October 2008. *Hauk v. JP Morgan Chase Bank USA*, 52 F.3d 1114, 1117-8 (9th Cir. 2009).

(2) *Pilot integration should have employed the Nicolau Award.*

A jury would have ample evidence that the Airline would have integrated pilot operations using a new CBA that employed a seniority list created according to ALPA Merger Policy. (Id. ¶ 24.) It could find that the East Pilots should have cooperated with the Airline in this regard and that cooperation would require employing the Nicolau Award. (Id. ¶¶ 22, 25.) A jury could find, therefore, that absent wrongful acts, the Airline would have integrated pilot operations using a CBA that employed the Nicolau Award.

(3) *Mr. Bradford and other East Pilots prevented pilot integration.*

Mr. Bradford and other East Pilots intentionally prevented integration of pilot operations. They did this by, inter alia, encouraging East Pilot dissatisfaction with the Nicolau Award. (Id. ¶ 30.) They organized concerted protests. (Id. ¶ 31.) They vowed with others that the East Pilots would never approve a CBA employing the Nicolau Award. (Id. ¶ 32.) They caused the East MEC to stop its participation in joint negotiation of a new CBA. (Id. ¶ 33, 34.) Because a new CBA was required to integrate pilot operations, stopping CBA negotiations prevented pilot integration. (Id. ¶ 8.)

(4) *The actions by Mr. Bradford and other East Pilots were wrongful.*

The Transition Agreement, ALPA Merger Policy and the Nicolau Award created a prospective advantage for Plaintiffs. (Id. ¶¶ 22-28.) Mr.

Bradford and other East Pilots, by stopping joint negotiations, interfered with that advantage. The Restatement explains why this was wrongful. *Restatement (Second) of Torts* § 767 (1979).

> The issue is not simply whether the actor is justified in causing the harm, but rather whether he is justified in causing it in the manner in which he does cause it.
>
> * * *
>
> Conduct specifically in violation of statutory provisions or contrary to established public policy may for that reason make an interference improper. This may be true, for example, of conduct that is in violation of antitrust provisions or is in restraint of trade or of conduct that is in violation of statutes, regulations, or judicial or administrative holdings regarding labor relations.
>
> * * *
>
> Violation of recognized ethical codes for a particular area of business activity or of established customs or practices regarding disapproved actions or methods may also be significant in evaluating the nature of the actor's conduct ….
>
> * * *
>
> It is often important whether the defendant was acting alone or in concert with others to accomplish his purpose.
>
> * * *
>
> Thus the manner of presenting an inducement to the third party may be significant.

Id. § 767(a) comment.

Significant factors to consider in the analysis of wrongful interference are: (1) manner of action; (2) effect on public policy, ethical codes or customs; and (3) whether the cooperation of others was improperly induced. *See id.* Each factor here weighs toward finding wrongful conduct.

First, Mr. Bradford and the other East Pilots acted in a wrongful manner because they used USAPA to blackmail the West MEC to make substantial concessions to what ought to have been a final resolution of the seniority dispute. (SOF ¶ 46.) Indeed, East Pilots admitted that the threat of certifying USAPA was being used as leverage. (Id.) Second, contrary to

RLA policy, they fomented labor unrest. (Id. ¶¶ 30-32.) Third, as ALPA members and officers they violated ALPA's polices by failing to treat the Nicolau Award as "final and binding" and by engaging in "dual unionism." (Id. ¶¶ 30-33, 45-47.) *See Aircraft Mechanics Fraternal Ass'n v. Transport Workers Union of America, Loc. 514, Air Transport Div., AFL-CIO*, 98 F.3d 597, 598 (10th Cir. 1996) (defining "dual unionism" as "promoting a rival union"). For example, current USAPA President Mr. Cleary and current USAPA grievance committee chair Tracy Parella promised to serve USAPA while they were ALPA East MEC officers. (Id. at ¶ 45.) Similarly, ALPA East MEC officers Eris Rowe, Dave Ciabattoni and Jim Portale were removed and replaced by trustees for engaging in dual unionism. (Id. at ¶¶ 40, 45, 46.) Mr. Ciabattoni is currently the Vice President of USAPA. Other pilots with positions of leadership in the ALPA East MEC, pilots who were part of the design to prevent implementation of the Nicolau Award, now have leadership positions in USAPA. (Id. at ¶ 48.) Finally, they improperly induced the cooperation of others by campaigning and promising that USAPA could ignore the Nicolau Award. (SOF ¶ 43.)

