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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

US Airways, Inc., a Delaware Corporation, Plaintiff, v. Don Addington, an individual; John Bostic, an individual; Mark Burman, an individual; Afshin Iranpour, an individual; Roger Velez, an individual; and Steve Wargocki, an individual, on behalf of themselves and all other similarly-situated individuals, and US Airline Pilots Association, an unincorporated association, Defendants.	Case No. 2-10-cv-01570-PHX-ROS **DECLARATION OF CHRIS A. HOLLINGER IN SUPPORT OF PLAINTIFF US AIRWAYS, INC.'S MOTION FOR CLASS CERTIFICATION**

I, Chris A. Hollinger, declare and state as follows:

1. I am a partner with the law firm of O'Melveny & Myers LLP, counsel for US Airways, Inc. ("US Airways"), am admitted *pro hac vice*, and am one of the attorneys primarily responsible for the litigation of this matter. If called as a witness in the above-captioned matter, I could and would testify competently to the following facts that are within my personal knowledge.

2. A true and correct copy of the West Pilots' Motion for Class Certification, dated December 29, 2008, is attached as Exhibit A. This Motion was filed in the prior *Addington* litigation. *See Addington v. US Airline Pilots Association*, Case No. CV 08-1633-PHX-NVW [Doc. No. 120] (D. Az.).

3. A true and correct copy of Judge Wake's Certification Order, dated March 10, 2009, is attached as Exhibit B. This Order was entered in the prior *Addington* litigation. *See Addington v. US Airline Pilots Association*, Case No. CV 08-1633-PHX-NVW [Doc. No. 248] (D. Az.).

4. A true and correct copy of certain portions of the deposition testimony of Mark Burman on January 28, 2009, is attached as Exhibit C. This testimony was also presented in the prior *Addington* litigation as Exhibit A to the Addington Plaintiffs' Reply in support of their Motion for Class Certification. *See Addington v. US Airline Pilots Association*, Case No. CV 08-1633-PHX-NVW [Doc. No. 214] (D. Az.).

5. A true and correct copy of certain portions of the deposition testimony of Afshin Iranpour on January 28, 2009, is attached as Exhibit D. This testimony was also presented in the prior *Addington* litigation as Exhibit C to the Addington Plaintiffs' Reply

1 in support of their Motion for Class Certification. *See Addington v. US Airline Pilots*
2 *Association*, Case No. CV 08-1633-PHX-NVW [Doc. No. 214] (D. Az.).
3
4 6. A true and correct copy of certain portions of the deposition testimony of
5 John Bostic on January 27, 2009, is attached as Exhibit E. This testimony was also
6 presented in the prior *Addington* litigation as Exhibit B to the Addington Plaintiffs' Reply
7 in support of their Motion for Class Certification. *See Addington v. US Airline Pilots*
8 *Association*, Case No. CV 08-1633-PHX-NVW [Doc. No. 214] (D. Az.).
9
10 7. A true and correct copy of Findings of Fact and Conclusions of Law and
11 Order, dated July 17, 2009, is attached as Exhibit F. This was entered in the prior
12 *Addington* litigation. *See Addington v. US Airline Pilots Association*, Case No. CV 08-
13 1633-PHX-NVW [Doc. No. 593] (D. Az.).
14
15 I declare under penalty of perjury under the laws of the United States of
16 America that the foregoing is true and correct.
17
18 EXECUTED this 15th day of August, 2011, at Los Angeles, California.
19
20 /s/ Chris A. Hollinger
21 Chris A. Hollinger

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EXHIBIT A

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

Don ADDINGTON, *et al.*, Plaintiffs, vs. US AIRLINE PILOTS ASSOCIATION, and US AIRWAYS, INC., Defendants.	CONSOLIDATED CASES NO. 2:08-CV-1633-PHX-NVW; 2:08-CV-1728-PHX-NVW **PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**
Don ADDINGTON, *et al.*, Plaintiffs, vs. Steven H. BRADFORD, *et al.*, Defendants.	

Plaintiffs Don ADDINGTON, John BOSTIC, Mark BURMAN, Afshin IRANPOUR, Roger VELEZ, and Steve WARGOCKI, move this Court, pursuant to Rule 23(b)(2),[1] for class certification. Plaintiffs base this motion on the First Amended Complaint, the Memorandum of Points and Authorities that follows, and the accompanying declarations of Marty Harper, Kelly Flood, and Andrew Jacob.

[1] "Rule" refers, throughout, to the Federal Rules of Civil Procedure.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Overview

Rule 23(b)(2) class action treatment will allow prompt adjudication of liability and injunctive relief.

A. Class Definition

The proposed class of approximately 1,700 individual members is defined as: "All pilots employed by the airline US Airways in September 2008 who were on the America West seniority list on September 20, 2005." All class members: (1) were represented in the Nicolau Arbitration and the Transition Agreement; (2) have seniority rights established by those agreements; (3) are owed a duty of fair representation by Defendant U.S. Airline Pilots Association ("USAPA"); and (4) have suffered injury as a consequence of USAPA's violations of that duty.[2]

B. Class-Wide Remedies

Plaintiffs seek the six equitable remedies that follow on behalf of the class:

(1) Declaration that USAPA violated the duty of fair representation;

(2) Order that USAPA take specific affirmative steps to correct injuries caused by that violation;

(3) Order that USAPA take no action reasonably likely to frustrate implementation of the Nicolau seniority list and other aspects of the Nicolau Award;

(4) Order vacating class member obligations to pay agency fees and membership dues until such time that the Company is operating under a single CBA that implements the Nicolau seniority list and other aspects of the Nicolau Award;

(5) Order directing restitution of fees and dues paid to USAPA by class; and

(6) Award of attorneys' fees and costs.

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[2] Plaintiffs rely on the Court's familiarity with the terminology used in prior pleadings.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

C. Common Class Issues

All class claims raise common issues of fact and law, that include whether USAPA:

(1) is motivated by wrongful hostility towards West Pilots;

(2) was wrongfully organized and established for the purpose of using majority power to impose date-of-hire seniority in disregard of an arbitrated compromise and/or without proper regard for West Pilot seniority interests;

(3) wrongfully made the April, 2008, NMB election a referendum on date-of-hire seniority by promising that, if it won the election, it would never implement the Nicolau seniority list;

(4) has no less duty to honor, defend and support the Nicolau Award than ALPA would have if it were still the bargaining representative;

(5) has a duty to bargain for a single CBA that would implement the Nicolau seniority list;

(6) wrongfully proposed its date-of-hire seniority scheme to US Airways in contract negotiations;

(7) must vacate any West Pilot obligations to pay agency fees and membership dues because it has been in breach of its fiduciary duties;

(8) must refund West Pilot payments of agency fees and membership dues because it has been in breach of its fiduciary duties; and

(9) should pay attorneys' fees and costs based on common benefit doctrine.

