

1 LEE SEHAM, Esq. *pro hac vice*  
LUCAS K. MIDDLEBROOK, Esq. *pro hac vice*  
2 NICHOLAS P. GRANATH, Esq., *pro hac vice*  
STANLEY J. SILVERSTONE, Esq., *pro hac vice*  
3 SEHAM, SEHAM, MELTZ & PETERSEN, LLP  
445 Hamilton Avenue, Suite 1204  
4 White Plains, NY 10601  
Tel: 914 997-1346; Fax: 914 997-7125

5 NICHOLAS J. ENOCH, Esq., State Bar No. 016473  
6 LUBIN & ENOCH, P.C.  
349 North 4th Avenue  
7 Phoenix, AZ 85003-1505  
Tel: 602 234-0008; Fax: 602 626 3586

8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE DISTRICT OF ARIZONA**

10 Don ADDINGTON; John BOSTIC; Mark  
BURMAN; Afshin IRANPOUR; Roger  
11 VELEZ; and Steve WARGOCKI,

12 Plaintiffs,

13 vs.

14 US AIRLINE PILOTS ASSOCIATION,  
US AIRWAYS, INC.,  
15 Defendants,

Case No. 2:08-cv-1633-PHX-NVW  
(Consolidated)

**DEFENDANT’S NOTICE OF, AND  
MOTION FOR, NEW TRIAL,  
PURSUANT TO RULE 59(a)(1)(A)**

16 Don ADDINGTON; John BOSTIC; Mark  
BURMAN; Afshin IRANPOUR; Roger  
17 VELEZ; and Steve WARGOCKI,

18 Plaintiffs,

19 vs.

20 Steven H. BRADFORD, Paul J. DIORIO,  
Robert A. FREAR, Mark. W. KING,  
21 Douglas L. MOWERY, and John A.  
STEPHAN,

22 Defendants.

Case No. 2:08-cv-1728-PHX-NVW

1 TO : PLAINTIFFS, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD.

2 **I. NOTICE.**

3 PLEASE TAKE NOTICE that Defendant US Airline Pilots Association  
4 (“USAPA” or Defendant) will move this Court, to be heard without oral argument, for  
5 an order setting aside the jury verdict on liability and granting a new trial on all claims,  
6 defenses, and issues tried to the Jury in the liability phase of the trial, pursuant to Rule  
7 59(a)(1)(A).

8 **II. MOTION.**

9 COMES NOW Defendant to move this Court as follows:

10 **1) Motions:**

11 For an order setting aside the verdict of the Jury on liability returned on May 13,  
12 2009 in favor of Plaintiffs (Doc. # 460) and granting to Defendant a new trial on all  
13 claims, defenses, and issues tried to the Jury in the liability phase of the trial, pursuant  
14 to Rule 59(a)(1)(A). This motion is brought without waiver of, and on the contrary,  
15 preserving the right to supplement or move again under Rule 59 for a new trial based on  
16 newly discovered evidence or developments or rulings.

17 **2) Grounds And Support For A New Trial:**

18 Defendant hereby states the following particular grounds in support of its motion  
19 for new trial:

20 First, the verdict is contrary to the clear weight of the evidence for lack of bad  
21 faith evidence. Bad faith – as defined by controlling law – was not shown for lack of  
22

1 any evidence of intentional misleading conduct, while at the same time the verdict  
2 disregarded legally sufficient evidence of special measures taken by Defendant to  
3 protect the interests of the class of Plaintiffs.

4 Second, the verdict is contrary to the clear weight of the evidence because there  
5 is no evidence of a causal connection between the alleged wrongdoing and any possible  
6 injury; therefore all of the necessary elements for a breach of the duty of fair  
7 representation were not established prior to verdict.

8 Third, the Court committed prejudicial errors of law in instructing the Jury and  
9 these errors were individually and cumulatively prejudicial, tainted the deliberation  
10 process, and are sufficiently serious to warrant a new trial. Individual erroneous and  
11 prejudicial instructions are listed below by reference to the final instructions filed at  
12 Doc. # 459 by page and line number. Each instruction listed below was objected to in  
13 trial, and on the record (*see*, Doc. # 449; trial transcript, Day 9, May 8, 2009, Tr. 1892-  
14 1907). In addition, Defendant proposed alternate instructions with supporting authority  
15 but this too was erroneously rejected. Individual instructions subject to this motion are  
16 listed below:

- 17 A) Doc. # 459 at 5:7-11: The bad faith instruction omitted any definition of  
18 bad faith as defined by controlling case law. This error deeply and unfairly  
tainted the deliberations and standing alone is grounds for a new trial.
- 19 B) Doc. # 459 at 7:13-21: The “Transition Agreement ... required ... USAPA  
20 to adopt the Nicolau Award as its bargaining position ...” instruction  
21 constituted a virtual directed verdict on the central underlying theory of  
22 Plaintiffs’ case. This error deeply and unfairly tainted the deliberations  
and standing alone is grounds for a new trial.

