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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 MOTION FOR NEW TRIAL PURSUANT TO RULE 59**
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

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 1
2) Legal Standard On A Rule 59 Motion For New Trial 1
III. Legal Argument 3
1) First Ground: The Verdict Is Contrary To The Weight Of Evidence Because There Was No Evidence Of "Bad Faith" As That Term Is Defined By Controlling Case-law 3
2) Second Ground: Even Had There Been "Bad Faith" The Verdict Is Still Contrary To The Weight Of Evidence Because There Is No Evidence Of A Causal Connection Between The Alleged Wrongdoing And Injury, A Necessary Element To Show *Liability* Under Controlling DFR Law 4
3) Third Ground: The Jury Instructions Were So Deeply Flawed By Gross Departures From Controlling Case Law That They Mis-instructed The Jury, Tainted The Deliberation Process, And Compelled An Unfair Verdict Contrary To Law 5
4) Fourth Ground: Numerous Evidentiary Trial-Rulings Cumulatively Prejudiced Defendant 10
5) Fifth Ground: Several Procedural Trial-Rulings Cumulatively Prejudiced Defendant 11
6) Sixth Ground: The Court Demonstrated A Lack Of Impartiality That Unfairly Prejudiced The Result Of The Trial 12
7) Seventh Ground: Counsel For Plaintiffs Committed Prejudicial Errors At Trial 13
8) Eighth Ground: Plaintiffs' Counsel Wrongfully Withheld Evidence From Defendant That Should Have Been Disclosed Pre-Trial, Unfairly Prejudicing Defendant And/Or Resulting In An Erroneous Verdict 13
IV. Relief Requested 15

Table of Authorities

Cases:

Agrizap, Inc. v. Woodstream Corp.,
520 F.3d 1337 (Fed. Cir. 2008) 2

Allied Chemical Corp. v. Daiflon, Inc.,
449 U.S. 33 (1980). 4

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 3

Associated Transport, Inc.,
185 N.L.R.B. 631 (1970) 6

Barton Brands, Ltd. v. NLRB,
529 F.2d 793 (7th Cir. 1976) 7

Bateman v. Mnemonics,
79 F.3d 1532 (11th Cir. 1996) 5

Boehringer Ingelheim Vetmedica, Inc. v. Schering-Plough Corp.,
106 F. Supp. 2d 696 (D.N.J. 2000) 1

Boston Scientific Corp. v. Johnson,
550 F. Supp. 1102 (N.D. Cal. 2008) 3

Burchfield v. Steelworkers,
577 F.2d 1018 (5th Cir. 1978) 7

Chaney v. City of Orlando,
483 F.3d 1221 (11th Cir. 2007) 3

Defenders of Wildlife v. Bernal,
204 F.3d 920 (9th Cir. 2000). 4

DeLong v. International Union,
850 F. Supp. 614 (S.D. Ohio 1993) 2

Director of Revenue, Colorado v. U.S.,
392 F.2d 307 (10th Cir. 1968) 2

Edward J. DeBartolo Corp. v. Coopers & Lybrand,
928 F. Supp. 557 (W.D. Pa. 1996) 2

Federal Insurance Company v. HPSC, Inc.,
480 F.3d 26 (1st Cir. 2007) 6

Fisher v. City of San Jose,
509 F.3d 952 (9th Cir. 2007), *reh'g en banc*, 519 F.3d 908 (9th Cir. 2008). 2