II. LEGAL ARGUMENT

A. Legal Standards

On a motion for class certification, courts accept the factual allegations as true. *Blackie v. Barack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975); *Shelter Realty Corp. v. Allied Maint. Corp.*, 574 F.2d 656, 661 n.15 (2d Cir. 1978). Courts also apply a presumption "in favor and not against the maintenance of the class action." *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968); *see*, *e.g.*, *Brown v. Cameron-Brown Co.*,

92 F.R.D. 32, 49 (E.D. Va. 1981) ("[D]oubt ... as to the advisability of proceeding with a class action ... should be resolved in favor of class certification.").

A party seeking class certification must establish, pursuant to Rule 23(a), that: (1) class size makes joinder of all members impracticable; (2) there are substantial questions of law or fact common to the class; (3) the representative plaintiffs have claims that are typical of class claims; and (4) the representative plaintiffs and their counsel will fairly and adequately protect the interests of the class. *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 462 (9th Cir. 2000). The party must also satisfy the requirements of one Rule 23(b) subdivision. *Id.*

The proposed class satisfies Rule 23(a) and Rule 23(b)(2). Plaintiffs address Rule 23(b)(2) first.

B. The Court Should Certify a (b)(2) Mandatory Class.

1. <u>This matter exemplifies proper (b)(2) class treatment.</u>

Class action treatment is warranted where "the party opposing the class has acted or refused to act on grounds generally applicable to the class," and the representatives are seeking "final injunctive relief or corresponding declaratory relief." Rule 23(b)(2). "The (b)(2) class action is intended for cases where broad, class-wide injunctive or declaratory relief is necessary to redress a group-wide injury." *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 162 (2d Cir. 2001). A (b)(2) class, however, "is improper if the merits of the claim turn on defendant's individual dealings with each plaintiff." *In re Harris*, 280 B.R. 876, 882-83 (Bankr. S.D.Ala. 2001). *See also* 2 NEWBERG ON CLASS ACTIONS § 4:11, n.1 (4th ed. 2008 supp.) (noting that *In re Harris* "exemplified" Rule 23(b)(2)).

The merits here do not turn on USAPA's dealing with individual class members. Rather, the merits turn on actions that USAPA directed at the entire group of West Pilots. For example, USAPA schemed to frustrate implementation of the Nicolau seniority list, formulated a date-of-hire seniority policy in disregard of the Nicolau

Arbitration, and presented a date-of-hire seniority policy to the Company as its negotiating position. Each such action was directed at and impacted the entire group of West Pilots. Hence, a class-wide remedy is needed.

Plaintiffs seek a class-wide remedy. They seek a declaration of a class-wide breach of duty and they seek a class-wide injunction as remedy. This matter, therefore, exemplifies a mandatory (b)(2) class.

2. A mandatory (b)(2) class provides conclusive adjudication for all members of the class.

Rule 23(b)(2) class action treatment allows the court "to bind the members of the class with one conclusive adjudication." *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 252-53 (3d Cir. 1975). Otherwise, if members "could elect to opt out and thereby not be bound by the judgment," it "would defeat the fundamental objective of (b)(2)." *Id.* This does not create due process problems because, with (b)(2) class treatment, "due process rights of absent class members generally are satisfied by adequate representation alone." *Crawford v. Honig*, 37 F.3d 485, 487, n.2 (9th Cir. 1994). It is, therefore, well accepted that a court can provide injunctive relief to a (b)(2) class without providing members formal notice or a right to opt out. *See, e.g.*, *Molski v. Gleich,* 318 F.3d 937, 949, n.13 (9th Cir. 2003); *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981).

3. A class seeking injunctive remedy and damages can be certified under (b)(2) if the injunctive remedy is necessary.

a. A class with damages claims can be certified under (b)(2) if injunctive remedy is the predominant reason for the litigation.

"Class actions certified under Rule 23(b)(2) … may include cases that also seek monetary damages." *Probe v. State Teachers' Retirement System*, 780 F.2d 776, 780 (9th Cir. 1986). "[C]ertification of a mandatory class may be appropriate even when monetary damages are involved." *Molski*, 318 F.3d at 947. The damages

claims must arise from the same wrongs as give rise to the right to injunctive remedy. *See Kanter v. Warner-Lambert Co.,* 265 F.3d 853, 860 (9th Cir. 2001); *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 928 (9th Cir. 1982).

The difference between (b)(2) and (b)(3) classes, then, is not in whether there are damages claims. It is also not in whether such damages can be determined on a class-wide basis. *See Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) (approving (b)(2) class certification where damages claims would be decided in "case-by-case adjudication"). Rather, it is in whether damages are the predominant reason for the litigation. *See Molski*, 318 F.3d at 950.

Where injunction is the predominate reason for the litigation, therefore, a class that has damages claims can be certified as a (b)(2) class.

b. Injunction is the predominant reason for the litigation where it is a necessary remedy.

To decide whether injunction is the predominant reason for the litigation, courts focus on "the intent of the plaintiffs in bringing the suit." *Id.* Injunction in the predominant reason where "reasonable plaintiffs would bring the suit to obtain an injunction," whether or not they had a claim for money damages. *Dukes v. Wal-Mart, Inc.* 509 F.3d 1168, 1188 (9th Cir. 2007); *see also Molski*, 318 F.3d at 950, n.15. In other words, based on the premise that reasonable plaintiffs pursue only necessary litigation, an injunction is the predominant reason for litigation only where it is a necessary remedy.

c. An injunction is a necessary remedy where it is needed to satisfy the goal of the litigation.

An injunction is a necessary remedy where the plaintiffs could not satisfy the goal of the litigation without it. Two recent Ninth Circuit district court class certification rulings illustrate the application of this rule. The first decision addressed plaintiffs who sought to remedy the defendant's violations of email privacy. *Murray v. Financial Visions, Inc.*, 2008 WL 4850328 (D.Ariz. 2008). The

court declined to certify a (b)(2) class because it found that the "predominant remedy sought [wa]s monetary damages," not injunction. *Id.* at 4. The court identified two reasons for this finding. First, the fact that the "[p]laintiffs' original complaint requested only monetary damages" showed that they lacked a subjective motivation to obtain injunctive relief. *See id.* Second, the fact that the defendant ceased the objectionable conduct "as soon as plaintiffs complained, and … committed not to resume" showed that the plaintiffs could achieve their goal of keeping their email private without an injunction. *Id.* Consequently, the *Murray* court did not certify a mandatory (b)(2) class.

