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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'S MEMORANDUM OF LAW IN SUPPORT OF ITS RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW PURSUANT TO RULE 50**
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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8
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10
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14
15
16
17
18
19
20
21
22

Table of Contents

Table of Contents I

Table of Authorities II

I. Background 1

II. Standards Of Law 1

1) This Motion Is Timely Because The FRCP Do Not Require Entry Of Judgment Following A Jury Verdict Prior To A Rule 50 Motion 1

2) The Legal Standard On A Rule 50(b) Motion For Judgment As A Matter Of Law 2

III. Legal Argument 3

1) The Court Should Not Wait For Judgment To Rule On This Motion Because This Court And All Parties Have Recognized The Urgency Of Allowing Early Appeal (And This Motion Is A Prerequisite To Defendant's Appeal) 3

2) First Ground: JMOL Is Warranted Because The *Ramey* Analysis Does Not Support The Conclusion That This Case Is Ripe; It Supports The Opposite, Because Plaintiffs' Claim Is Substantive They Must Wait For The Union To "Act" By Reaching A "Final Product" In The Form Of A Negotiated Agreement With The Company, Just As Occurred In *Ramey* 5

3) Second Ground: JMOL Is Warranted Because There Is An Absence Of Legally Sufficient Evidence To Establish "Bad Faith" As That Term Is Defined By Controlling Case Law 12

4) A Conditional Order for New Trial Under Rule 50(c) Is Also Warranted 15

IV. Relief Requested 18

1
Table of Authorities

2 **Cases:**

3 *Ackley v. Western Conf. of Teamsters*,
958 F.2d 1463 (9th Cir. 1992) 15
4 *Agrizap, Inc. v. Woodstream Corp.*,
5 520 F.3d 1337 (Fed. Cir. 2008) 2
6 *Allied Chemical Corp. v. Daiflon, Inc.*,
449 U.S. 33 (1980). 4
7 *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees of Am. v. Lockridge*,
403 U.S. 274 (1971) 12
8
Anderson v. Liberty Lobby, Inc.,
9 477 U.S. 242 (1986) 3
10 *Associated Transport, Inc.*,
185 N.L.R.B. 631 (1970) 14
11 *Barlow v. American National Can Company*,
173 F.3d 604 (8th Cir. 1999) 7
12 *Bateman v. Mnemonics,*
13 79 F.3d 1532 (11th Cir. 1996) 5
Beck v. United Food and Commercial Workers Union,
14 506 F.3d 874 (9th Cir. 2007) 12
15 *Bensel v. Allied Pilots Association*,
387 F.3d 298 (3d Cir. 2004) 8, 16
16 *Boehringer Ingelheim Vetmedica, Inc. v. Schering-Plough Corp.*,
106 F. Supp. 2d 696 (D.N.J. 2000) 1
17 *Boston Scientific Corp. v. Johnson*,
18 550 F. Supp. 1102 (N.D. Cal. 2008) 3
Brooks v. Air Line Pilots Association, Int'l,
19 2009 U.S. Dist. LEXIS 55210 (D.D.C. Jun. 30, 2009) 11
20 *Chaney v. City of Orlando*,
483 F.3d 1221 (11th Cir. 2007) 3
21 *Cooper v. TWA Airlines, LLC*,
349 F. Supp. 2d 495 (E.D.N.Y. 2004) 16
22

1 *Defenders of Wildlife v. Bernal*,
204 F.3d 920 (9th Cir. 2000)..........4
2
DeLong v. International Union,
3 850 F. Supp. 614 (S.D. Ohio 1993)..........2
Director of Revenue, Colorado v. United States,
4 392 F.2d 307 (10th Cir. 1968)..........2
5 *Edward J. DeBartolo Corp. v. Coopers & Lybrand*,
928 F. Supp. 557 (W.D. Pa.1996)..........2
6 *Federal Insurance Company v. HPSC, Inc.*,
480 F.3d 26 (1st Cir. 2007)..........4
7
Fisher v. City of San Jose,
8 509 F.3d 952 (9th Cir. 2007)..........2
Gasperini v. Center For Humanities, Inc.,
9 518 U.S. 415 (1996)..........4
10 *Gunning v. Cooley*,
281 U.S. 90 (1991)..........2
11 *Hagerman v. Transportation Union*,
281 F.3d 1089 (10th Cir. 2002)..........8
12
Hanson v. Shell Oil Company,
13 541 F.2d 1352 (9th Cir. 1976)..........5
Henning v. Union Pacific R. Co.,
14
503 F.3d 1206 (10th Cir. 2008)..........3
15 *Humphrey v. Moore*,
375 U.S. 335 (1964)..........13
16
Int'l Union of Electronic Workers v. NLRB,
17 41 F.3d 1532 (D.C. Cir. 1994)..........12
Jeffreys v. Communications Workers,
18 354 F.3d 270 (4th Cir. 2003)..........12
Jorgensen v. Cassiday,
19 320 F.3d 906 (9th Cir. 2003)..........3
20 *Jurgens v. McKasy*,
905 F.2d 382 (Fed. Cir. 1990)..........2
21
Lange v. Penn Mut. Life. Ins. Co.,
22 843 F.2d 1175 (9th Cir. 1988)..........2