Gasperini v. Center For Humanities, Inc.,
518 U.S. 415 (1996) 4

Gunning v. Cooley,
281 U.S. 90 (1991) 3

Hanson v. Shell Oil Company,
541 F.2d 1352 (9th Cir. 1976). 5

Hass v. Darigold Dairy Prod. Co.,
751 F.2d 1096 (9th Cir. 1985) 7

Henning v. Union Pacific R.R. Co.,
503 F.3d 1206 (10th Cir. 2008) 4

Hiatt v. New York Cent. R.R. Co.,
444 F.2d 1397 (2d Cir. 1971) 7

Johnson v. Air Line Pilots Ass'n,
650 F.2d 133 (8th Cir. 1981) 7

Jorgensen v. Cassiday,
320 F.3d 906 (9th Cir. 2003) 3

Jurgens v. McKasy,
905 F.2d 382 (Fed. Cir. 1990) 2

Landes Const. v. Royal Bank of Canada,
833 F.2d 1365 (9th Cir. 1987) 5

Lange v. Penn Mut. Life. Ins. Co.,
843 F.2d 1175 (9th Cir. 1988) 2

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

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

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) 6

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) 6

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

Shamblin v. General Motors Corp., 743 F.2d 436 (6th Cir. 1984) 7

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

Tripati v. McKay,
211 Fed. Appx. 552 (9th Cir. 2006) 3

United Food & Commercial Workers Int'l Union v. Gold Star Sausage Co.,
897 F.2d 1022 (10th Cir. 1990) 7

Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.,
546 U.S. 394 (2006) 6

Wightman v. Springfield Terminal Railway Co.,
100 F.3d 228 (1st Cir. 1996) 7

Authorities:

Federal Practice and Procedure: Civil 2d, Wright, Miller & Kane 1, 2, 4, 5

I. BACKGROUND.

This Court trifurcated the trial into three phases: 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; the damage phase remains pending. The Court has not ordered entry of judgment. Plaintiffs have now abandoned their Counts I and II against the company by voluntarily withdrawing their grievance. USAPA and US Airways remain 'at the table' in collective bargaining. USAPA has previously moved for Judgment As A Matter of Law, under Rule 50 (Doc. # 567), which remains pending; that motion and brief are hereby incorporated by reference.

II. STANDARDS OF LAW.

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

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.

2) Legal Standard On A Rule 59 Motion For New Trial.

On a Rule 59 motion for a new trial, a district court has wide discretion to order a

new trial whenever any prejudicial error has occurred, or in order to prevent injustice. *See Federal Practice and Procedure: Civil 2d* § 2805, Wright, Miller & Kane. Under Rule 59, a court is free to consider the credibility of witnesses and the weight of evidence. *See Gasperini v. Center For Humanities, Inc*., 518 U.S. 415, 433 (1996) ("the authority of trial judges to grant new trials ... is large"); *Allied Chemical Corp. v. Daiflon, Inc*., 449 U.S. 33 (1980). On a motion for new trial a court may reopen the judgment or even hear additional testimony. *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 928 (9th Cir. 2000). In reviewing a Rule 59 motion, "the trial court may grant a new trial, *even though the verdict is supported by substantial evidence*, if the verdict is contrary to the clear weight of evidence, or is based upon evidence which is false, or to prevent, at the sound discretion of the court, a miscarriage of justice." *Roy v. Volkswagen of America*, 896 F.2d 1174, 1176 (9th Cir. 1990) (*citing Hanson v. Shell Oil Company*, 541 F.2d 1352, 1359 (9th Cir. 1976)).

A finding that there is substantial evidence to uphold the verdict does *not* prevent a court from ordering a new trial. *Id*. *See also Landes Const. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987). Moreover, a court is not required to take the view of the evidence most favorable to the verdict winner and the court is free to weigh the evidence for itself. *Landes Const. Co*., 833 F.2d at 1371-73. *See also Federal Practice and Procedure: Civil 2d* § 2806, Wright, Miller & Kane.

III. LEGAL ARGUMENT.

1) First Ground: The Verdict Is Contrary To The Weight Of Evidence Because There Was No Evidence Of "Bad Faith" As That Term Is Defined By Controlling Case-law.

For all the reasons stated in Defendant's brief in support of its motion for judgment as a matter of law (Doc. # 568 at § III. 2 B), i.e. that there is an absence of legally sufficient evidence to establish "bad faith" as that term is defined by controlling case-law, so too should a new trial be granted pursuant to Rule 59. In short, on the one hand, the record shows an absence of evidence of intentionally misleading conduct that is necessary to show DFR-defined bad faith. On the other hand, the record shows evidence of good faith in the form of the Conditions and Restrictions and the evidence that USAPA understood that date of hire is the method of seniority integration that benefits all pilots in the long run; and case law shows date-of-hire to be the 'gold standard' of seniority integration methods – not the Nicolau list. *See, e.g., Laturner v. Burlington Northern, Inc.*, 501 F.2d 593, 599 (9th Cir. 1974); *Truck Drivers and Helpers, Local Union 568 v. NLRB*, 379 F.2d 137, 143 (D.C. Cir. 1967).