The second decision addressed plaintiffs who sought to remedy civil rights violations by the LAPD. *Multi-Ethnic Immigrant Workers Organizing Network v. City of Los Angeles*, 246 F.R.D. 621 (C.D.Cal. 2007). In contrast to *Murray*, this court approved (b)(2) class certification because, it found, injunction was the predominant remedy, regardless that the LAPD had agreed to stop the conduct. *Id.* at 633. The difference was that the LAPD's failure to abide by that agreement was the cause of the litigation. *See id.* The plaintiffs in *Immigrant Workers* sought what was, in effect, an order of specific performance. In other words, "the primary goal of the litigation [wa]s to secure … rights … in the future." *Id.* The *Immigrant Workers* court certified a mandatory (b)(2) class because an agreement alone had not secured those rights.

4. The Court should certify a (b)(2) class because the injunction here is necessary to achieve the goal of the litigation.

Plaintiffs here seek an injunction that will, in effect, compel USAPA to honor the agreement to abide by the Nicolau Award and its seniority list. This matter, therefore, is analogous to the *Immigrant Workers* decision. Injunction was necessary in *Immigrant Workers* because the plaintiffs could not rely on LAPD to honor its agreed upon obligations. Injunction is necessary here because Plaintiffs

similarly cannot rely on USAPA to honor existing obligations to treat the Nicolau Award as final and binding. The result here, therefore, should be the same as in *Immigrant Workers*—the Court should certify a mandatory (b)(2) class.

This matter is also distinguishable from the *Murray* decision. The *Murray* court had two reasons to not certify a (b)(2) class. Neither of these reasons applies here. First, unlike the defendant in *Mupray*, USAPA did not cease its wrongful conduct "as soon as plaintiffs complained." 2008 WL 4850328 at 4. Rather, USAPA refuses to admit that its conduct is wrongful and continues such conduct after Plaintiffs filed this litigation (*e.g.* USAPA proposed a date-of-hire seniority scheme in contract negotiations with the Company). Second, unlike the plaintiffs in *Murray*, Plaintiffs here included injunctive relief in their original complaint. Plaintiff's situation, therefore, is opposite that in *Murray*. The result here, therefore, should be opposite to that in *Murray*—the Court should certify a mandatory (b)(2) class.

C. The West Pilot Class Satisfies Rule 23(a).

Rule 23(a) provides that a class must satisfy numerosity, commonality, typicality, and adequacy. *In re Mego Financial Corp.*, 213 F.3d at 462. The proposed class readily satisfies these standards.

1. Numerosity

Rule 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." *East Texas Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 405 (1977). There is no specific number cut-off for class size. *Ballard v. Equifax Check Servs., Inc.*, 186 F.R.D. 589, 594 (E.D. Cal. 1999). For example, one court held that numerosity is said to be "easily met" when there are "hundreds of class members." *Satchell v. FedEx Corp.*, 2005 WL 2397522, *4 (N.D. Cal. Sept. 28, 2005). Another court found numerosity satisfied by as few as 39 potential class members. *Patrick*

v. Marshall, 460 F.Supp. 23, 26 (N.D. Cal. 1978). The West Pilot Class has about 1700 members. It, therefore, readily satisfies numerosity.

2. Commonality

"A class has sufficient commonality if there are questions of fact and law which are common to the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). This requirement is said to be "minimal" because all questions of law and fact need not be common. *Id.* at 1020. "The existence of shared legal issues … is sufficient," regardless that there may be "divergent factual predicates" or "disparate legal remedies within the class." *Id.* at 1019. In fact, a single material issue common to all members of the class can be sufficient to meet the (a)(2) commonality standard. *Wehner v. Syntex Corp.*, 117 F.R.D. 641, 644 (N.D. Cal. 1987).

In this instance, USAPA owes every member of the West Pilot Class the same duty of fair representation. Every member of the West Pilot Class has rights established by the 2004 CBA, Transition Agreement and Nicolau Arbitration. USAPA's duty requires that it give due consideration to those rights and fairly represent every member of the class. This provides each member of the West Pilot Class a common basis to make a claim against USAPA.

The West Pilot Class, therefore, readily satisfies commonality.

3. Typicality

"The question of typicality in Rule 23(a)(3) is closely related to the preceding question of commonality." *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). The difference is that typicality considers whether "the interest of the named representative aligns with the interests of the class." *Hannon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Generally, those interests align where the named plaintiff shares the right that would be vindicated on behalf of the class. *Id.*

Typicality does not require, however, that all class members share the named plaintiffs' enthusiasm for the litigation. *See Abrams v. Communications Workers of*

Am., 59 F.3d 1373, 1378 (D.C. Cir. 1995) (typicality is satisfied regardless that it is not established that all class members favor the litigation).[3] Typicality also does not require that the named plaintiffs' claims "be substantially identical" to the claims of all class members. *Hanlon*, 150 F.3d at 1020. All that is needed is that injuries to the named plaintiffs class members arise out of the same conduct that injured other class members. *See Keele v. Wexleer*, 149 F.3d 589, 593 (7th Cir. 1999). Similarly, the fact that a "different amount of damage" is claimed by individual named plaintiffs does "not negate a finding of typicality." *Thomas & Thomas Rodmakers, Inc., v. Newport Adhesives & Composites, Inc.*, 209 F.R.D. 159, 164 (C.D. Cal. 2002).

Hence, it does not matter here whether some Plaintiffs and some West Pilot Class members have claims for lost wages. I would not matter if some class members did not support this litigation. Because Plaintiffs have the same interests as class members to see implementation of the Nicolau Award and because USAPA's wrongful conduct has impaired those interests, Plaintiffs are typical of the class membership.

The West Pilot Class, therefore, readily satisfies typicality.

4. Adequacy

The question of adequacy considers the qualifications of class counsel and the qualifications and interests of the proposed class representatives. The analysis of adequate representation depends on three factors: (a) "the qualifications of counsel for the representatives;" (b) "an absence of antagonism, a sharing of interests between representatives and absentees;" and (c) and "the unlikelihood that the suit is collusive." *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994). "[T]he named representatives must appear able to prosecute the action vigorously through

[3] In fact, a very substantial majority of West Pilots support this litigation.