In short, there is more than sufficient evidence for a jury to find that Mr. Bradford and other East Pilots acted wrongfully.

(5) *The wrongful acts have a direct causal link to the Airline's failure to integrate pilot operations by October 2008.*

A jury would have a sound basis to find a direct causal link between wrongful acts and the Airline's failure to integrate pilot operations by October 2008. It would have uncontroverted evidence that the Airline should have completed pilot integration in three years (id. ¶ 23) and reliable evidence that negotiation of the new CBA was on schedule. (Id. ¶¶ 26-29). It would also have a sound basis to find that the new CBA would have been

timely negotiated and ratified. (Id. ¶¶ 27, 28.) It would also have evidence that the East Pilots would have accepted that the Airline had to eventually implement the Nicolau Award. (Id. ¶¶ 25, 28, 29.) Finally, it would have evidence that the new CBA would have provided sufficiently better East Pilot pay and benefits to overcome dissatisfaction with the Nicolau Award. (Id. ¶ 29.) As such, a jury could reasonably conclude that a contract that included the Nicolau Award would be ratified by all pilots.

(a) Pilot integration and CBA negotiation were on schedule.

The expected timetable to complete pilot integration is discussed above. A jury would have ample evidence that, up until the summer of 2007, pilot integration was on schedule. (Id. ¶¶ 26-28.) For example, Mr. Hemenway testified that, by May 2007, CBA negotiations were nearing completion:

> We ha[d] been in negotiations with the representatives, at that time ALPA, approximately beginning December '05 through that date [May 2007]. We had made a fair amount of progress, and in the company's view it was time to offer a comprehensive proposal which really, instead of just addressing one section or one part of one section that was open, attempted on a comprehensive basis to put on the table a proposal that dealt with all of the open areas in all of the open sections

(Id. ¶ 29.) Mr. Dotter, who represented the West Pilots on the Joint Negotiating Committee ("JNC"), confirmed this impression.

> [W]e now had … a framework for agreement. We finally had all the positions of all the sections on the table. So from the standpoint of a negotiating committee and also from the standpoint of the company's management team, we -- each of us knew where the other party stood relative to these issues which provided us, at least the anchors by which we would have to start moving toward one another to complete an agreement. That's a very significant milestone in the negotiations….

(Id. ¶ 28.) There is no evidence to the contrary.

(b) The East Pilots would have ratified the CBA.

A jury could find that the East Pilots would have voted to ratify the proposed new CBA based on the merits of its non-seniority provisions. Without wrongful acts, the East Pilots would not have seen ratification as an acceptable means to block the Nicolau Award. Prior to the Nicolau Award, they were told that "[n]o ALPA seniority integration arbitration result has ever been set aside by the courts, although some dissatisfied pilots have challenged the award before administrative agencies and the courts." (Id. ¶ 25.) If Mr. Bradford had not repeatedly told them otherwise, they would have accepted that it was, in fact, final. (Id. ¶ 43.)

The jury could also find that improvements in East Pilot pay and benefits would overcome dissatisfaction with the Nicolau Award. The Airline's opening offer is evidence of how much pay and benefits would improve in the new CBA. This opening offer was called the Kirby Proposal and was made in May 2007. (Id. at ¶ 28.) Given that the RLA strongly disfavors negotiating with a "take-it-or-leave-it" approach, the Airline's best terms likely would have been better than the Kirby Proposal. *See REA Exp., Inc. v. Brotherhood of Ry., Airline and S. S. Clerks, Freight Handlers, Exp. and Station Emp., AFL-CIO*, 358 F.Supp. 760, 772 (S.D.N.Y. 1973).

The Kirby Proposal itself offered substantial improvements to East Pilot pay and benefits. It provided approximately an additional $108 million per year to the East Pilots as a group. For an individual East Pilot this was, on average, about $32,000 per year. (Id. ¶ 29.) This evidence provides a jury a rationally basis to determine whether a new CBA would have been ratified.