Latino v. Kaiser,
58 F.3d 310 (7th Cir. 1995)..5

Laturner v. Burlington Northern, Inc.,
501 F.2d 593 (9th Cir. 1974)..13

Marquez v. Screen Actors Guild,
525 U.S. 33 (1998)..12

Marcoux v. American Airlines, Inc.,
2008 U.S. Dist. LEXIS 55751 (E.D.N.Y. Jul. 22, 2008)..16

Marrero v. Goya of Puerto Rico, Inc.,
304 F.3d 7 (1st Cir. 2002)..3

McCulloch Motors Corp. v. Orgon Saw Chain Corp.,
245 F. Supp. 851 (S.D. Cal. 1963)..2

Mitchota v. Anheuser-Busch, Inc.,
755 F.2d 330 (3d Cir. 1985)..7

Mock v. T.G. & Y. Stores Co.,
971 F.2d 522 (10th Cir. 1992)...12

Molski v. M.J. Cable, Inc.,
481 F.3d 724 (9th Cir. 2007)..5

Nitco Holding Corp. v. Boujikian,
491 F.3d 1086 (9th Cir. 2007)..4

Optimum Technologies, Inc. v. Henkel Consumer Adhesives, Inc.,
496 F.3d 1231 (11th Cir. 2007)..3

Partridge v. Presley,
189 F.2d 645 (D.C. Cir.), *cert denied*, 342 U.S. 850 (1951)..2

Presutti v. FDIC,
24 Fed. Appx. 92 (2d Cir. 2001), *cert. denied*, 536 U.S. 939 (2002)..1

Rajala v. Allied Corp.,
919 F.2d 610 (10th Cir. 1990) *cert. denied,* 500 U.S. 905 (1991)..3

Rakestraw v. United Airlines, Inc.,
981 F.2d 1524 (7th Cir. 1992)..8

Ramey v. District 141, IAMAW,
378 F.3d 269 (2d Cir. 2004)..5

Ratkosky v. Transportation Union,
843 F.2d 862 (6th Cir. 1988)..7

Roy v. Volkswagen of America,
896 F.2d 1174 (9th Cir. 1990) 5

Santos v. Gates,
287 F.3d 846 (9th Cir. 2002) 3

Schudel v. General Electric Co.,
120 F.3d 991 (9th Cir. 1997), *cert. denied,* 523 U.S. 1094 (1998) 1

Settlegood v. Portland Public Schools,
371 F.3d 503 (9th Cir.), *cert. denied*, 543 U.S. 979 (2004) 3

Spellacy v. Airline Pilots Ass'n-Int'l,
156 F.3d 120 (2d Cir. 1998) 12

Summers v. Keebler Co.,
133 F. Appx. 249 (6th Cir. 2005) 12

Torres v. City Los Angeles,
540 F.3d 1031 (9th Cir. 2008) 3

Truck Drivers and Helpers, Local Union 568 v. NLRB,
379 F.2d 137 (D.C. Cir. 1967) 14

United States v. Bentson,
947 F.2d 1353 (9th Cir. 1991) 16

United Independent Flight Officers, Inc. v. United Airlines, Inc.,
756 F.2d 1262 (7th Cir. 1985) 7

United States v. Wilmer,
799 F.2d 495 (9th Cir. 1986) 16

Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.,
546 U.S. 394 (2006) 4

Williams v. Romano Brothers Average Co.,
939 F.2d 505 (7th Cir. 1991) 15

Statutes:

Railway Labor Act, 45 USC § 152, et. seq. 15

Authorities:

Federal Practice and Procedure: Civil 2d, Wright, Miller & Kane 1, 3, 4, 5
Labor Union Law And Regulation, Osborne, ABA, published by BNA (2003), BNA (2003) 6, 7
Labor Union Law And Regulation, Osborne, ABA, published by BNA (2003), 2007 Cumulative Supplement 6, 12

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I. BACKGROUND.

This Court trifurcated the trial into: i) a jury liability-fact phase, ii) a bench trial phase on equitable remedy and, iii) a jury trial on damages. Phase I ended with a verdict for Plaintiffs on May 13, 2009. (Doc. # 460). A bench trial followed but no injunction has yet been ordered. A damages trial is set for January 2010. No judgment has yet been entered and the Court has not ordered entry of judgment (even for the dismissed company). USAPA and US Airways remain 'at the table' in collective bargaining. Plaintiffs have now abandoned their Counts I and II by voluntarily withdrawing their grievance. USAPA intends to seek expedited appeal upon entry of judgment, or earlier upon any order granting injunctive relief. This reflects a contingency this Court previously anticipated: "I'm going to have to ... answer to the Court of Appeals." (Tr. 136:9).[1]

II. STANDARDS OF LAW.

1) This Motion Is Timely Because The FRCP Do Not Require Entry Of Judgment Following A Jury Verdict Prior To A Rule 50 Motion.

A motion for judgment as a matter of law made before entry of judgment has been held to be timely because it fulfills the Rule 50 requirement that a party file such a motion "no later than 10 days after entry of judgment." *Presutti v. FDIC*, 24 Fed. Appx. 92 (2d Cir. 2001), *cert. denied*, 536 U.S. 939 (2002); *Schudel v. General Electric Co.*, 120 F.3d 991 (9th Cir. 1997), *cert. den.* 523 U.S. 1094 (1998); *Boehringer Ingelheim Vetmedica, Inc. v. Schering-Plough Corp.*, 106 F. Supp. 2d 696 (D.N.J. 2000). *See also Federal Practice and*

[1] All references to the transcript refer to the transcript of the jury liability trial unless noted.