The absence of any legally sufficient evidence to establish "bad faith" was compounded by the Court's bad faith instruction to the jury which failed to charge the jury on the definition of bad faith in the context of a DFR suit.[1] Even assuming *arguendo* that there had been legally sufficient evidence establishing bad faith-DFR at trial, there is no way, without being given the proper DFR-bad faith definition, that the jury verdict

[1] *See infra*, page 5, § A.

was a true indicator of the intent of the jury in finding for plaintiffs on that ground.

2) <u>Second Ground: Even If There Were "Bad Faith" The Verdict Is Still Contrary To The Weight Of Evidence Because There Is No Evidence Of A Causal Connection Between The Alleged Wrongdoing And Injury, A Necessary Element To Show *Liability* Under Controlling DFR Law.</u>

In order to state a claim for violation of the Duty of Fair Representation, assuming it has been established that the union has acted outside a wide range of reasonableness, two elements are necessary:

First, arbitrary, discriminatory, or bad faith conduct;

Second, a causal connection between the wrongful conduct and injury. *Ackley v. Western Conf. of Teamsters*, 958 F.2d 1463, 1472 (9th Cir. 1992). *See also Spellacy v. Air Line Pilots Ass'n*, 156 F.3d 120, 126 (2d Cir. 1998); *Williams v. Romano Brothers Average Co.*, 939 F.2d 505, 508 (7th Cir. 1991); *in accord, Ramey v. Dist. 141, IAM*, 2002 U.S. Dist. LEXIS 26670, *25 (E.D.N.Y 2002).

But on this record there is no evidence that the claimed bad faith was *causally* connected with any injury that was presented to the Jury in the liability phase of the trial. Instead, Plaintiffs merely presented the contrasting seniority lists and argued that the Nicolau list was better for Plaintiffs. That is a far cry from a casual connection; it is shear speculation.

Plaintiffs claim that their injury results from not having Nicolau fully implemented, that is, negotiated in a signed and ratified contract before there were any furloughs of Plaintiffs or in time to allow for promotions or other contract benefits Plaintiffs claim they would have been entitled to. But *even had* USAPA announced its

intention from the date of certification to, in effect, 'pick up where ALPA left off,' and even had it proposed the Nicolau list the next day, there simply was no evidence *presented in the liability phase of the trial* that this would have resulted in a contract in time to affect Plaintiffs. Indeed, Plaintiffs' latest theory on damages causation, when taken to its logical limits, would mean that *nothing* that USAPA could ever have done once it became the certified representative, and assumed the duty of fair representation, would have un-done the damages supposedly caused by its agents prior to certification. This striking result means that USAPA was tainted at birth, a result that penalizes individual pilots who cannot under law be liable for a DFR violation merely for exercising their RLA-guaranteed right to choose their own representatives for any motive, good or bad, and is wholly unsupported by any case applying the duty of fair representation whatsoever.

3) <u>Third Ground: The Jury Instructions Were So Deeply Flawed By Gross Departures From Controlling Case Law That They Mis-instructed The Jury, Tainted The Deliberation Process, And Compelled An Unfair Verdict Contrary To Law.</u>

Incorrect jury instructions that taint the deliberative process are grounds for a new trial. *See, e.g. Bateman v. Mnemonics*, 79 F.3d 1532 (11th Cir. 1996). Defendant's motion details 23 individual errors of instructions which are as follows:

