Exhibit A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-16564

Don ADDINGTON, John BOSTIC, Mark BURMAN, Afshin IRANPOUR, Roger VELEZ, and Steve WARGOCKI, individually and representing a class of persons similarly situated,

Plaintiffs-Appellees

v.

US AIRLINE PILOTS ASSOCIATION, an unincorporated association representing the pilots in the employment of US Airways Inc.,

Defendant-Appellant

PETITION FOR CLARIFICATION
FRAP RULE 40

POLSINELLI SHUGHART, P.C.
MARTY HARPER (SBN 003416)
ANDREW S. JACOB (SBN 022516)
3636 N. Central Avenue, Suite 1200
Phoenix, Arizona 85012
Telephone: (602) 650-2008
Facsimile: (602) 264-7033

PETITION

I. OVERVIEW

The Opinion finds that "Plaintiffs' DFR claim is not ripe" and orders the case remanded with directions "that the action be dismissed." *Slip Op.* at 8014. The Opinion notes that the district court "granted the West Pilot Plaintiffs an injunction against USAPA." *Id.* at 8001. It makes only passing reference, however, to the named plaintiffs' pending personal claims for money damages.[1] The named plaintiffs file this Petition, pursuant to FRAP 40, for clarification as to whether the Court intended to dismiss those claims as well.

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[1] The district court explained the procedural posture of the case as follows:

> [T]rial in the fair representation case was accelerated and bifurcated into two stages to expedite resolution of this urgent case. The first stage would address the liability of the union and the propriety of injunctive relief. In the event of a verdict finding USAPA liable, the second stage would address the causation and quantification of any damages owed to Plaintiffs.

Doc. # 593 at 10:19 to 10:23.

II. BACKGROUND

Following the filing of the interlocutory order and judgment that are on appeal (Docs. ## 593 & 594), the parties proceeded to litigate the named plaintiffs' individual damages claims. In opposition to USAPA's motion to dismiss those claims (Doc. # 612), the named plaintiffs explained the legal basis for their damages claims as follows:

> In August 2007, the East MEC [master executive council of ALPA] withdrew its representatives from the Joint Negotiating Committee ("JNC") and all negotiation of a new CBA necessarily ceased. Had the East MEC not done so, the JNC would have completed negotiation of a single CBA well-before October 2008 and that CBA would have been a CBA that used the Nicolau Award seniority list ("Nicolau CBA"). A Nicolau CBA would likely have had substantial improvements in pay for the East Pilots. It is quite plausible, therefore, that a Nicolau CBA would have been timely ratified and put into effect, integrating operations on or before October 2008. If so, **Plaintiffs would not have been furloughed or lost Captain opportunities.** Withdrawal of the East JNC representatives, therefore, was a substantial part of the but-for cause of Plaintiffs' injuries.

> In 2007, East Pilots formed USAPA for the purpose of preventing the Airline from integrating operations using a Nicolau CBA. Prior to April 18, 2008, members of the East MEC and other East Pilot rank-and-file solicited support for USAPA with the intention of preventing the Airline from integrating operations using a Nicolau CBA. After April 18, 2008, USAPA breached its DFR with the intention to prevent the Airline from integrating operations using a Nicolau CBA.
>
> USAPA was integrally involved in the actions taken by members of the East MEC and East Pilot rank-and-file prior to April 18, 2008. USAPA shared a common objective with those actors when it breached its DFR after April 18, 2008. USAPA and those actors, therefore, acted in concert. Having acted in concert when it breached its DFR, USAPA is liable for all damages caused by those also acting in concert. This includes damages caused by the East MEC's refusal to participate in the JNC.

Doc. # 624 at 1:3 to 2:10 (citations to record omitted, emphasis added).

At USAPA's request, the district court held its motion to dismiss plaintiffs' damages claims in abeyance while this Court decided the merits of USAPA's appeal of the injunction. Doc.

637. The district court planned to decide USAPA's motion in the event this Court affirmed and planned to treat the motion as moot in the event that the Court reversed on the merits. *Id.*

III. DAMAGES CLAIMS

A. The nature of the damages claims does not raise any ripeness concerns.

The Court held that the case was not ripe for injunctive relief, in part, because the district court "cannot fashion a[n] [injunctive] remedy that will alleviate Plaintiffs' harm." *Slip Op.* at 8007-08. It explained that, "under the district court's injunction mandating USAPA to pursue the Nicolau Award, it is uncertain that the West Pilots' preferred seniority system ever would be effectuated." *Id.* at 8007.

Presumably, the district court would have no problem fashioning a damages remedy. The Opinion, however, does not address whether that affects the ripeness inquiry for those claims. It does not address whether this case was ripe to award money damages to remedy the named plaintiffs' extant pecuniary injuries, even if it was not ripe to provide injunctive relief.

The named plaintiffs' damages claims are predicated on showing that USAPA is jointly liable for the totality of misconduct since 2006—particularly the East Pilot decision to withdraw from the joint negotiation of a single CBA. These claims raise issues of causation and liability.

The named plaintiffs must show that the totality of misconduct since 2006 was the proximate cause for US Airways to not be operating under a Nicolau CBA in time to avert the furloughs and demotions affecting the named plaintiffs. The relevant misconduct and injury have already occurred. Nothing will be gained by waiting to decide whether the misconduct was the proximate cause of that injury.

The named plaintiffs must also show joint liability based on action in concert. In the related context of unfair labor practices, unions are subject to joint liability when they act in concert. *See Allied Int'l v. Int'l Longshoremen's Ass'n*, 814 F.2d 32, 40-41 (1st Cir. 1987). The First Circuit explained as follows:

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

Id.