Procedure: Civil 2d § 2537, Wright, Miller & Kane. Similarly, under Rule 59 there is no prohibition against moving for a new trial prior to entry of judgment. *DeLong v. International Union*, 850 F. Supp. 614, 618 n. 19 (S.D. Ohio 1993); *Jurgens v. McKasy*, 905 F.2d 382, 386 (Fed. Cir. 1990); *Director of Revenue, Colorado v. U.S.*, 392 F.2d 307 (10th Cir. 1968); *McCulloch Motors Corp. v. Orgon Saw Chain Corp*., 245 F. Supp. 851 (S.D. Cal. 1963); *Partridge v. Presley*, 189 F.2d 645 (D.C. Cir.), *cert. denied,* 342 U.S. 850 (1951). *See also Federal Practice and Procedure: Civil 2d*, Wright, Miller & Kane, § 2812. Finally, like the circumstances here, a trial court may rule on a motion for judgment notwithstanding the verdict made after the jury finds for the plaintiffs on the liability issue in a bifurcated trial, but before any trial on damages. *Edward J. DeBartolo Corp. v. Coopers & Lybrand*, 928 F. Supp. 557 (W.D. Pa. 1996).

2) <u>The Legal Standard On A Rule 50(b) Motion For Judgment As A Matter Of Law.</u>

Whether the evidence presented at trial is legally sufficient to create an issue of fact for the jury that will permit a court to enter judgment as a matter of law is a question of law to be determined by the trial court. *Lange v. Penn Mut. Life. Ins. Co*., 843 F.2d 1175 (9th Cir. 1988); *Agrizap, Inc. v. Woodstream Corp*., 520 F.3d 1337 (Fed. Cir. 2008). The standard for a Rule 50(b) motion is the same as it is for a 50(a) motion. *Fisher v. City of San Jose*, 509 F.3d 952 (9th Cir. 2007), *reh'g en banc*, 519 F.3d 908 (9th Cir. 2008).

A mere scintilla of evidence in support of the non-moving party is not sufficient under the federal standard. *Gunning v. Cooley*, 281 U.S. 90 (1991); *Boston Scientific Corp. v. Johnson*, 550 F. Supp. 1102 (N.D. Cal. 2008). The question is not whether there is clearly no evidence supporting the party against whom the motion is directed at, but rather whether

there is evidence upon which the jury might reasonably find a verdict for that party – based on the *applicable law*. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986); *Settlegood v. Portland Public Schools*, 371 F.3d 503 (9th Cir.), *cert. denied,* 543 U.S. 979 (2004); *Jorgensen v. Cassiday*, 320 F.3d 906 (9th Cir. 2003).

Generally, on a Rule 50 motion, a court should not rely on the Jury's findings but must make an *independent* assessment of the sufficiency of the non-movant's evidence. *See e.g. Chaney v. City of Orlando*, 483 F.3d 1221, 1227 (11th Cir. 2007); *Optimum Technologies, Inc. v. Henkel Consumer Adhesives, Inc*., 496 F.3d 1231 (11th Cir. 2007). And specifically, a trial court must consider the *substantive evidentiary burden of proof that would apply at trial* to the non-movant's claims. *Marrero v. Goya of Puerto Rico, Inc*., 304 F.3d 7 (1st Cir. 2002*); Rajala v. Allied Corp*., 919 F.2d 610 (10th Cir.), *cert. denied,* 500 U.S. 905 (1990). *See also Santos v. Gates*, 287 F.3d 846, 851 (9th Cir. 2002); *El-Hakem v. BJY Inc*., 415 F.3d 1068, 1072 (9th Cir. 2005); *Torres v. City Los Angeles*, 540 F.3d 1031 (9th Cir. 2008). Under the express terms of Rule 50, the Court may direct entry of judgment as a matter of law in favor of the moving party, or it may order a new trial. (Rule 50(b)). However, the standard applied under Rule 59 is not the same as Rule 50. *See Federal Practice and Procedure: Civil 2d* § 2531, Wright, Miller & Kane. *See also Henning v. Union Pacific R. Co.*, 503 F.3d 1206 (10th Cir. 2008).

III. LEGAL ARGUMENT.

1) The Court Should Not Wait For Judgment To Rule On This Motion Because This Court And All Parties Have Recognized The Urgency Of Allowing Early Appeal (And This Motion Is A Prerequisite To Defendant's Appeal).

The Court should rule on Defendant's motion at bar without waiting for entry of

1 judgment:

2 First, because Defendant earlier brought a Rule 50(a) motion challenging the
3 sufficiency of the evidence, but subsequently lost the verdict, and in order to challenge the
4 sufficiency of the evidence on appeal, it is necessary for Defendant to now bring this
5 renewed Rule 50(b) motion. *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S.
6 394 (2006); *Nitco Holding Corp. v. Boujikian*, 491 F.3d 1086 (9th Cir. 2007); *Federal*
7 *Insurance Company v. HPSC, Inc.*, 480 F.3d 26, 32 (1st Cir. 2007).