In sum, a jury could find that, absent wrongful conduct, the East Pilots would have accepted the finality of the Nicolau Award and would have had

no reason to delay CBA ratification. Although a jury would not have direct evidence of the new CBA's terms, it would have a sound basis to find that those terms were likely to be sufficiently favorable to overcome dissatisfaction with the Nicolau Award. It could reasonably determine, therefore, that a new CBA would have been ratified.

B. USAPA has joint and several liability for Plaintiffs' injuries.

Because it acted in concert, USAPA cannot "escape from liability by claiming … that [it] did not [itself] cause … [P]laintiff[s'] injury." *Restatement (Third) of Torts: Apportionment Liab.* § 15 Rptr. n. comment (a); *see also Restatement (Second) of Torts* § 876 (1979) (recognizing joint and several liability arising from acting in concert, encouragement and/or ratification). The law does not require, as USAPA argues, that Plaintiffs demonstrate a causal connection between *USAPA's* "wrongful conduct and their injuries." *See* USAPA Memo at 11:17-18. Rather, it requires only that Plaintiffs demonstrate a causal connection between wrongful conduct of those who *acted in concert* with USAPA and Plaintiffs' injuries. Alternatively, a jury could find that USAPA is liable because it ratified the conduct of those who acted in concert. Courts apply joint and several liability to unions in other contexts and they hold unions liable for harm caused by others under successor liability theory. This Court should apply it here.

(1) *A tortfeasor who acts in concert with or who ratifies wrongful conduct is jointly and severally liable for harm caused.*

(a) Acting in concert supports joint and several liability.

A tortfeasor has joint and several liability for harm directly caused by those with whom it acts in concert. *Restatement (Second) of* Torts § 876. The Restatement explains this as responsibility for another's harm, rather

than as responsibility for another's liability. *See id.* (speaking in terms of liability for "harm resulting to a third person from the tortious conduct of another"). Joint and several liability for harm is applied in three closely related contexts—where a defendant:

> (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Id. (emphasis added).

This is different than vicarious labiality. The distinction is that the defendant's liability arises from its conduct, not from its relationship to the other actor. "The vicariously liable party has not committed any breach of duty to the plaintiff but is held liable simply as a matter of legal imputation of responsibility for another's tortious acts." *Restatement (Third) of Torts: Apportionment Liab.* § 13 cmt. (c) (2000). "The vicariously liable party is liable only for … damages for which the tortious actor is held liable." *Id.* cmt. (f). If a tortious actor caused harm but has a complete defense to liability, one who is vicariously liable also has a complete defense. *See id.*

In contrast, if a tortious actor caused harm and has a complete defense to liability, one who is jointly and severally liable does not have a complete defense. Hence, one joint tortfeasor can be liable even if "the conduct of the other was … blameless." *Restatement (Second) of Torts* § 879 cmt (a) (1979).

Because we are concerned with joint and several liability (not vicarious liability), a defense to Mr. Bradford's liability is not a defense to USAPA's liability.

A tortfeasor "acts in concert" when it agrees to "cooperate" or to "accomplish a particular result" with others. *Restatement (Second) of Torts* § 876(a) cmt. This agreement need not be expressed in language. Rather, it "may be implied and understood to exist from the conduct itself." *Id.*

A jury would have substantial evidence that USAPA acted in concert with Mr. Bradford and other East Pilots. First, there are admissions that East Pilots used USAPA as a "tool" to prevent ALPA from compelling completion of the joint negotiations. (SOF ¶¶ 40, 46.) The plan was to use the threat of the NMB election to deter ALPA from replacing the East MEC with a trustee. (Id. ¶¶ 40, 41.) With the East MEC refusing to negotiate and USAPA being used to deter imposition of a trustee, CBA negotiations ceased. (Id. ¶¶ 33, 34, 36.) Otherwise, ALPA's authority to impose a trusteeship on the East MEC would have been used to prevent the East MEC from further obstructing the negotiations toward a single CBA that would incorporate the Nicolau Award. (Id. at ¶¶ 40, 41.) Similarly, substantial evidence exists that Mr. Bradford and East Pilots, including the East MEC, worked to keep the contract open so they would have time to vote in the new union. (Id. at ¶ 39.)