The named plaintiffs' claim is that joint liability applies here because, by representing the pilots in bad faith, USAPA assumed responsibility for the harm caused by related wrongful acts such as the East Pilot withdrawal from the JNC. The conduct that would establish USAPA's joint liability has already occurred. In other words, USAPA has already "stepped aboard" the train (to use the First Circuit's metaphor). Again, nothing will be gained by waiting to decide whether this establishes jointly liability.

In sum, the named plaintiffs' damages claims are predicated on conduct that has already occurred, causation that has already happened, and ongoing injuries that began nearly two years ago.

The nature of these claims, therefore, does not raise ripeness concerns.

B. Ripeness analysis does not consider merits.

The Court cannot find a lack of ripeness in regard to the damages claims on the basis that it is "difficult to separate where standing ends and analysis of the cause of action begins." *Fulfillment Services Inc. v. United Parcel Service, Inc.*, 528 F.3d 614, 619 (9th Cir. 2008). Rather, the Court must separate the two issues because, "[a]s a general rule, when the question of jurisdiction and the merits of the action are intertwined, dismissal for lack of subject matter jurisdiction is improper." *Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold & Easement in the Cloverly Subterranean, Geological Formation*, 524 F.3d 1090, 1094 (9th Cir. 2008) (alteration and quotation marks omitted).

DFR claims are a classic example of claims that present intertwined questions of jurisdiction and merits. In the context of DFR claims, "a party's right to recovery rests upon the

interpretation of a federal statute that provides both the basis for the court's subject matter jurisdiction and the plaintiff's claim for relief." *Id.* In such instances, the claim should be addressed on the basis of the merits, not ripeness. Hence, the Supreme Court states: "It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional power to adjudicate the case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998).

The Court cannot dismiss the named plaintiffs' damages claims as invalid, while also finding a lack of ripeness. To do so would be to take "hypothetical jurisdiction." *See Newdow v. Lefevre*, 598 F.3d 638, 645 (9th Cir. 2010) (defining "hypothetical jurisdiction" as "assuming jurisdiction for the purpose of deciding the merits of a case"). "After *Steel Co.*, a court cannot . . . address the merits of a case without ensuring it has jurisdiction over the case." *Id.* Rather, before the Court can address the merits of the damages claims, it must find these claims are ripe. Nonetheless,

as explained below, the Court cannot, in this instance, reach the merits of the damages claims on this appeal. The Court's only option is to remand those claims back to the district court.

C. The Court cannot decide the merits of the damages claims on this appeal.

At USAPA's request, the district court has not addressed the merits of the named plaintiffs' damages claims. Those issues, therefore, are waived for appeal at this time. *See Cornhusker Cas. Ins. Co. v. Kachman,* 553 F.3d 1187, 1191-92 (9th Cir. 2009) (Issue is waived until it is "raised sufficiently for the trial court to rule on it."). It is premature, therefore, for this Court to decide the merits of the damages claims on this appeal. *See United States v. Oregon*, 769 F.2d 1410, 1414 (9th Cir. 1985) ("The rule is well-established that absent exceptional circumstances, an issue not raised below will not be considered on appeal."). Hence, the Court must remand those claims back to the district court.

D. The Court should avoid a ruling that would make the damages claims both too early and too late.

Ripeness should affect only when a claim can be made, not whether it can be made—particularly where the alleged injury has already occurred. The Court should hesitate, therefore, to find that a DFR claim based on existing and ongoing injury lacks ripeness because such claims are subject to a very tight six-month statute of limitations. *See Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Aloha Airlines, Inc.*, 790 F.2d 727, 735 (9th Cir. 1986). One effect of this limitations is that "[o]nly those asserted improper acts occurring six months prior to the institution of suit in federal district court . . . are actionable." *Sevako v. Anchor Motor Freight, Inc.*, 792 F.2d 570, 575 (6th Cir. 1986). It would be entirely contrary to the purpose for ripeness doctrine if the named plaintiffs timely filed their claims, were dismissed two years later for lack of ripeness, and then were precluded by limitations from refilling.

There are sound policies for applying a tight statute of limitations and a narrow definition of ripeness to DFR claims.

That said, the Court should not apply these doctrines such that a claim would always be either too early or too late. *See* Doc. # 84 at 13:20 to 13:21 (district court noting that "USAPA argues that the Plaintiff West Pilots have sued too early and too late"). Yet, if this Court finds that the named plaintiffs' damages claims are not ripe, there is a real risk that these claims would be untimely on refilling. That cannot be right.

IV. CONCLUSION

The named plaintiffs respectfully request that the Court give further consideration to the status of their damages claims – claims that seek remedy for furloughs and demotions that began nearly two years ago. Because the merits of these claims are neither on appeal nor relevant to ripeness, the Court must be careful not to allow merits to factor into its analysis. The named plaintiffs respectfully ask the Court to amend its Opinion to clarify that their individual claims for damages are not dismissed, that the jury's verdict is not vacated in the context of

those claims, and that those claims are remanded for further consideration by the district court.

RESPECTFULLY SUBMITTED this 11th day of June, 2010.

POLSINELLI SHUGHART, P.C.

By: *s/ Andrew S. Jacob*
Marty Harper
Andrew S. Jacob
Attorneys for Appellees

CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket No. 06-16417

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 11, 2010.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. Participants who are not registered as shown on the Service List will be served by U.S. Mail.

/s/

_____

Andrew S. Jacob

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)

_X_ Proportionately spaced, has a typeface of 14 points or more and contains 1,980 words (petitions and answers must not exceed 4,200 words).

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or

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/s/

_____

Andrew S. Jacob