1 qualified counsel" and "the representatives must not have antagonistic or
2 conflicting interests with the unnamed members of the class." *Lerwill v. Inflight*
3 *Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978) (*citing Natl. Assoc. of Reg'l*
4 *Med. Programs, Inc. v. Matthews*, 551 F.2d 340 (D.C. Cir. 1976)); *see also Wetzel*,
5 508 F.2d at 247 ("Adequate representation depends on two factors: (a) the plaintiff's
6 attorney must be qualified, experienced, and generally able to conduct the proposed
7 litigation, and (b) the plaintiff must not have interests antagonistic to those of the
8 class.").

9 The standards for determination of the adequacy of class council are further
10 codified in Rule 23(g). *Hill v. Merrill Gardens, L.L.C.*, 2005 WL 2465250, *3 (N.D.
11 Ind. 2005). Rule 23(g)(1)(C) provides:

12 In appointing class counsel, the court … must consider: (i) the work counsel
13 has done in identifying or investigating potential claims in the action, (ii)
counsel's experience in handling class actions, other complex litigation, and
14 claims of the type asserted in the action, (iii) counsel's knowledge of the
applicable law, and (iv) the resources counsel will commit to representing
15 the class.

16 *Id.* A court also "may consider any other matter pertinent to counsel's ability to
17 fairly and adequately represent the interests of the class …." Rule 23(g)(1)(C)(ii).

18 a. Counsel readily satisfies adequacy.

19 Plaintiffs have engaged class counsel who are experienced in prosecuting large
20 class actions. (*See* Marty Harper, Decl. (Dec. 29, 2008).) They also have experience
21 in prosecuting complex Railway Labor Act matters. *See*, *e.g., Airline Pilots Assn.,*
22 *Intl. v. O'Neill*, 499 U.S. 65 (1991): *Rachford v. Air Line Pilots Assn., Intern.*, 2006
23 WL 927742 (N.D. Cal. 2006) (Case No. C-03-3618-PJH). The Court should readily
24 find that the class counsel here satisfy the adequacy standards of Rule 23(g), and on
25 that basis satisfy Rule 23(a)(4).

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b. Plaintiffs readily satisfy adequacy.

In regard to the adequacy of representative plaintiffs, "[t]he court is bound to take the substantive allegations of the complaint as true." *Blackie*, 524 F.2d at 901, n.17. Nothing in the allegations here suggests that Plaintiffs have any interests antagonistic to the interests of the class. Rather, Plaintiffs seek no relief for themselves other than the class-wide relief sought for all West Pilots. The Court, therefore, should find that Plaintiffs satisfy adequacy.

III. CONCLUSION

Rule 23(b)(2) class certification, as proposed herein, will provide efficient adjudication of common issues and a means to obtain class-wide injunctive relief. Accordingly, Plaintiffs respectfully ask this Court to certify the proposed West Pilot (b)(2) class.

Dated this 29th day of December, 2008.

SHUGHART THOMSON & KILROY, P.C.

By: */s/ Andrew S. Jacob*

Marty Harper
Kelly Flood
Andrew S. Jacob
Security Title Plaza
3636 N. Central Ave., Suite 1200
Phoenix, AZ 85012
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2008, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing.

s/ *Andrew S. Jacob*

EXHIBIT B

1 **WO**

6 IN THE UNITED STATES DISTRICT COURT

7 FOR THE DISTRICT OF ARIZONA

Don Addington; John Bostic; Mark Burman; Afshin Iranpour; Roger Velez; Steve Wargocki, Plaintiffs, vs. US Airline Pilots Association; US Airways, Inc., Defendants.	No. CV 08-1633-PHX-NVW (consolidated) **ORDER**
Don Addington; John Bostic; Mark Burman; Afshin Iranpour; Roger Velez; Steve Wargocki, et al., Plaintiffs, vs. Steven Bradford; Paul Diorio; Robert Frear; Mark King; Douglas Mowery; John Stephan, et al., Defendants.	CV08-1728-PHX-NVW

24 Plaintiffs brought suit against Defendant US Airline Pilots Association ("USAPA")
25 alleging that USAPA breached its duty of fair representation. Plaintiffs have now moved
26 under Fed. R. Civ. P. 23(b)(2) to certify a class of "[a]ll pilots employed by the airline US
27 Airways in September 2008 who were on the America West seniority list on September 20,
28

1 2005." (Doc. # 120.) Defendant USAPA opposes this motion. Because certification in this
2 case is appropriate under Rules 23(a) and (b)(2), the Plaintiffs' motion will be granted.

3 **I. Factual Background**

4 The allegations are summarized here, having already been detailed in prior orders of
5 this Court. (*E.g.*, doc. # 84). Plaintiffs are pilots who were employed by America West
6 Airlines Inc. when that airline merged with US Airways, Inc. ("US Airways"). After the
7 merger, a union arbitration process resulted in a single merged seniority list for the pilots of
8 both airlines. This arbitrated award (the "Nicolau Award") purported to balance the career
9 interests of the two pilot groups. Pilots who worked for US Airways before the merger
10 ("East Pilots") were unhappy with the award, so they used their majority status to vote out
11 the old union and constitute a new union, USAPA, that would abandon it.

12 Plaintiffs filed this lawsuit alleging that USAPA violated its duty of fair representation
13 by casting the Nicolau Award aside in favor of East Pilot interests. They subsequently
14 amended their complaint to bring this action on behalf of a class of approximately 1700
15 similarly situated pilots who were on the America West seniority list a few months after the
16 merger announcement (the "West Pilots"). In their motion, Plaintiffs state that they seek the
17 following remedies on behalf of the class:[1]

18 (1) Declaration that USAPA violated the duty of fair representation;
19 (2) Order that USAPA take specific affirmative steps to correct injuries caused by
20 that violation;
21 (3) Order that USAPA take no action reasonably likely to frustrate implementation
22 of the Nicolau seniority list and other aspects of the Nicolau Award;
23 (4) Order vacating class member obligations to pay agency fees and membership
24 dues until such time that the Company is operating under a single CBA that
25 implements the Nicolau seniority list and other aspects of the Nicolau Award;

26

27 [1] Although the First Amended Complaint also seeks damages for lost wages, benefits,
and working conditions on behalf of the class, the Plaintiffs do not move to certify a class as
28 to those damages issues.