8 Second, this Court has recognized, as have the parties – and correctly so – that
9 regardless of the outcome of the jury trial on liability, an appeal would almost surely follow
10 and consequently that swift, expedited treatment at the District Court is in all parties' best
11 interests:

12 COURT: And then there's a fifth component here that is of great importance to me, and that is, I wish to get this case concluded to the point of appealability as
13 promptly as possible so in the off chance anybody is unhappy with the outcome, they can have their appeal remedy. (Bench Tr. 23:2);

14 COURT: Now, as I said before, I am most anxious to reduce this to an
15 enforceable and appealable order as quickly as possible. (Bench Tr. 62:12);

16 COURT: [commenting] ... I think we all share a common objective to get an appealable order entered as quickly as possible consistent with the need to have other proceedings on your damage claim. (Bench Tr. 64:2).

17 Third, in fact Defendant will appeal and intends to seek expedited treatment from the
18 Ninth Circuit. Together, these circumstances make early resolution of the pending motion
19 especially appropriate and the Court will do all parties (including the company) a service by
20 ruling on this motion without waiting to enter judgment.

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2) First Ground: JMOL Is Warranted Because The *Ramey* Analysis Does Not Support The Conclusion That This Case Is Ripe; It Supports The Opposite, Because Plaintiffs' Claim Is Substantive They Must Wait For The Union To "Act" By Reaching A "Final Product" In The Form Of A Negotiated Agreement With The Company, Just As Occurred In *Ramey*.

As a threshold matter, we will not burden the Court with a repetition of arguments previously made. The Court is respectfully referred to the following documents, which are hereby incorporated by reference: Doc. # 418 (Defendant's first Rule 50(a) motion on ripeness), and Doc. # 445 (motion to reconsider the same). Rather, the starting point is the discussion had on the record prior to denial of Defendant's Rule 50(a) motion. There the Court made two points: First, that the *Ramey* case "lays out the analytical structure for ripeness" (Tr. 1045:5), particularly on page 279, footnote 4 (Tr. 1052:1). *See Ramey v. District 141, IAMAW*, 378 F.3d 269 (2d Cir. 2004). And second, because "one thing is undisputed. We know it won't be the Nicolau ... award" (Tr. 1047:8), which is understood to be a reference to the fact that it is undisputed that USAPA did not intend to bargain for Nicolau. The Court commented, however, that "if there's any fluidity at all as to what the union's bargaining position is" then the case might not be ripe. (Tr. 1049:11). And Plaintiffs, too, though they did not rely on *Ramey*, at oral argument stressed the certainty of USAPA's position in particular and contrasted it to the *Breeger* case[2] where Plaintiffs claimed it was "not at all certain" what USAPA's bargaining position would be. (Tr. 1049:15). But the *Ramey* analysis and the facts in *Ramey* do not support the conclusion that there is enough certainty in *this case* even to project what USAPA's bargaining position will be, let alone

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[2] *Breeger vs. USAPA*, Case No 3:08CV490-RJC-DSC (W.D.N.C. Apr. 23, 2009) (on file in this case at Doc. # 402); *see also*, Memorandum And Order, May 12, 2009, Judge Conrad, Doc. # 25, at separately attached Granath Decl., Att. 2.

what the *final product* of bargaining will be. *Ramey* simply does not justify an exception to the final product doctrine that could apply here.

In *Ramey* the Second Circuit held that the statute of limitations did not begin to run when the union announced that it would not fully credit the seniority of a disfavored group of employees; instead, the statute began to run five years later when the employer and the union *negotiated* the merger seniority lists, actually carrying out the announced threat. *See Labor Union Law And Regulation*, Osborne, ABA, published by BNA (2003), 2007 Cumulative Supplement, p. 156 (discussing *Ramey*). According to the Second Circuit, a suit based even on an unequivocal threatened breach of the duty of fair representation would have been dismissed as premature. It is only when a union "acts against the interests of its members" that a DFR cause accrues. *Ramey,* 378 F.3d *at* 278. And the "act" in *Ramey* was succinctly stated by the District Court:

> Finally, 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* ... As such, the evidence thus far indicates 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. Indeed, 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.

Ramey v. District 141, IAMAW, 2002 U.S. Dist. LEXIS 26670, *22 (E.D.N.Y. Nov. 4, 2002) (emphasis added); *see* separately attached Granath Decl., Att. 1.

It is in *this* context that the Second Circuit's comment in footnote 4, on page 279, i.e. that "in some limited circumstances a suit for a preliminary injunction may be brought based on such announcement" must be understood. Whatever the footnote means, it is clear that

because *Ramey* did *not* sanction the plaintiffs' suit based merely on an "announcement" of a bargaining position, that the footnote should not be read as anything more than dicta – and undefined dicta at that. That there may be exceptions to the final product doctrine articulated by the Supreme Court in *Ford Motor v. Huffman*, 345 U.S. 330, 338 (1953) and *ALPA v. O'Neill*, 499 U.S. 65, 78 (1991) ("the final product of the bargaining process may constitute evidence of a breach of duty") does not mean that the doctrine can be set aside in the first instance. That should give this Court pause for two reasons.