A) Doc. # 459 at 5:7-11: The bad faith instruction *omitted any definition* of bad faith as defined by controlling case law. In the context of a union's duty of fair representation, such a term is not, by case law, self-defining. *Rakestraw v. United Airlines, Inc*., 981 F.2d 1524, 1530 (7th Cir. 1992) ("these terms are not self-defining"). Bad faith is, as here, the gravamen of the claim pled and tried. Even the Court repeatedly observed that the standard for showing bad faith is a high one. The omission was arbitrary as well because the Court *and Plaintiffs* had, before the verdict, proposed a bad faith definition other than what went into the

final instructions, and which incorporated the law requiring a "showing of fraud, deceit or dishonest action." (*See* Granath Declaration, Attachment 1, page 2, Instruction No. 7; Doc. # 438, page 11, Instruction No. 7; Doc. # 441, page. 5, Instruction No. 6). Compare the Court's proposed draft instructions of April 27 Instr. No. 7 with the Plaintiffs' comment in Instr. No. 6 on page 5 of Doc. # 441. Not only did the final instruction omit the applicable DFR definition of union bad faith, the Plaintiffs had already agreed to an instruction that reflected the proper definition. This error deeply and unfairly tainted the deliberations and *standing alone is grounds for a new trial*.

B) Doc. # 459 at 7:13-21: The "Transition Agreement ... required ... USAPA to adopt the Nicolau Award as its bargaining position ..." instruction constituted a *virtual directed verdict* on the central underlying theory of Plaintiffs' case – and the stated theory of Plaintiffs' dismissed state case – i.e. the suggestion that USAPA was somehow legally obligated *ab initio* to adopt Nicolau. This instruction invaded the System Board of Adjustment's exclusive jurisdiction by interpreting a collective bargaining agreement when exactly the same contention was before the Board in a grievance then known by the Court to be pending prior to and during trial. This instruction invaded the Jury's fact-finding province by directing it to accept the Court's own factual interpretation of ALPA Merger Policy, a hotly contested fact issue at trial. This instruction also ignored evidence and egregiously departed from controlling law. This error is particularly arbitrary and inexplicable in view of the Court's steadfast refusal prior to trial to accept summary judgment motions on this very issue, as requested by both parties. (*See*, Doc. #215 and # 218). This error deeply and unfairly tainted the deliberations and *standing alone is grounds for a new trial*.

C) Doc. # 459 at 5:19-6:7: The "any promises USAPA may have made during its election campaign ..." instruction improperly invited the Jury to find liability based on conduct that arose *before* any Duty arose. But as the Court had already ruled, and correctly so, on Defendant's motion in limine: "Pre-certification conduct cannot be the basis for liability." (Doc. 361, p. 3:21). This error deeply and unfairly tainted the deliberations and *standing alone is grounds for a new trial*.

D) Doc. # 459 at 6:24-7:6: The "outcome of a conflict already resolved ..." instruction invaded the province of the Jury by deciding a fact issue about the Merger policy (or alternatively, invaded the exclusive jurisdiction of the System Board of Adjustment by interpreting a collective bargaining agreement, beyond the Court's jurisdiction), misstated or ignored evidence, and radically departed from controlling case law that allows a union to collectively bargain over *non-vested* seniority rights *even after an arbitration*. *See e.g.*, *Associated Transport, Inc.*, 185 N.L.R.B. 631 (1970) (union revocation of arbitration proceeding over seniority).

This error deeply and unfairly tainted the deliberations and *standing alone is grounds for a new trial.*

E) Doc. # 459 at 6:18-22: The "Preferential representation to the numerically larger number of voters ..." instruction misstated controlling case law and substituted an arbitrary standard contrary to the settled precepts of applicable federal labor law. *See e.g., Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1533 (7th Cir. 1992) (majority rule the norm). This error deeply and unfairly tainted the deliberations and *standing alone is grounds for a new trial.*

F) Doc. # 459 at 6:24-7:6: The "a general preference for any particular seniority system other than the Nicolau Award is not, standing alone, a legitimate union objective..." instruction grossly misstated controlling law, invaded the province of the Jury, or alternatively invaded, beyond the Court's jurisdiction, the exclusive jurisdiction of the System Board of Adjustment, and misstated or ignored evidence. This error deeply and unfairly tainted the deliberations and *standing alone is grounds for a new trial*.