(5) Order directing restitution of fees and dues paid to USAPA by class; and

(6) Award of attorneys' fees and costs.

Plaintiffs claim that the issues of law and fact underlying USAPA's potential liability and the listed remedies are common to the proposed class. They claim that their class action will have the practical effect of tolling the six-month statute of limitations for all class members who may wish to pursue additional compensatory damages if USAPA is found to have breached its duty. It is undisputed that a funding entity ("Leonidas LLC") has been established to manage absent West Pilots's contributions toward the payment of attorney fees for the class action.

When the complaint was amended to include class action allegations, USAPA expressed surprise. USAPA informed the Court that it "denies each and every class allegation and . . . intends to vigorously oppose certification," moving to continue the original accelerated trial date of February 17, 2009. (Doc. ## 91, 92.) On this basis, trial was continued and further briefing was scheduled to take place in January and February 2009. (Doc. # 116, 130.) Later, the Court granted USAPA a further extension of time to file its response in opposition to the Motion for Certification so that additional discovery regarding certification could be completed. (Doc. # 155.) Trial on the merits has been set for April 28, 2009.

II. Analysis

Rule 23(b)(2) permits certification of an injunction class if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Any such certification is still subject to Rule 23(a), requiring that all class actions satisfy conditions of numerosity, commonality, typicality, and adequate representation. In this matter, Plaintiffs seek injunctive and declaratory relief in addition to monetary recovery relating to union dues and fees. Because the injunctive and declaratory relief predominates

over the monetary claim and because the other requirements of Rule 23(a) and (b)(2) are satisfied, certification is appropriate in this case.

A. Injunction Class Treatment

Rule 23(b)(2) was designed for cases like this one. Plaintiffs allege that USAPA owed a duty of fair representation to the West Pilots as a whole. They further allege that USAPA has breached this duty by neglecting contractual obligations assumed by USAPA's predecessor and US Airways to support the implementation of the Nicolau Award. The Nicolau Award represented an internal union compromise of conflicting interests between the two pilot groups. USAPA's seniority proposal, on the other hand, tilts strongly in favor of East Pilot interests. According to Plaintiffs, USAPA has chosen to abandon the Nicolau Award solely for the benefit of East Pilots and without regard for the welfare of US Airways pilots as a whole. Plainly, on these allegations, USAPA "has acted or refused to act on grounds that apply generally to the class" of West Pilots within the meaning of Rule 23(b)(2). The duty of fair representation extends to all West Pilots, and in this case it runs to a specific interest, the Nicolau Award, that many of them share. The proposed class shares a common injury arising out of that duty.

The remedy, too, is common to the proposed class, mirroring the injury complained of. Plaintiffs seek an order that would require USAPA to take remedial measures and to stop obstructing the implementation of the Nicolau Award. If USAPA were to do so, then the duty to fairly represent the West Pilots would be honored in that regard. Necessarily, any adjudication respecting such a remedy would impact the proposed class of West Pilots as a whole.[2] The nature of the claim for injunctive and declaratory relief supports mandatory certification of the class of West Pilots as requested under Rule 23(b)(2) in this case. *See*

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[2] In this respect, the proposed class also resembles the type contemplated by Rule 23(b)(1), where the prosecution of separate actions by the class members might effectively adjudicate absent class members' interests or create a risk of incompatible standards of conduct for USAPA. The Court declines USAPA's invitation to decide whether Plaintiffs have waived any grounds for certification outside of Rule 23(b)(2). The answer to that question is not necessary to the disposition at hand.

1 Fed. R. Civ. P. 23(c)(2)(A) (allowing mandatory certification of classes under Rules 23(b)(1)
2 and (b)(2)).
3 Plaintiffs also seek monetary and declaratory recovery relating to dues and fee
4 payments on behalf of the class. USAPA contends that Rule 23(b)(2) does not extend so far.
5 The Court agrees with both parties that the rule of *Molski v. Gleich* governs this question:
6 Where the claim for injunctive relief "predominates" over any claim for monetary recovery,
7 mandatory certification under Rule 23(b)(2) may still be appropriate. 318 F.3d 937, 949-50
8 (9th Cir. 2003). "In order to determine predominance," the Court focuses "on the language
9 of Rule 23(b)(2) and the intent of the plaintiffs in bringing the suit." *Id.* at 950.
10 In this case, the claims for injunctive relief do predominate. Plaintiffs complain of
11 union conduct that threatens their rights in the future as well as the past. The potential
12 damages flowing from the union's behavior are vast and difficult to quantify in their entirety.
13 USAPA's conduct has allegedly deprived West Pilots of wages, promotion opportunities, and
14 other working conditions that they would have enjoyed had the union honored its duty to
15 adopt the Nicolau Award. Plaintiffs seek injunctive relief because they have no adequate
16 remedy at law and want to curtail these ongoing harms. Without an injunction, the proposed
17 class would have little to show for its efforts; the prospective importance of an injunction
18 here dwarfs any monetary award relating to union dues and fees. It is not difficult to
19 conclude that the standard of *Molski* and related authority is met. "[E]ven in the absence of
20 a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the
21 injunctive or declaratory relief sought" and "the injunctive or declaratory relief sought would
22 be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits."
23 *Id.* at 950 n. 15 (quoting with approval *Robinson v. Metro-North Commuter R.R.*, 267 F.3d
24 147, 163-64 (2d Cir. 2001)); *see also Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1186 (9th Cir.
25 2007), *reh'g en banc granted*, 2009 WL 365818 (9th Cir. Feb. 13, 2009).[3]
26
27
28

[3] *Dukes* reaffirmed *Molski* and that case's rejection of *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), which adopted a bright-line "incidental damages" test

USAPA objects that any refund of dues and fees is a legal (as opposed to equitable) monetary remedy that would turn on the individual circumstances of each class member. This reasoning is empty. As a matter of theory, it is of no moment for certification purposes whether monetary recovery finds historical roots in law or equity. Rule 23(b)(2) speaks to remedies of an "injunctive nature or of a corresponding declaratory nature," not remedies of equitable pedigree. Fed. R. Civ. P. 23(b)(2) adv. comm. nn. The *Molski* standard applies whether the monetary relief is equitable or legal.