- 1 C) Doc. # 459 at 5:19-6:7: The “any promises USAPA may have made  
2 during its election campaign ...” instruction improperly invited the Jury to  
3 find liability based on conduct that arose before any Duty arose. This  
4 error deeply and unfairly tainted the deliberations and standing alone is  
5 grounds for a new trial.
- 6 D) Doc. # 459 at 6:24-7:6: The “outcome of a conflict already resolved ...”  
7 instruction. This error deeply and unfairly tainted the deliberations and  
8 standing alone is grounds for a new trial.
- 9 E) Doc. # 459 at 6:18-22: The “Preferential representation to the numerically  
10 larger number of voters ...” instruction. This error deeply and unfairly  
11 tainted the deliberations and standing alone is grounds for a new trial.
- 12 F) Doc. # 459 at 6:24-7:6: The “a general preference for any particular  
13 seniority system other than the Nicolau Award is not, standing alone, a  
14 legitimate union objective...” instruction. This error deeply and unfairly  
15 tainted the deliberations and standing alone is grounds for a new trial.
- 16 G) Doc. # 459 at 7:8-9: The “dissatisfaction with the ... previous union ... not  
17 a legitimate union objective” instruction. This error deeply and unfairly  
18 tainted the deliberations and standing alone is grounds for a new trial.
- 19 H) Doc. # 459 at 7:13-21: The “revisiting the seniority issue ... was not a  
20 legitimate union objective ...” instruction. This error deeply and unfairly  
21 tainted the deliberations and standing alone is grounds for a new trial.
- 22 I) Doc. # 459 at 7:13-21: The “Nicolau award was a final and binding  
resolution ...” instruction. This error deeply and unfairly tainted the  
deliberations and standing alone is grounds for a new trial.
- J) Doc. # 459 at 7:23-24: The “dissatisfaction with the procedures ... by  
which the Nicolau Award was formulated is not a legitimate union  
objective” instruction misstated controlling law and injected an irrelevant  
and prejudicial element. This error deeply and unfairly tainted the  
deliberations and standing alone is grounds for a new trial.
- K) Doc. # 459 at 7:26-8:7: The “pretext” instruction was a continuation of the  
discrimination prong of a DFR claim that Plaintiffs waived. This error  
deeply and unfairly tainted the deliberations and standing alone is grounds  
for a new trial.
- L) Doc. # 459 at 7:26-8:7: The “improper reasons” instruction substituted

1 the definition of bad faith that Plaintiffs and the Court had earlier  
2 proposed with the controlling law of bargaining with an arbitrary standard  
3 that favored Plaintiffs. This error deeply and unfairly tainted the  
4 deliberations and standing alone is grounds for a new trial.

5 M) Doc. # 459 at 8:18-22: The “if you decide ... did so only to enhance the  
6 rights of the East Pilots ...” instruction. This error deeply and unfairly  
7 tainted the deliberations and standing alone is grounds for a new trial.

8 N) Doc. # 459 at 4:11-16: The scope-of-duty instruction misstated and  
9 omitted applicable and necessary case law.

10 O) Doc. # 459 at 4:27 to 5:3: The “you may still consider ...” instruction.

11 P) Doc. # 459 at 5:7-11: The breach-of-duty instruction.

12 Q) Doc. # 459 at 5:7-11: The “not legitimate union objectives ...” instruction.

13 R) Doc. # 459 at 5:15-17: The “impartially” and “with an honest purpose”  
14 instructions.

15 S) Doc. # 459 at 5:19-6:7: The “take solely ...” instruction misstated  
16 controlling case law.

17 T) Doc. # 459 at 5:19-6:7: The “intent to benefit the bargaining unit as a  
18 whole ...” instruction.

19 U) Doc. # 459 at 5:19-6:7: The “solely motivated by objectives that are not  
20 legitimate union objectives ...” invited the Jury to apply a standard of  
21 liability outside of controlling law instruction.

22 V) Doc. # 459 at 8:18-22: The “at the expense of West Pilots ...” instruction.

Fourth, the Court committed prejudicial legal error in numerous evidentiary  
rulings as listed below:

A) By excluding the testimony of Defendant’s proffered expert witnesses, R.  
Hurd (labor and seniority expert) and R. Salamat (finance and statistics  
expert).

B) By excluding Defendant’s evidence of *video-tapes* produced by ALPA  
National.