Second, a jury would have the liability verdict—USAPA breached its DFR by abrogating the Nicolau Award and adopting and promoting a date-of-hire seniority list without a legitimate union purpose. (Id. ¶¶ 11, 19, 44.) The fact that USAPA was improperly motivated to disregard the Nicolau Award and evidence that it is closely associated with delaying CBA negotiation allows a jury to infer that USAPA acted in concert with those who directly delayed that negotiation.

In sum, a jury would have sound reason to find that USAPA acted in concert with, and is jointly and severally liable with, those who delayed negotiation of the new CBA.

(b) Ratification supports joint and several liability.

Joint and several liability can also be established by "proof of … ratification … based on circumstantial evidence." *Fry v. Airline Pilots Ass'n, Int'l.*, 88 F.3d 831, 842 (10th Cir. 1996). A union ratifies wrongful acts by its members when it knows of the acts and "fail[s] to take affirmative remedial action." *Id.*

> In *Yellow Bus Lines, Inc.*, for example, the evidence clearly showed the union had actual knowledge that its local business director, the union's agent under federal law, committed unlawful acts while running a strike. The union's failure to take affirmative remedial action against its business director's improprieties, and its decision to allow him to continue running the strike as before, were held to constitute knowing tolerance.

Id. (referring to *Yellow Bus Lines, Inc. v. Loc. Union 639*, 883 F.2d 132, 136 (D.C. Cir. 1989), emphasis added).

A jury would have sound basis to find that USAPA knew that Mr. Bradford and other East Pilots delayed timely integration of pilot operations as part of a design to prevent implementation of the Nicolau Award. (SOF ¶¶ 37-39, 42-44.) Yet, despite having this knowledge, USAPA took no affirmative action to remedy the resultant harm after it became the bargaining representative. To the contrary, it put the persons who delayed CBA negotiation into positions of responsibility. (SOF ¶ 48.)

In sum, a jury would also have sound reason to find that USAPA ratified the acts of, and is jointly and severally liable with, those who delayed negotiation of the new CBA.

(2) *Courts apply joint and several liability to unions.*

In related contexts, courts apply joint and several liability to unions that act in concert. For example, they apply joint and several liability "[w]hen an employer and a union participate in the other's breach." *Lewis v. Tuscan Dairy Farms, Inc.*, 25 F.3d 1138, 1146 (2d Cir. 1994) (relying on *Vaca v. Sipes*, 386 U.S. 171, 197 n. 18 (1967)). They also apply joint and several liability to unions that participated in the same secondary boycott. *Allied Int'l v. Int'l Longshoremen's Ass'n*, 814 F.2d 32, 40-41 (1st Cir. 1987).

> Local 799 was plainly acting in concert with the ILA. It associated itself with the outlawed activity as a willing participant. It was, in short, a joint tortfeasor. Local 799 thereby became liable for the entire amount of the boycott-related damages, even if the amount directly attributable to the Local's conduct was but a fraction of the whole. A conspiracy is like a train. When a party knowingly steps aboard, he is part of the crew, and assumes conspirator's responsibility for the existing freight.

Id. at 40-41 (citations, quotations and alteration marks omitted). These cases show that a union is not immunized from joint and several liability.

(3) *Unions can be liable under successor theory.*

Where a union has knowledge of wrongdoing under a predecessor, courts may hold it liable for that harm as a successor. *See Dornan v. Sheet Metal Workers' Intern. Ass'n*, 905 F.2d 909, 915 (6th Cir. 1990); *Local Union No. 5741, United Mine Workers v. NLRB*, 865 F.2d 733 (6th Cir.), *NLRB v. Laborers' Int'l. Union of North America, AFL-CIO*, 882 F.2d 949, 951 (5th Cir. 1989). Courts apply successor liability to unions because "victims of unfair labor practices by unions need a meaningful remedy just as much as victims of unfair labor practices by employers." *Metallic Lathers*, 259 NLRB 70, *2 (1981).

Courts consider multiple factors when deciding whether to apply successor liability to a union. These include (but are not limited to) the

following: (1) "whether the successor union had notice of the liability;" (2) "whether the officers of the predecessor union continued in some official capacity in the successor union;" and (3) "whether the wages, terms and conditions of employment administered by the predecessor, as set forth in the collective bargaining agreement, are the same or substantially equivalent to those administered by the successor." *Dornan*, 905 F.2d at 915; *Loc. Union No. 5741, United Mine Workers*, 865 F.2d at 737 (same). Courts also consider whether the successor was created to avoid the predecessor union's legal obligation. *See Laborers' Int'l. Union of North America*, 882 F.2d at 953 (finding the successor existed "to frustrate [the court's] judgment").