As a matter of practice, the individualized difficulties that USAPA postulates are irrelevant here. USAPA argues that dues and fees calculations will depend on the individualized circumstances of the West Pilots, who fall into a number of different categories relating to member standing and prior agreements unrelated to this specific case. Plaintiffs' prayer for a refund of dues and fees transcends these categories, however, because it does not relate to the standing or contractual status of individual members but rather to USAPA's failure to meet fiduciary obligations to the West Pilots as a group, obligations that presumably arise anterior to the course of representation. Indeed, as the Court understands Plaintiffs' theory, the breach of fiduciary duty is claimed to nullify obligations compelling the payment of dues and fees. None of USAPA's arguments undermines the conclusion that any proper refunds could be determined by consulting USAPA's records of dues and fee payments.

The Court has already expressed its concern that there may be no legal basis for a class-wide refund of union dues and fees (doc. # 202, at 8), and further briefing is expected as to whether the Plaintiffs state a claim in this respect and whether it was sufficiently alleged in the First Amended Complaint. If Plaintiffs have failed to state a claim for monetary relief

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for certifying Rule 23(b)(2) class actions. Even under *Allison*'s less flexible standard, certification is appropriate in this case because Plaintiffs seek monetary recovery "to which class members automatically would be entitled once liability to the class . . . as a whole is established" and which is "capable of computation by means of objective standards" with no "complex individualized determinations." *Allison*, 151 F.3d at 415.

1 that is appropriate for class certification, the Court will consider, as appropriate, de-certifying
2 the class as to the monetary claim or dismissing with prejudice the class monetary claim.
3 **B. General Class Action Requirements**
4 Rule 23(a) permits certification only if four conditions are met: "(1) the class is so
5 numerous that joinder of all members is impracticable; (2) there are questions of law or fact
6 common to the class; (3) the claims or defenses of the representative parties are typical of the
7 claims or defenses of the class; and (4) the representative parties will fairly and adequately
8 protect the interests of the class." The proposed class of West Pilots satisfies these
9 conditions.
10 **1. Numerosity**
11 The proposed class contains approximately 1700 members. There is no specific
12 number cut-off for class size. *Ballard v. Equifax Check Servs., Inc.*, 186 F.R.D. 589, 594
13 (E.D. Cal. 1999). Nonetheless, it is safe to say that this class is large enough to take flight.
14 It would be impracticable to join 1700 West Pilots claiming that USAPA's actions have
15 adversely affected their seniority status. USAPA's faint protests on this point ring hollow.
16 The allegations of harm are not confined to "49 or so pre-merger West Pilot furloughees";
17 the administration of dues refunds has nothing to do with numerosity; and the West Pilots'
18 Arizona domicile and "sophisticated communications network" does not make joinder of so
19 many feasible.
20 **2. Commonality**
21 Likewise, "questions of law or fact common to the class" are not far to seek. The only
22 questions raised on behalf of the proposed class relate to USAPA's unitary duty to represent
23 its whole membership fairly. Plaintiffs allege that this duty was breached in the same manner
24 with respect to all proposed class members, and they seek a single injunction common to the
25 class. These common issues prevail even though different West Pilots may be entitled to
26 different refunds of dues and fees; disparate remedies within the class do not undermine the
27 "permissive" commonality requirement in Rule 23(b)(2) cases. *Hanlon v. Chrysler Corp.*,
28 150 F.3d 1011, 1019 (9th Cir. 1998).

1 **3. Typicality**

2 Like the other West Pilots, the named Plaintiffs were on the America West seniority
3 list in September 2008 and on September 20, 2005. Like the other West Pilots, the named
4 Plaintiffs are allegedly aggrieved by USAPA's abandonment of the Nicolau Award for a
5 seniority list that favors the East Pilots. By definition, the use or disuse of the Nicolau
6 Award impacts every West Pilot. The named Plaintiffs' claims are sufficiently typical of the
7 class they seek to represent.

8 USAPA argues that counsel for Plaintiffs "cherry-picked" the Plaintiffs from the
9 bottom and middle of the America West seniority list because of their immediate
10 vulnerability to furloughs, demotions, and lost promotions. USAPA further adds that some
11 senior West Pilots have little or nothing to gain from the injunctive relief sought because
12 USAPA's proposal grants them some job security and other benefits. But Rule 23(a) does
13 not require identical circumstances. "Under the rule's permissive standards, representative
14 claims are 'typical' if they are reasonably co-extensive with those of absent class members;
15 they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. Different West Pilots
16 will necessarily occupy different ranks on any hierarchical seniority list; these differences
17 do not undermine typicality. As for the claim that USAPA's policies are not detrimental to
18 some or all West Pilots, this issue is contested and relates closely to the merits of the case.
19 USAPA's breach or non-breach of its duty—along with the success or failure of this
20 action—runs to the West Pilot membership as a whole. If USAPA can prove that its actions
21 and policies rationally serve the aggregate welfare of US Airways pilots, it may be that
22 neither the named Plaintiffs nor any other West Pilot can prevail in this fair representation
23 case. In this sense, the named Plaintiffs' claims are typical within the scope of the rule.

24 **4. Adequacy of Representative Plaintiffs**

25 USAPA claims that Plaintiffs and their attorneys are inadequate representatives of the
26 proposed class of West Pilots. This argument must be rejected because the representative
27 parties are well qualified, there is no showing of antagonism or conflict with the absentees,
28 and this suit is unlikely to be collusive. *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994).

This Order has already outlined the commonality of interest between Plaintiffs and the proposed class of West Pilots. USAPA has not presented any evidence of antagonism or conflicted interests, and there is no reason for this Court to believe either exists. *See infra* Section II.B.5. The relief Plaintiffs seek on behalf of the proposed class runs to the class as a whole. Though Plaintiffs decided to forgo certification as to damages claims, the certification sought is intended to expedite a determination on the merits while preserving the represented West Pilots' ability to seek damages at a later date. No opinion is here expressed as to the correctness of the latter theory, but it finds reasoned support in *Swierkowski v. Consol. Rail Corp.*, 168 F. Supp. 2d 389, 395 (E.D. Pa. 2001).

USAPA argues that the Plaintiffs do not sufficiently participate in the litigation because Leonidas LLC has been established as a funding and liaison mechanism managed by a "control group" of West Pilots. USAPA urges that the Plaintiffs are therefore too far removed from the case to qualify as class representatives. To be sure, it is impermissible to select a "stand-in plaintiff" with undeniable and overwhelming ignorance regarding the nature of the action. *Bodner v. Oreck Direct, LLC*, No. C 06-4756 MHP, 2007 WL 1223777, at *2-3 (N.D. Cal. 2007). However, the Plaintiffs' *bona fides* is obvious in this case. Plaintiffs are representative members of the discrete group of West Pilots with a substantial and legitimate interest in this litigation. They participate in litigation strategy sessions with the "control group," review court filings, and communicate regularly with counsel. The establishment and use of Leonidas LLC to fund the litigation and communicate with the proposed West Pilot class is, if anything, a prudent discharge of Plaintiffs' representative function.