G) Doc. # 459 at 7:8-9: The "dissatisfaction with the ... previous union ... not a legitimate union objective" instruction misstated controlling law under the Railway Labor Act, injected an irrelevant element (the subjective motives of employees in choosing their own representative), and impermissibly prejudiced Defendant. This error deeply and unfairly tainted the deliberations and *standing alone is grounds for a new trial*.

H) Doc. # 459 at 7:13-21: The "revisiting the seniority issue ... was not a legitimate union objective ..." instruction misstated controlling law which holds to the contrary and allows a union to revisit seniority terms even after terms were adjusted by arbitration. *See e.g., Hass v. Darigold Dairy Prod. Co.,* 751 F.2d 1096, 1099 (9th Cir. 1985); *Wightman v. Springfield Terminal Railway Co.,* 100 F.3d 228, 232 (1st Cir. 1996); *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1535 (7th Cir. 1992); *United Food & Commercial Workers Int'l Union v. Gold Star Sausage Co.*, 897 F.2d 1022, 1026 (10th Cir. 1990); *Shamblin v. General Motors Corp.*, 743 F.2d 436, 438-39 (6th Cir. 1984); *Johnson v. Air Line Pilots Ass'n*, 650 F.2d 133, 136-37 (8th Cir. 1981); *Burchfield v. Steelworkers*, 577 F.2d 1018, 1020 (5th Cir. 1978); *Hiatt v. New York Cent. R.R. Co.*, 444 F.2d 1397 (2d Cir. 1971). This error deeply and unfairly tainted the deliberations and *standing alone is grounds for a new trial*.

I) Doc. # 459 at 7:13-21: The "Nicolau award was a final and binding resolution ..." instruction invaded the exclusive jurisdiction of the System Board of Adjustment beyond the Court's jurisdiction, or alternatively invaded the province of the Jury,

misstated or ignored evidence, and ignored controlling law. *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 800 (7th Cir. 1976) (*citing Associated Transport, Inc.*, 185 N.L.R.B. 631 (1970)) (labor union may re-visit arbitrated seniority decisions, even where they agreed that they are final and binding, where the union has a principled objection to the arbitration result). 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* when they expressly, and on the record, waived any discrimination claim. ("We believe it's only on the bad faith side so we're not making a discrimination claim." Tr. Apr. 28, 2009, vol. I, 130:3-4; Doc. # 348 at p. 87:16 - objecting to a discrimination instruction proposed by Defendant because it would "set up a straw man that is easy for Defendant to defeat ..." *See also* Defendant's Instruction § IV, No. 15 and 20 in Doc. # 348). This instruction misstated the claim before the Jury and invited it to affix liability for actions taken prior to when the Duty arose, contrary to the Court's correct earlier ruling ("Pre-certification conduct cannot be the basis for liability." Doc. 361, p. 3:21). Further, this instruction prejudiced Defendant on an immaterial issue. 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 the definition of bad faith that Plaintiffs and the Court had earlier proposed and the controlling law of bargaining with an arbitrary standard that favored Plaintiffs. Compare the Court's proposed draft instructions of April 27 Instr. No. 7 (Granath Decl. Att. 1) with the Plaintiffs' comment in Instr. No. 6 on page 5 of Doc. # 441. This error deeply and unfairly tainted the deliberations and *standing alone is grounds for a new trial*.

M) Doc. # 459 at 8:18-22: The "if you decide ... did so only to enhance the rights of the East Pilots ..." instruction misstated controlling law which allows a union to honor the democratic preference of the majority and invited the Jury to take sides on a seniority dispute that was not material to any issue properly before the Jury. This error deeply and unfairly tainted the deliberations and *standing alone is grounds for a new trial*.

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

O) Doc. # 459 at 4:27 to 5:3: The "you may still consider ..." instruction impermissibly invited, or allowed, the Jury to find liability based on conduct prior to when the Defendant owed any Duty. This contradicted the Court's earlier rulings recognizing no duty was owed until Defendant was certified based on controlling law ("Pre-certification conduct cannot be the basis for liability." Doc. 361, p. 3:21).