USAPA had notice that East MEC officers and representatives were breaching their duty to treat the Nicolau Award as final and binding. (SOF ¶¶ 46, 47.) USAPA placed many of the East MEC officers and representatives into similar positions in USAPA. (Id. ¶ 48.)(E.g., Mike Clearly, Doug Mowery, Tracy Parella.) The pilots are working under the same terms until a new CBA is negotiated. (Id. ¶ 19). Finally, there is ample evidence that USAPA was created to avoid ALPA's legal obligation to defend the Nicolau Award. (Id. ¶¶ 41, 46.) A jury, therefore, would have a sound basis to find that USAPA is liable under successorship theory for harm caused before it became the bargaining representative.

C. The RLA should not shield USAPA from liability.

Mr. Bradford and other East Pilots evaded liability for delaying implementation of the Nicolau Award in Case No. 2:08-cv-01728-NVW by claiming to be agents of USAPA. *Mot. to Dismiss* 17:9-14 (Nov. 20, 2008) (doc. 17) They argued that under the RLA: (1) union officers and

"representatives such as the named Defendants, are generally not liable for DFR claims"; and (2) "union officers and employees are not individually liable to third parties for acts performed as representatives of the union in the collective bargaining process." *Mot. to Dismiss* 17:9-14 (Nov. 20, 2008) (doc. 17). In effect, they used the RLA as a shield.

If the RLA shielded Mr. Bradford and other East Pilots from personal liability on the basis of agency, it should not shield USAPA from liability on the basis of lack of agency. To allow both defenses would, in effect, allow wrongdoers to evade liability altogether by claiming to both act through and for others at the same time. Courts consistently reject such arguments. *See*, *e.g.*, *Warshaw v. Xoma Corp.*, 137 F.3d 955, 959 (9th Cir. 1996) (If "Xoma intentionally used these third parties to disseminate false information to the investing public," it "cannot escape liability simply because it carried out its alleged fraud through the public statements of third parties."); *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1577 (9th Cir. 1990) ("Section 20(a) [of the Securities Exchange Act of 1934] … was intended 'to prevent evasion' of the law 'by organizing dummies who will undertake the actual things forbidden.'"); *In re Bel Air Chateau Hospital, Inc.*, 611 F.2d 1248, 1251 (9th Cir. 1979) (recognizing "established policy against allowing employers to change their legal form as a means of evading their responsibility under the Act [NLRA]").

D. Plaintiffs should be awarded full damages against USAPA.

(1) *Joint and several damages need not be apportioned.*

As a general rule, tortfeasors who act in concert and cause indivisible damages are fully liable for the entire harm.

> If the tortious conduct of each of two or more persons is a legal cause of harm that cannot be apportioned, each is subject to

> liability for the entire harm, irrespective of whether their conduct is concurring or consecutive.

Restatement (2d) of Torts § 879 (1979). The comment to subsection (a) explains, in relevant part, as follows:

> One whose tortious conduct is otherwise one of the legal causes of an injurious result is not relieved from liability for the entire harm by the fact that the tortious act of another responsible person contributes to the result. Nor are the damages against him diminished.
>
> * * *
>
> It is immaterial that as between the two, one of them was primarily at fault for causing the harm or that the other, upon payment of damages, would be entitled to indemnity against him. It is also immaterial that the conduct of one was seriously wrongful while the conduct of the other was merely negligent or, indeed, blameless. It is also immaterial that the liability of one is based upon common law rules while that of the other is based upon a statute.

Id. at § 879 cmt. (a). Hence, where two or more tortfeasors legally cause one harm, the law does not require apportioning damages.

(2) *Although often apportioned between employer and union, damages should not be apportioned here.*

Labor law favors but does not require apportionment in hybrid DFR cases. In the usual hybrid case, the harm flows from an employer's breach of the CBA but would have been less if the union had properly grieved on behalf of the employee. In such cases, damages can be apportioned by identifying a hypothetical date before which the harm is attributed to the employer and after which it is attributed to the union. *See, e.g., Bowen v. United States Postal Service*, 459 U.S. 212, 223 n.11 (1983); *Vaca*, 386 U.S. at 197 n.18.