- 1 C) By admitting, over Defendant's objections, objected-to portions of the  
2 deposition testimony of Bradford.
- 3 D) By admitting, over Defendant's objections, objected-to portions of the  
4 deposition testimony of Hemenway.
- 5 E) By admitting over Defendant's objections Plaintiffs' exhibits Nos. 14, 29,  
6 31, 33, 34, 37, 44, 48, 96, 97, 100, 101, 103, 314, 336, 346, 350, 372, 389,  
7 512, 513.
- 8 F) By excluding Defendant's exhibits: No. 1003, No. 1048, No. 1055, and  
9 No. 1068.
- 10 G) By admitting over Defendant's objections evidence offered to relitigate  
11 the Nicolau award, contrary to the Court's earlier motion in limine  
12 excluding such evidence.
- 13 H) By ignoring the wide range of reasonableness standard and granting  
14 Plaintiffs' motion in limine excluding any evidence of other non-pilot US  
15 Airways' union's seniority integrations.
- 16 I) By granting Plaintiffs' motion in limine excluding any evidence of so-  
17 called "bad acts" evidence.
- 18 J) By granting Plaintiffs' motion in limine excluding any evidence of *status*  
19 of negotiations beyond those directly related to seniority integration.
- 20 K) By granting Plaintiffs' motion in limine limiting evidence challenging the  
21 merits of ALPA Merger Policy.

22 Fifth, the Court committed prejudicial error in several procedural rulings as listed  
below:

- 18 A) In restricting Defendant's closing argument when Defendant's counsel  
19 attempted to correct a factual misstatement by Plaintiffs' counsel made in  
20 Plaintiffs' closing argument.
- 21 B) In prohibiting Defendant's attorney (Brenge) from making any objections  
22 whatsoever during the testimony of Sullenberger.

1 C) In scheduling the trial on an expedited basis over Defendant's objections.

2 Sixth, overall, the conduct of the Court demonstrated such a lack of impartiality  
3 that it unfairly and improperly prejudiced the result of the trial.

4 Seventh, Counsel for Plaintiffs committed prejudicial error at trial in the instance  
5 and manner listed below:

6 A) In closing argument by repeated instances of attorney vouching.

7 B) In Closing argument by arguing in violation of a Court order granted in  
8 response to Defendant's motion *in limine*.

9 Eighth, even before trial, Counsel for Plaintiffs committed error unfairly  
10 prejudicial to Defendant by withholding evidence from Defendant that Defendant had  
11 sought in discovery and that Plaintiffs were under a duty to disclose before trial, and by  
12 unfairly exploiting this violation in Plaintiffs' Closing argument, misconduct or error  
13 that makes the Jury's verdict erroneous.

14 For support of its motion for new trial, Defendant relies on the following, which  
15 are made part of this motion:

16 First, "Defendant's Memorandum Of Law In Support Of Its Motion For New  
17 Trial Pursuant To Rule 59" and its supporting Declarations and attachments, which is  
18 incorporated by reference into this motion.

19 Second, this document, all the pleadings, papers and other records on file, the  
20 record at trial, and any oral argument had.

1  
2 **III. RELIEF REQUESTED.**

3 Defendant requests that this Court grant Defendant's motion, issue an order  
4 setting aside the verdict for Plaintiffs, and order a new trial on all claims, defenses, and  
5 issues tried to the Jury in the liability phase of the trial, pursuant to Rule 59(a)(1)(A).

6 A proposed order is separately submitted.

7 Respectfully Submitted,

8 Dated: July 17, 2009

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

9  
10 Nicholas P. Granath, Esq. (*pro hac vice*)  
ngranath@ssmplaw.com  
SEHAM, SEHAM, MELTZ & PETERSEN, LLP  
2915 Wayzata Blvd.  
11 Minneapolis, MN 55405

12 Lee Seham, Esq. (*pro hac vice*)  
Lucas K. Middlebrook, Esq. (*pro hac vice*)  
Stanley J. Silverstone, Esq. (*pro hac vice*)  
13 Theresa Murphy, Esq. (*pro hac vice*)  
SEHAM, SEHAM, MELTZ & PETERSEN, LLP  
445 Hamilton Avenue, Suite 1204  
14 White Plains, NY 10601

15 Nicholas Enoch, Esq. State Bar No. 016473  
stan@lubinandenoch.com  
16 LUBIN & ENOCH, PC  
349 North 4th Avenue  
17 Phoenix, AZ 85003-1505

18 *Attorneys for Defendant*  
19 *US Airline Pilots Association*



1 **CERTIFICATE OF SERVICE**

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

- 4 • DEFENDANT’S NOTICE OF, AND MOTION FOR, NEW TRIAL,  
PURSUANT TO RULE 59(a)(1)(A)
- 5 • Any supporting Declarations and their attachments
- 6 • Proposed Order
- 7 • Certificate of Service

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

Marty Harper	Don Stevens	Andrew S. Jacob
MHarper@Polsinelli.com	DStevens@Polsinelli.com	AJacob@Polsinelli.com
Kelly J. Flood	Katie Brown	
KFlood@Polsinelli.com	KVBrown@Polsinelli.com	

11 Further, I certify that paper hard copies shall be provided to The Honorable Neil  
12 V. Wake, District Court Judge, 401 W. Washington Street, SPC 52, Phoenix, AZ 85003.

13 On July 17, 2009, by:

14 */s/ Nicholas Paul Granath, Esq.*

15

16

17

18

19

20

21

22