P) Doc. # 459 at 5:7-11: The breach-of-duty instruction erroneously contained "discriminatory" references when this prong of the alleged DFR claim was not plead and specifically and on the record was waived by Plaintiffs. ("We believe it's only on the bad faith side so we're not making a discrimination claim." Tr. Apr. 28, 2009, vol. I, 130:3-4; Doc. # 348 at p. 87:16 - objecting to a discrimination instruction proposed by Defendant because it would "set up a straw man that is easy for Defendant to defeat ..." *See also* Defendant's Instruction § IV, No. 15 and 20 in Doc. # 348).

Q) Doc. # 459 at 5:7-11: The "not legitimate union objectives ..." instruction ignored controlling case law allowing unions a wide range of reasonableness and substituted an arbitrary and unlawful standard that lowered the threshold for liability.

R) Doc. # 459 at 5:15-17: The "impartially" and "with an honest purpose" instructions departed from controlling case law formulations of the duty of fair representations in the context of collective bargaining.

S) Doc. # 459 at 5:19-6:7: The "taken solely ...." instruction misstated controlling case law.

T) Doc. # 459 at 5:19-6:7: The "intent to benefit the bargaining unit as a whole ..." instruction misstated controlling case law.

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

V) Doc. # 459 at 8:18-22: The "at the expense of West Pilots ..." instruction misstated controlling law.

4) Fourth Ground: Numerous Evidentiary Rulings Cumulatively Prejudiced Defendant.

The following evidentiary rulings were erroneous and cumulatively prejudiced Defendant at trial for the reasons stated below:

A) Excluding the testimony of Defendant's proffered *expert witnesses*, R. Hurd (labor and seniority expert) and R. Salamat (finance and statistics expert). The Court based the exclusion on the claim that late disclosure prejudiced Plaintiffs' trial preparation, but the Court had expressly declined to order any disclosure date and consequently there was no expert disclosure date. The only controlling date was for witness disclosure and it is undisputed that Defendant met that (*see*, Doc # 417 p. 37). This error was sufficiently prejudicial to affect the result of the trial because Professor Hurd would have testified as to *why* a date of hire seniority system benefits the entire bargaining unit *as a whole*, which would have contradicted Plaintiffs' closing, affected the Jury instructions, and undermined Plaintiffs' Rule 50 motion.

B) Excluding Defendant's evidence of *video-tapes* produced by ALPA National. This error was sufficiently prejudicial to affect the result of the trial because this evidence was relevant, material and the best evidence of ALPA's interpretation of its Merger Policy as well as of the contention that the Nicolau award was irretrievably opposed by a majority of pilots. Defendant's Exhibit No. 1133 (i.e. the Couette video showing that ALPA would not 'cram down' Nicolau), and No. 1145 (Stephan video "straight talk" showing that a vote for keeping ALPA was a vote for keeping Nicolau at bay, which went to the issue of delay) were improperly excluded.

C) Admitting, over Defendant's objections, objected-to portions of the *deposition testimony of Bradford*.

D) Admitting, over Defendant's objections, objected-to portions of the *deposition testimony of Hemenway*.

E) Admitting over Defendant's objections *Plaintiffs' exhibits* Nos. 14, 29, 31, 33, 34, 37, 44, 48, 96, 97, 100, 101, 103, 314, 336, 346, 350, 372, 389, 512, 513.

F) Excluding Defendant's exhibits: No. 1003 (Notice of Removal, because this would have shown the ALPA West MEC attorney Freund describing Nicolau as merely a bargaining proposal), No. 1048 (AWA MEC message, because this would have shown ALPA pressuring the West to compromise Nicolau), No. 1055 (ALPA West MEC attorney Freund's post-hearing brief, because this would have shown

that ALPA Merger Policy had undergone a political process whereby consideration of date of hire had been deliberately excised), No. 1068 (ALPA West MEC attorney Freund's email, because this would have shown that ALPA considered East operations more profitable and thus a basis upon which East pilots would reject voluntarily accepting the Nicolau award).

G) Admitting over Defendant's objections evidence offered to relitigate the Nicolau award, contrary to the Court's earlier motion in limine excluding such evidence.