First, the jurisprudence in which *Ramey* must be read has held that a DFR claim aimed at the substance of contract negotiations is ripe at the other end of the spectrum, at the final product end, not the intent or bargaining end. *See Labor Union Law And Regulation*, Osborne, ABA (BNA 2003), p. 365 ("if the alleged breach involves the negotiation of a contract or settlement agreement, the cause of action normally accrues when the contract is executed or becomes effective") (*citing at n. 414*, *Barlow v. American National Can Company*, 173 F.3d 604, 643-45 (8th Cir. 1999)); *Ratkosky v. Transportation Union*, 843 F.2d 862, 873 (6th Cir. 1988); *United Independent Flight Officers, Inc. v. United Airlines, Inc.,* 756 F.2d 1262, 1273 (7th Cir. 1985); *Mitchota v. Anheuser-Busch, Inc.,* 755 F.2d 330 (3d Cir. 1985). *See also Supplement*, *citing* at p. 156 n. 76, *Bensel v. Allied Pilots Association*, 387 F.3d 298 (3d Cir. 2004), *cert. denied*, 554 U.S. 1018 (2005); *Hagerman v. Transportation Union*, 281 F.3d 1089 (10th Cir. 2002).

Second, there is a powerful policy reason for the final product rule, which is that unions need to be free from lawsuits in order to collectively bargain in the midst of often conflicting interests of their members: "Bargaining has winners and losers ... *Huffman* and *O'Neill* show that a conflict among workers does not undercut the union's ability to choose."

Rakestraw v. United Airlines, Inc., 981 F.2d 1524, 1530 (7th Cir. 1992). The *Ramey* court also recognized this policy rationale:

> 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 ... to hold otherwise would invite plaintiffs to sue ... and would needlessly clog our court system with litigation over whether a union's position is 'final enough' ....

Ramey, 378 F.3d at 278.

While the Second Circuit in *Ramey* found the claim accrued "on the date which performance was due," the factual context is distinguishable from this case. In *Ramey,* not only did plaintiffs wait for an agreement before they sued, but the union had already "advocated a position on the seniority issue to USAir" i.e. *to the company*. *Ramey,* 378 F.3d at 280. That did *not* happen in this case. Here, rather, the Plaintiffs brought suit before USAPA advocated *any* seniority position to the employer (this is undisputed; the Amended Complaint used the word "intend"; Doc. # 86 at ¶ 75) – let alone announced to the company an *unalterable* bargaining position (which has *never* occurred at any time). And though it is true that while this action was pending USAPA did make a proposal to the company, what this Court has overlooked so far is the undeniable fact that USAPA's bargaining position is not so certain as to indicate or predict what the final contract will be. This goes beyond how fluid the current proposal of USAPA is. In other words, the Court's conclusion that 'we know what the *contract will not be*,' i.e. without Nicolau, is simply not justified by this record because the outcome of bargaining is not at all certain because it is subject to several undeniable contingencies, which under the law make the case premature.

At the threshold, this Court cannot know that there will even *be* a contract. This is because while the TA required the company to accept the product of ALPA's Merger Policy,

1 it did not require the company to execute a new contract. The evidence in the form of the TA
2 is that it is not inevitable or even required that a single contract be negotiated, ever. In fact,
3 the TA could be canceled by the parties, or unilaterally in other circumstances (Ex. 21, p.
4 15). Indeed, there is nothing in the TA – or under the Railway Labor Act – that would have
5 prevented ALPA, or now prevents USAPA, from going forward with *two* separate contracts,
6 as both the National Mediation Board and courts have consistently recognized. *See*, *Grand*
7 *Trunk Western Railroad Co*., 19 NMB 226, 232 (1992) ("parties are not precluded from
8 mutually agreeing to multiple agreements covering a particular craft or class"); *Association*
9 *of Flight Attendants v. USAir, Inc*., 24 F.3d 1432, 1437-38 (D.C. Cir. 1994); *Association of*
10 *Flight Attendants v. United Airlines, Inc*., 71 F.3d 915, 919 (D.C. Cir. 1995); *Bishop v. Air*
11 *Line Pilots Ass'n*, 1998 U.S. Dist. LEXIS 11948, at *27-29 (N.D. Cal. Aug. 4, 1998), *aff'd*,
12 2000 U.S. App. LEXIS 3270 (9th Cir. 2000).
13 Second, and to the Court's comment about the fluidity of USAPA's bargaining
14 position, *even that is not written in stone*. This is because other contingencies are not
15 accounted for by simply projecting into the future from what USAPA's present intent is *even*
16 *if that intent is presently certain*. Undeniably, multiple contingencies exist. As is so often
17 the case in this particular industry, economic circumstances could drastically change and for
18 the worse, especially in the midst of a prolonged and deep recession. This could cause
19 USAPA to radically change its bargaining position (even amend its constitution to facilitate
20 such a change if need be). For example, the prospect of new layoffs or a new merger, or a
21 third bankruptcy at US Airways in the near-term future may make acceptance of the Nicolau
22 list with the certainty of improved wages now suddenly far more appealing to a majority of
rank and file, from West to East. Or another merger could take place and there might *never*