Alternatively, in such cases damages can be apportioned on "a percentage fault basis." *See Aguinaga v. United Food & Commercial Workers Int'l*, 720 F. Supp. 862, 869 (D.C. Kan. 1989). "[T]his method

involves reviewing the evidence presented at trial on the liability issue and assessing fault in some rational manner." *Dushaw v. Roadway Exp., Inc.*, 816 F. Supp. 1226, 1228 (N.D. Ohio 1992). Either way, the goal is to impose a reasonable disincentive on both parties. *See id.*

In contrast, courts do not apportion damages in cases where the union and the employer overtly acted in concert. *Id.* (no apportionment where union and employer "conspired … closely"). Courts also do not apportion damages between employer and union where to do so would reduce the employee's actual recovery. *See Bowen*, 459 U.S. at 223 n.12 (1983) (holding that if the plaintiff is unable to collect against the union, the employer "remains secondarily liable for the full loss of back pay").

If there was to be any apportionment here it logically would be by the percentage fault method because the harm did not begin until after all relevant conduct occurred. Regardless that Plaintiffs have a grievance pending against the Airline, the Court can lawfully apportion all damages against the union if it finds no basis to assign fault to the employer. *See Achilli v. John J. Nissen Baking Co.*, 989 F.2d 561, 565 (1st Cir. 1993) ("[The] court could reasonably conclude that the employer was not at fault. Hence, its apportionment of all the damages to the Local is reasonable and lawful."). If USAPA wants to prove fault against and seek contribution from the Airline it can do that on its own.

When Mr. Bradford and other East Pilots caused the delay of CBA negotiations, they acted so closely with USAPA (using it as part of the scheme) that apportionment would not serve a valid purpose. *See Dushaw*, 816 F. Supp. at 1228. Moreover, apportioning damages to Mr. Bradford and other East Pilots would likely reduce Plaintiffs' recovery. Indeed, it would be inconsistent with the order dismissing the claims against the East Pilot

class. These considerations, therefore, weigh against apportionment. If USAPA wants contribution by Mr. Bradford and other USAPA proponents, it must assert that right itself.

E. Plaintiffs did not waive their damages claims.

USAPA fails to show that Plaintiffs waived their damages claims. Plaintiffs surely did not do so during their depositions, as argued by USAPA. (SOF ¶ 15.) Answers at depositions or to other discovery (other than responses to formal requests for admission) are merely evidence that can be refuted. They do not function as waiver of a claim.

> An answer to an interrogatory is comparable to answers, which may be mistaken, given in deposition testimony or during the course of the trial itself. Answers to interrogatories must often be supplied before investigation is completed and can rest only upon knowledge which is available at the time. When there is conflict between answers supplied in response to interrogatories and answers obtained through other questioning, either in deposition or trial, the finder of fact must weigh all of the answers and resolve the conflict.

Victory Carriers, Inc. v. Stockton Stevedoring Co., 388 F.2d 955, 959 (9th Cir. 1968) (emphasis added). USAPA, therefore, cannot use Plaintiffs' deposition responses to establish that Plaintiffs waived their damages claims. Moreover, Plaintiffs' deposition responses cited by USAPA logically do not waive their damages claims because nothing in those answers is inconsistent with those claims. (SOF ¶ 15.) Plaintiffs, therefore, did not waive their damages claims.

III. Conclusion

There is ample evidence for a jury to find the following: (1) that Mr. Bradford and other East Pilots wrongfully delayed negotiation of a new CBA; (2) that USAPA joined in, encouraged and ratified these wrongful acts, (3) that, had this delay and related wrongful acts not occurred, the Airline

would have been operating off the Nicolau Award seniority list when it began to furlough in October 2008; and (4) that USAPA is jointly and severally liable for the harm that resulted from this delay and related wrongful acts. The Court, therefore, should deny USAPA's motion for summary judgment on damages.

Dated this 1st day of June, 2009

POLSINELLI SHUGHART PC

By: */s/*

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2009, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing.

I further certify that on June 1, 2009, I caused a paper courtesy copy of the foregoing document and the Notice of Electronic Filing to be delivered to the assigned Judge.

s/ *Andrew S. Jacob*