USAPA's remaining arguments on this point barely merit discussion. USAPA contends that the Plaintiffs displayed ignorance of key portions of the case in their depositions. The deposition excerpts presented to the Court show nothing more than uncertainty and imprecision relating to legal concepts in this case, concepts which no lay plaintiff could be reasonably expected to articulate. For example, one named Plaintiff was asked, "Do you know how many causes of action are in this lawsuit?" He answered, "I'm

not an attorney. I don't know." In fact, he could not know because as asked, this question has no single answer. Does it refer to the original action or the consolidated action? Does it refer to the causes of action still pending, or the causes of action originally brought? Vagueness aside, a non-lawyer cannot be expected to understand the term "causes of action" as distinct from many other terms such as "legal theories," "culpable acts," "triable questions of fact," or "cases."

In another line of questioning about the case, Plaintiffs were asked if it still involved contract-based claims, or if contract claims could come into the litigation at a later date. Despite the case's complexity and the many quiddities of federal labor law, Plaintiffs showed no deficit of understanding. Their affirmative replies demonstrated a high-level sense of the case's substance and not, as USAPA contends, a mistaken impression. Although the pending fair representation claim does not find its source in contract law, this Court has explained before how contract principles support the factual and legal predicate of the action. (Doc. ## 84, at 9-10; 202, at 5-6.) Similarly, Plaintiffs are not deficient for acknowledging in depositions that USAPA is not delaying negotiations (as previously asserted) but is currently negotiating toward a single CBA on terms inconsistent with the Nicolau Award. Such statements do not negate the basic allegation that USAPA has abdicated its duty—through delay or otherwise—to honor the Nicolau award.

There is no issue as to Plaintiffs' abilities to discharge their fiduciary obligations. Their interests are not in conflict with the class, and they are endeavoring actively to pursue the litigation to the maximum benefit of the proposed class. *In re Quintus Sec. Litig.*, 148 F. Supp. 2d 967, 970 (N.D. Cal. 2001). The record shows that Plaintiffs were provided with an explanation of their fiduciary duties when the complaint was amended to allege a class action. USAPA presents deposition testimony wherein Plaintiffs expressed uncertainty regarding the existence and extent of "fiduciary duties" so termed, but nothing in the record suggests they substantively misunderstand their role in the litigation. The predominant relief they seek is an injunction to enforce USAPA's duty, a duty owed to all West Pilots in common. The same principle disposes of the claim that Plaintiffs are not adequate because

1 they have sworn off settlement. Plaintiffs' ultimate goal is to have the union abide by its
2 duty of fair representation; the injunctive relief sought does not appear amenable to
3 settlement.

4 USAPA faults Plaintiffs for not knowing why their attorneys chose to schedule an
5 arbitration in May rather than January 2009, when USAPA was proceeding to arbitrate a
6 related but significantly narrower grievance. (*See* doc. # 84, at 8.) Plaintiffs cannot be
7 expected to know the intricacies of counsel's every scheduling decision.

8 **5. Adequacy of Counsel**

9 As to the qualifications of counsel, this Court has considered the factors listed in Rule
10 23(g) and those factors militate in favor of certification. Counsel for Plaintiffs has done
11 significant work investigating potential claims in the action. Several of the original claims
12 have been dismissed for lack of subject matter jurisdiction and failure to state a claim, but
13 not for lack of vigor in prosecuting the case. Counsel for Plaintiffs has also demonstrated
14 substantial experience with complex class actions and labor disputes as well as a functional
15 understanding of relevant legal principles. There appears to be no hesitation committing
16 sufficient resources to represent the class, and a funding mechanism exists for the collection
17 of legal fees from class members who wish to contribute to the litigation. *See* Fed. R. Civ.
18 P. 23(g)(1)(A).

19 USAPA's other arguments concerning Plaintiffs' counsel are easily rejected.
20 Plaintiffs' filing of a state court class action based upon alternative theories was not
21 "duplicative" in any improper sense. Plaintiffs' challenge to USAPA's assertion of Seventh
22 Amendment rights was consistent with the rules and not necessarily inconsistent with their
23 decision to seek a refund of dues and fees. (Doc. # 202, at 2 n.1, 8.) Plaintiffs' counsel has
24 explained that it added class allegations to its federal complaint because the Court's earlier
25 denial of preliminary injunctive relief against the airline exposed many absent West Pilots
26 to detriment. USAPA's complaints regarding arbitration scheduling, details of a contested
27 stipulation, and discovery disputes add nothing to the analysis.
28

1 Finally, USAPA argues that Plaintiffs' counsel is deficient for failing to recognize and
2 address a conflict of interest between the Plaintiffs and Leonidas LLC. Leonidas LLC has
3 encouraged West Pilots to continue paying union dues and fees while the Plaintiffs have sued
4 for a refund of those dues and fees. By continuing to pay dues, the West Pilots hope to
5 preserve their status and participation in the union until broader rights have been adjudicated.
6 The cautionary payment of dues poses no obstacle to possible future refunds; there is not
7 even a hint of conflict between Leonidas LLC's advice and the actions of counsel.
8 IT IS THEREFORE ORDERED that Plaintiffs' Motion for Certification (doc. # 120)
9 is granted.
10 DATED this 10th day of March, 2009.
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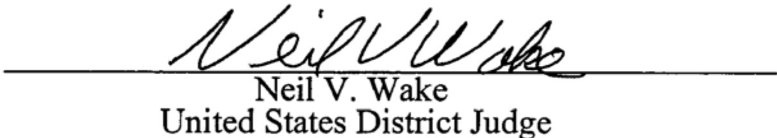
15
16
17 
Neil V. Wake
18 United States District Judge
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EXHIBIT C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VALEZ; and Steve WARGOCKI,	)	
Plaintiffs,	)	08-cv-1633 PHX-NVW 08-cv-1728 PHX-NVW
v.	)	
US AIRLINE PILOTS ASSOCIATION, US AIRWAYS, INC.,	)	
Defendants.	)	
AND RELATED CROSS-ACTIONS.	)	

DEPOSITION OF MARK BURMAN

PHOENIX, ARIZONA

JANUARY 28, 2009

8:34 A.M.