be a single USAPA-USAirways contract. Or USAPA could be *decertified* and another union takes its place before any new contract is negotiated. In that case there could be a whole new round of internal union attempts to merge yet another list with some merged carrier, perhaps under a new TA. These permutations only reflect what has historically occurred in the airline business and are present-day realities ripped from the headlines. (e.g., *See*, Granath Decl., Att. 3 article "Meltdown 101: Will Airlines Go Bankrupt"; Att. 4 article "US Airways CEO Says Mergers Key To Profitability"; Att. 5 article "US Airways Seeks 400 Attendants For Voluntary Leaves"). Another plausible contingency that could change USAPA's bargaining position is the possibility of a two-CBA 'solution' leading to a single CBA, or not. The record at trial is abundantly clear that ALPA, and both the East and West MECs, understood and preserved this option. (Defendant's Exhibits 1266, 1267, and 1079 and Plaintiffs' Exhibit 142; *see* Granath Decl. ¶ 10, Att. 8). And however the Court chooses to interpret the TA, the record is clear that under ALPA both East and West interpreted their own agreement to allow for two contracts; moreover any question arising from this litigation requiring an interpretation of the TA falls within the *exclusive* jurisdiction the System Board Of Adjustment and the Court should direct the question to the Board to resolve.

Third, for much the same reasons as above, even if it is certain that USAPA's present intent is to bargain towards some goal other than the Nicolau list, that merely only creates a *possibility* – not a certainty – that the Nicolau list will not be included. An analogous situation is illustrated in a recent ruling in *Brooks v. Air Line Pilots Ass'n, Int'l.*, 2009 U.S. Dist. LEXIS 55210 (D.D.C. Jun. 30, 2009) (*See*, Granath Decl., Att. 7). In *Brooks* the U.S. District Court for the District of Columbia rejected a suit seeking withdrawal of a union's grievance that took a position on seniority diametrically opposite of that of the plaintiffs' true

interest and which if successful would have certainly denied the *Brooks* plaintiffs their seniority. Regardless of the absolute certainty of the union's then current position as put forward in the grievance to the company, and the fact the union had openly declared it and was pursuing it to the clear jeopardy of the plaintiffs, nevertheless the Court in *Brooks* recognized that, the suit was "not [yet] fit for judicial review." 2009 U.S. Dist. LEXIS 55210, at *7. The *outcome* in *Brooks* was as uncertain as was certain the union's *position*: the union might win its grievance, but it might lose it, or it could be settled or withdrawn – all possible contingencies notwithstanding the lack of fluidity in the union's position. Thus, because the "plaintiff's fear is by no means certain to occur" the *Brooks* complaint was not ripe. *Id*. at *8.

All this compels the conclusion that whether a single USAPA-USAirways contract includes or does not include a Nicolau list or something like it, whether there will be one contract or two, or whether USAPA will be a party to any CBA – all of this is fluid and uncertain.[3] In other words, without a *final product* of bargaining all the Court has are *contingencies*, whether of outcomes or of USAPA's bargaining position. And no claim is ripe for adjudication 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).

[3] And the proposed or any issued injunction that prevents two CBAs is not material to the ripeness analysis because the Court cannot retroactively make a case ripe and because the injunction is subject to the contingency of being stayed and dissolved on appeal.

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3) Second Ground: JMOL Is Warranted Because There Is An Absence Of Legally Sufficient Evidence To Establish "Bad Faith" As That Term Is Defined By Controlling Case Law.

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On *this record* there is not one shred of evidence to support "bad faith" as that term is *properly* defined by controlling DFR law. At its core, the undisputed factual predicate for this case is that Defendant, a properly certified new union, did not take a bargaining position demanded by the Plaintiffs. Legally, at its core, Plaintiffs always had to confront the issue of whether there is any *legal entitlement* to the Nicolau list *enforceable against USAPA*. They had three avenues.

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First, contractual entitlement under a CBA. But this could only be pursued through a grievance before the System Board of Adjustment, as this Court's dismissal of Counts I and II correctly indicates, and Plaintiffs have now voluntarily abandoned that. (*See* Granath Decl. Att. 6).

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Second, by claiming some contractual entitlement *outside* of the collective bargaining realm. But this meant either a suit against ALPA, on a union-constitutional theory which never happened, or a common-law contract claim which this Court properly rejected in dismissing the State case.

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Third, Plaintiffs could attempt to force Nicolau as a *remedy* to a DFR claim (there being no duty at law to apply Nicolau). This was the theory Plaintiffs actually tried to the Jury. [4] But because Plaintiffs voluntarily jettisoned both the arbitrary and discriminatory prongs of the DFR claim, their case was tried only on the bad faith prong. (Tr. 136:4 –

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[4] Irrationality was not an issue: "Plaintiffs do *not* allege USAPA acted outside of a wide range of reasonableness." (Doc. 441 at 21:13) [emphasis added]; nor is there any pretense that Plaintiffs' claim is not a substantive one as it seeks, literally, to dictate the terms of a final contract.

Stevens: "We believe it's only on the bad faith side. So we're not making a discrimination claim"; Doc. # 348 at p. 87:16).[5] What Plaintiffs were left with, then, was to prove that the failure to adopt the Nicolau list amounted to bad faith – just as this Court recognized at the outset of the trial. (Tr. 98:2 Court: "They are talking about allegedly a specific, intended to be binding, resolution of a dispute that was abandoned without basis and bad faith. That's their narrow view of their case.).