H) Ignoring the wide range of reasonableness standard and granting Plaintiffs' motion in limine excluding any evidence of other US Airways' union's *seniority integrations* that would have shown that on the US Airways' property all other unions had integrated their seniority lists by date of hire *without any* conditions and restrictions designed to protect their West counterparts.

I) Granting Plaintiffs' motion in limine excluding any evidence of so-called *"bad acts"* evidence showing a concerted criminal and tortious campaign by certain West pilots to prevent the participation of West pilots in USAPA or their involvement in negotiations.

J) Granting Plaintiffs' motion in limine excluding any evidence of *status of negotiations* beyond those directly related to seniority integration.

K) Granting Plaintiffs' motion in limine limiting evidence challenging the merits of ALPA Merger Policy.

5) <u>Fifth Ground: Several Procedural Rulings Cumulatively Prejudiced Defendant.</u>

The following procedural rulings were erroneous and cumulatively prejudiced Defendant at trial for the reasons stated below:

A) Restricting Defendant's closing argument when Defendant's counsel attempted to correct a factual misstatement by Plaintiffs' counsel made in Plaintiffs' closing argument (i.e. that under the USAPA Conditions and Restrictions a West pilot would lose a protected position by merely bidding for an East position; this is wrong in fact because, under the USAPA seniority proposal, that only occurs if a bid was actually awarded). This error was compounded by the Court's erroneous special instruction to the Jury, and the Court's simultaneous refusal of Defendant's request to reopen the record to correct the error.

B) Instructing Defendant's attorney (Brengle) to cease making any objections

whatsoever during the testimony of Sullenberger by commanding him to sit down without justification, thus preventing counsel from standing to make objection. (*See*, Tr. 960:18; 961:17; 962:15; 1033:8-23). This deprived Defendant of constitutional due process of law.

C) Scheduling the trial on an expedited basis over Defendant's objections that Defendant was prejudiced in its ability to prepare for trial, and in the Court's placing an arbitrary length of time for Defendant to present its case in trial.

6) <u>Sixth Ground: The Court Demonstrated A Lack Of Impartiality That Unfairly Prejudiced The Result Of The Trial.</u>

Respectfully, Defendant submits that the Court's statements made well before trial at the very outset of the case suggesting that USAPA had acted in bad faith or that the Nicolau list was a legal entitlement in favor of plaintiffs (*e.g.*, Oct. 29 at Tr. 57 "the union was created and selected by express campaign promises to disregard the interests of the West pilots") and during trial but before jury deliberations affirming the same (*e.g.*, Tr. 1074:14-18 "how could it be in good faith for a majority to use their backup power to ratify an entire CBA as a way to indirectly defeat their duty to the minority to honor the agreed resolution of the seniority list"), that the Court's jury instructions imposed over vigorous objection that effectively directed a verdict in favor of Plaintiffs, combined with questionable rulings in trial tending to deprive, or effectively depriving, Defendant of due process (e.g. forbidding the making of objections by trial counsel, Tr. 960:18; 961:17; 962:15; 1033:8-23; refusing to correct known mistakes in the factual record created by Plaintiffs' counsel about to go to the jury, Tr. 2046:10–2050:3), and other actions, combined to demonstrate a lack of impartiality that unfairly prejudiced the result of the trial.

The Court either gave the impression of or allowed itself to assist the plaintiffs in

proving their case. In the face of plaintiffs' counsels' knowing and voluntary repeated waivers of the arbitrary and discriminatory prongs of their DFR claim, the Court encouraged the plaintiffs, to their sole advantage, that the case proceed on those prongs. This transpired over Defendant's strenuous objection that it was being forced to defend against a moving target even while the trial was proceeding. (*See* Tr. at 523-528). This unfairly harmed Defendant by diminishing its ability to defend, during trial, against a constantly changing case theory endorsed by the Court. This harm was compounded by the Court's submission to the jury of undefined DFR liability theories [i.e., discrimination and bad faith] that resulted in a Jury verdict unsupported in fact or law.