But "bad faith" is defined only by the jurisprudence of DFR case law. As the District Court in *Ramey* observed, "a showing of bad faith requires a showing of fraudulent, deceitful or dishonest action." (*Ramey*, 2002 U.S. Dist. LEXIS 26670, at *25; Granath Decl. Att. 1). In short, well settled case-law holds that proof of a DFR-bad faith claim requires a showing of "intentionally misleading conduct." *Spellacy v. Airline Pilots Ass'n-Int'l*, 156 F.3d 120, 126 (2d Cir. 1998). *See also Marquez v. Screen Actors Guild*, 525 U.S. 33, 47 (1998) ("under these circumstances, there is no intent to mislead, so the first part of petitioner's "bad faith" argument fails"); *Beck v. United Food & Commercial Workers Union*, 506 F.3d 874 (9th Cir. 2007) ("to establish that the union's exercise of judgment was in bad faith, the plaintiff must show 'substantial evidence of fraud, deceitful action or dishonest conduct'") (*citing Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees of Am. v. Lockridge,* 403 U.S. 274, 299 (1971)); *Summers v. Keebler Co.*, 133 F. Appx. 249, 253 (6th Cir. 2005); *Int'l Union Of Electronic Workers v. NLRB*, 41 F.3d 1532, 1537 (D.C. Cir. 1994) (bad faith "as

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[5] Even were a discriminatory prong pursued, "a union's choice between alternative contract interpretations that will benefit and disadvantage competing groups of employees is not discriminatory absent ill will or improper motive." *Labor Union Law And Regulation*, Osborne, ABA, published by BNA (2003), 2007 Cumulative Supplement, p. 140, *citing*, *Jeffreys v. Communications Workers*, 354 F.3d 270 (4th Cir. 2003).

1 that term has been defined under the duty of fair representation ... 'requires a showing of
2 fraud, or deceitful or dishonest action'") (*citing Mock v. T.G. & Y. Stores Co.,* 971 F.2d 522,
3 531 (10th Cir. 1992)).

4 And, as *this* Court observed at the outset of the trial, the applicable case law sets a
5 high standard for proving bad faith. (Tr. 135:12 - "but you know, for bad faith you need
6 deception and deceitfulness"). Yet this verdict rests on *no evidence* of intentionally
7 misleading conduct. There is *no evidence* of deception, fraud, deceitfulness, dishonesty, *no*
8 *evidence* of reprisals or punishment. Indeed, these things were not even claimed. What is
9 the evidence? That it was known that USAPA had no intention of pursuing Nicolau, that it
10 promulgated a constitutional objective consistent with that (which alone was perfectly
11 legal[6]), and that it proposed a modified date-of-hire method instead of the list Plaintiffs
12 wanted. But all this was done out in the open. In fact, Plaintiffs loudly decried that USAPA
13 supporters 'promised' in the campaign to replace ALPA, i.e. that the new union would avoid
14 Nicolau. Plaintiffs called this the 'tyranny of the majority' *but they did not call it deception*.
15 Nor would the evidence let them. Not only is there *no* evidence of intentional misleading,
16 merely and openly appealing to a majority is the intended democratic function of any union.
17 *Rakestraw v. United Airlines, Inc*., 981 F.2d 1524, 1533 (7th Cir. 1992) (majority rule is the
18 norm).

19 In mid-trial, this Court made some preliminary comments on bad faith and the

20 [6] *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
21 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
22 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)).

1 evidence (*see* Tr. 1074:1 - 1078:6), concluding that not allowing a rank and file vote on
2 Nicolau "looks like bad faith by the union." (Tr. 1078:6). But that is not accurate thrice over:
3 first, it ignores the "deception" requirement for bad faith that the Court earlier noted (Tr.
4 135:12); second, it misinterprets the evidence that the Nicolau arbitration was only ever
5 intended under ALPA Merger policy merely as a one-time bargaining proposal (albeit not
6 subject to ratification) that was satisfied once ALPA did propose it and reasonably defended
7 it; and third, it mis-applies case law allowing a union to revisit seniority terms, even those
8 previously contained in contract – even those previously arbitrated, e.g. *Associated*
9 *Transport, Inc.,* 185 N.L.R.B. 631 (1970).

10 Plainly, when measured against the *applicable law*, this verdict is unsustainable for
11 lack of *any* legally sufficient evidence amounting to bad faith in a DFR context.

12 **4) <u>A Conditional Order For A New Trial Under Rule 50(c) Is Also Warranted.</u>**

13 For all the reasons stated herein in support of judgment as a matter of law, a
14 conditional order for new trial should also be granted.

15 In short, on the one hand, the record shows an absence of evidence of any intentional
16 misleading conduct necessary to show DFR-bad faith. On the other hand, the record shows
17 evidence of good faith in the form of the Conditions and Restrictions as well as evidence that
18 USAPA understood that date of hire is a method of seniority integration that benefits all
19 pilots in the long run. And case law finds date of hire to be the 'gold standard' – not the
20 Nicolau list. *See, e.g., Laturner v. Burlington Northern, Inc.,* 501 F.2d 593, 599 (9th Cir.
21 1974); *Truck Drivers and Helpers, Local Union 568 v. NLRB*, 379 F.2d 137, 143 (D.C. Cir.
22 1967).