7) <u>Seventh Ground: Counsel For Plaintiffs Committed Prejudicial Errors At Trial.</u>

Counsel for Plaintiffs committed prejudicial error by the following:

A) In closing argument by repeated instances of *attorney vouching*. (*See*, Tr. 1948:2, 1949:10, 2072:25, 2074:3-9).

B) In Closing argument by arguing in violation of a Court order (Tr. 2074:17-22, objected to at 2074:23) granted in response to Defendant's motion *in limine* excluding evidence of conduct offered to show liability for conduct prior to April 18, 2008 when USAPA was certified (*See*, Doc. # 361, page 3:21 "Pre-certification conduct cannot be the basis for liability"). This error was greatly amplified to the jury through counsel's PowerPoint, overhead presentation (See, Doc. # 559-2). In addition, during closing argument counsel made additional objected-to arguments that further violated Court orders, (*See*, Tr. 2078:17, 2081:19).

8) <u>Eighth Ground: Plaintiffs' Counsel Wrongfully Withheld Evidence From Defendant That Should Have Been Disclosed Pre-Trial, Unfairly Prejudicing Defendant And/Or Resulting In An Erroneous Verdict.</u>

Counsel for Plaintiffs committed error that was unfairly prejudicial to Defendant

by *withholding evidence* that Defendant had sought in pre-trial discovery and that Plaintiffs were under a duty to disclose before trial, and by unfairly exploiting this at trial. In pre-trial discovery Defendant served comprehensive Requests For Documents. (*See*, Granath Decl. Att. 4). After the liability-phase trial, on June 15, 2009, Plaintiffs produced to Defendant several documents by way of supplementing evidence for the anticipated damages-phase trial. Select documents that were bates stamped ADD00004975-4977, ADD00005365-5366 and ADD00005367-5369 were clearly responsive to Defendant's pre-liability trial discovery demands.

The first document (ADD00004975-4977; *See*, Granath Decl. Att. 5) is an East MEC resolution dated March 7, 2008, which is contrary to Plaintiffs' theory that the East MEC was acting in collusion with USAPA to affect a delay until USAPA could get on the property. This resolution tracks the sentiment contained in the ALPA-produced video of Captain Jack Stephan that Defendant offered but the Court refused to admit. Defendant did not have this document until it was produced by Plaintiffs *after* the liability trial.

The second document (ADD00005365-5366; *See*, Granath Decl. Att. 6) is a March 6, 2008 memo containing a proposal to modify the Transition Agreement that would be endorsed by both East and West to allow for continued separate operations, in other words, a two-contract solution. Defendant did not have this document until it was produced by Plaintiffs *after* the liability trial.

The third document (ADD00005367-5369; *See*, Granath Decl. Att. 7) is a letter by John McIlvenna, the former West ALPA MEC Chairman to Jack Stephan, the former

East MEC Chairman (who testified at trial) that also addressed the viability of a two-contract solution. Defendant did not have this document until it was produced by Plaintiffs *after* the liability trial. This letter directly contradicts plaintiffs' position throughout trial and during closing argument that ALPA and the Company were close to reaching a single CBA. In this letter that was withheld by plaintiffs until *after* trial, the West MEC Chairman unequivocally stated that "The May 2007 "Kirby" proposal offered both pilot groups West Book plus 3% pay rates and was deemed unacceptable by both pilot groups." (ADD00005367).

Since the inception of this litigation, plaintiffs have continually and without justification accused USAPA of conducting trial by ambush. It now appears that by withholding pertinent evidence, plaintiffs were engaged in trial by deception. This is misconduct or error that makes the Jury's verdict erroneous and now warrants a new trial.

IV. RELIEF REQUESTED.

Defendant requests that the Court grant Defendant's motion for a new trial pursuant to Rule 59. Pursuant to this request, a proposed order is separately submitted.

Respectfully Submitted,

Dated: July 17, 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'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR NEW TRIAL PURSUANT TO RULE 59
- 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:

Marty Harper MHarper@Polsinelli.com	Don Stevens DStevens@Polsinelli.com	Andrew S. Jacob AJacob@Polsinelli.com
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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 16, 2009, by:

/s/ Nicholas Paul Granath, Esq.