1 But even if there were "bad faith," the verdict is still contrary to the weight of
2 evidence because there is *no evidence* of a *causal connection* between the alleged
3 wrongdoing and injury, and a causal connection is a necessary element to show *liability*
4 under controlling DFR law. In order to state a claim for violation of the Duty of Fair
5 Representation, assuming irrationality, two elements are necessary: First, arbitrary,
6 discriminatory, or bad faith conduct; Second, a causal connection between the wrongful
7 conduct and injury. *Ackley v. Western Conf. of Teamsters*, 958 F.2d 1463, 1472 (9th Cir.
8 1992). *See also Spellacy v. Airline Pilots Ass'n*, 156 F.3d 120, 126 (2d Cir. 1998); *Williams*
9 *v. Romano Brothers Beverage Co*., 939 F.2d 505, 508 (7th Cir. 1991); *in accord, Ramey v.*
10 *Dist. 141, IAM*, 2002 U.S. Dist. LEXIS 26670, at *25 (E.D.N.Y. Nov. 4, 2002). But on this
11 record there is *no evidence* that the bad faith claimed here was causally connected with any
12 injury. For the first element Plaintiffs claimed that it was bad faith not to have
13 "implemented" the Nicolau list by pursuing it through collective bargaining with the
14 company in a round of bargaining that remained open under ALPA and which USAPA
15 inherited. For the second element, Plaintiffs claim that their injury results from not having
16 the Nicolau list fully implemented, that is, in a negotiated, signed and ratified contract. But
17 even had USAPA announced its intention from the date of its certification to, in effect, 'pick
18 up where ALPA left off' – and even had it proposed the Nicolau list the very next day –
19 *there is no evidence on record that this would have resulted in a contract in time to affect*
20 *Plaintiffs nor could Plaintiffs legally compel one*:

21 First, USAPA could not make a contract without the company (and Plaintiffs have
22 voluntarily jettisoned their Counts I and II grievance).

Second, both union and the company had a *statutory* right to engage in bargaining and

under law only the company ever had standing to complain that USAPA was dragging its feet in bad faith. 45 USC § 152. *See also Bensel v. Allied Pilots Ass'n*, 387 F.3d 298, 319 (3d Cir. 2004), *cert. denied* 544 U.S. 1018 (2005) (individual pilots "lack[ed] an implied private right of action to bring claims asserting breaches of the duty to bargain and duty to negotiate in good faith . . . because they are not and have never been a certified representative of the .. pilots."); *see also Marcoux v. American Airlines, Inc*., 2008 U.S. Dist. LEXIS 55751 at *51-52 (E.D.N.Y. Jul. 22, 2008); *Cooper v. TWA Airlines, LLC*, 349 F. Supp. 2d 495, 503 (E.D.N.Y. 2004).

Third, it is undisputed that the Transition Agreement contains no timetable.

Fourth, there has never been any claim, and there is *no evidence* on this record whatsoever, that a contract was imminent when USAPA was certified. Indeed, it is uncontested that months and months of bargaining remained.

Fifth, Plaintiffs affirmatively waived any claim that USAPA delayed negotiating *any* section of the contract, and those open court stipulations are binding on this Court. Plaintiffs' attorneys twice stipulated in open court that: "We're not saying that they delayed any section" (Pre-Trial transcript Tr. 42:8: Stevens to Court), and:

> THE COURT: Were you saying – I thought you were saying – that you are not making an issue in this trial about the substance or the pace of the bargaining on other substantive issues apart from the –
>
> MR. HARPER: Absolutely correct, Your Honor.
>
> THE COURT: His anxiety about having to rebut an argument or contention that there was inappropriate delay or retrograde bargaining on other issues, are you telling the Court that you do not intend to make such an argument or suggestion?
>
> MR. HARPER: Correct. … (Tr. 1562:24-1563:3; 1563:9-1563:14).

These statements constitute judicial admissions that this Court is not free to ignore.

See United States 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). *See also* Final Jury PreTrial Order, Doc. # 417, at § C "Stipulations and Uncontested Facts and Law" ¶ 18.

Sixth, the uncontradicted evidence is that bargaining over all other sections besides the seniority one is ongoing even today and such ongoing bargaining is lawful in every respect.[7]

IV. RELIEF REQUESTED.

Defendant requests that the Court grant Defendant's motion for judgment as a matter of law as well as grant Defendant a new trial albeit *conditionally*, pursuant to Rule 50(c)(1). Thereafter, Defendant requests that this Court order entry of judgment for Defendant. Pursuant to this request, a proposed order is separately submitted.

Respectfully Submitted,

Dated: July 9, 2009

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

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[7] Plaintiffs' alternative theory, that USAPA caused delay *prior* to USAPA's certification and before any duty of fair representation legally arose, is legally specious.

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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'S MEMORANDUM OF LAW IN SUPPORT OF ITS RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW PURSUANT TO RULE 50
- Any supporting Declarations and their attachments
- Proposed Order
- 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 July 9, 2009, by:

/s/ Nicholas Paul Granath, Esq.