DAVID M. LEE, RMR, CCR

Certified Reporter

Certificate Number 50391

Page 10

1 A. Yes.
2 Q. Okay. What documents have you reviewed?
3 A. I've had an opportunity to look over all of the
4 documents that have been filed by both sides in some way,
5 shape or form.
6 Q. Okay. With respect to the documents filed on
7 behalf of the Plaintiffs by Shughart, have you reviewed
8 those documents prior to them being filed, or subsequent
9 to their being filed?
10 A. Which documents are you --
11 Q. Just in general. Was there a general protocol
12 where you were reviewing documents before the law firm
13 filed them on your behalf, or did you get them after they
14 were filed as part of an ongoing file that you were
15 keeping?
16 A. After.
17 Q. Do you have any -- so would you have any role in
18 the drafting of filings by Shughart?
19 MS. FLOOD: Form.
20 THE WITNESS: What do you mean when you say
21 "role"? I'm --
22 Q. BY MR. SEHAM: Did you see drafts of the
23 filings -- well, I retract that, because I think you
24 already answered that.
25 Tell me, how much time did you spend

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1 preparing for this deposition?
2 A. Approximately three to four hours with the
3 attorneys.
4 Q. And when did you spend this three to four hours?
5 A. This was last Thursday with Ms. Flood and
6 Mr. Stevens at the law firm.
7 Q. Okay. Who else was there?
8 A. Mr. Addington, Mr. Bostic, and Mr. Valez showed
9 up about an hour after we started.
10 Q. Okay. No one else other than the persons you've
11 listed?
12 A. That's correct.
13 Q. Did you talk to anyone else besides your
14 attorneys at Shughart and those individuals you've listed
15 in preparation for your deposition today?
16 A. No.
17 Q. How long have you been a US Airways pilot?
18 A. I was originally hired with America West in
19 January of 1998 -- excuse me, September of 1998.
20 Q. Have you ever been disciplined by any employer
21 who employed you as a pilot?
22 A. No.
23 Q. Have you ever been disciplined by a labor union?
24 A. No.
25 Q. Do you understand what it means to be a class

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1 representative?
2 MS. FLOOD: Form.
3 THE WITNESS: In what context?
4 Q. BY MR. SEHAM: Well, in the context of this
5 lawsuit.
6 A. Yes, I do.
7 Q. Okay. Can you explain to me your understanding?
8 A. My understanding of being a class representative?
9 Q. Yes.
10 A. Well, if you have a copy of the class
11 certification filing, it has some specifics in there I
12 could refer to.
13 Q. Well, I'm asking for what you understand.
14 A. Oh, in my opinion?
15 Q. Yes.
16 A. In my opinion, as a class representative, it's
17 somebody that represents, in this case, the 1700 West
18 America West pilots.
19 Q. And it's your intention to act as the class
20 representative of 1700 West pilots?
21 MS. FLOOD: Form.
22 THE WITNESS: Not me alone.
23 Q. BY MR. SEHAM: Okay. But you would be one of six
24 class representatives representing a class of 1700 West
25 pilots?

Page 13

1 A. That's correct.
2 Q. Does that class include -- when I use the term
3 "new hire pilots," can we agree that that's referring to
4 pilots who were not on the West or East seniority list
5 prior to the time of the merger between America West and
6 US Airways?
7 A. I think that's a fair statement.
8 Q. Okay. Would you agree that that's how that term
9 is commonly used when we refer to new hire pilots in the
10 lawsuit?
11 A. Yeah. In discussing that with other pilots, I
12 think that's a fair statement.
13 Q. To your understanding does the class that you are
14 now seeking to represent, does it include new hire West
15 pilots?
16 MS. FLOOD: Form.
17 THE WITNESS: Does the class representative --
18 you know, I'm not sure.
19 Q. BY MR. SEHAM: Do you know whether there are any
20 fiduciary duties that attach to you as a class action
21 representative?
22 MS. FLOOD: Form.
23 THE WITNESS: I don't know the specific -- you
24 know, can you repeat the question, please?
25 (Record read.)

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1 Q. BY MR. SEHAM: Okay. Is it part of your case
2 against USAPA that USAPA has breached the West pilots'
3 Collective Bargaining Agreement?
4 MS. FLOOD: Form.
5 THE WITNESS: No. I believe that the case
6 against USAPA is a breach of duty of fair representation.
7 Q. BY MR. SEHAM: Okay. Is it part of your case
8 against USAPA that it has allegedly violated ALPA merger
9 policy?
10 MS. FLOOD: Form.
11 THE WITNESS: Again, I'm not sure. What I do
12 know is that the suit deals with USAPA's failure to fairly
13 represent the West. It's kind of an overall thing.
14 You're asking me specifics and I'm not entirely sure.
15 Q. BY MR. SEHAM: Okay. Is it part of your case
16 that USAPA has caused the company to breach contractual
17 obligations owed to you as described in Count 1 and Count
18 2 of the First Amended Complaint?
19 MS. FLOOD: Form.
20 THE WITNESS: I believe that to be correct.
21 Q. BY MR. SEHAM: So do you agree with this
22 statement, at line 23 on page 2, that "This matter no
23 longer has no breach of contract component"?
24 MS. FLOOD: Form.
25 Q. BY MR. SEHAM: Which I interpret to mean "This

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1 matter no longer has any breach of contract component."
2 MS. FLOOD: Same objection.
3 THE WITNESS: Again, you're -- it's probably more
4 for the attorneys to speculate on that, because it seems
5 like it's more of something that's a legal opinion that
6 I'm not prepared to discuss.
7 Q. BY MR. SEHAM: Are you currently seeking any
8 monetary compensation for -- from USAPA for yourself,
9 pursuant to this lawsuit, other than compensation related
10 to dues, agency fees and attorney's fees?
11 MS. FLOOD: Form.
12 THE WITNESS: If you're asking if I am
13 specifically seeking damages against USAPA --
14 Q. BY MR. SEHAM: Yes.
15 A. That's not the primary goal.
16 Q. Well, is it any part of the goal of your
17 litigation?
18 A. Well, there is -- my understanding is that there
19 is that aspect of it that could come in at some later
20 date, but the primary goal is ceasing the breach of the
21 duty of fair representation and injunctive relief to that
22 effect.
23 Q. And then the same question with respect to the
24 class that you are seeking to represent. Are you seeking
25 any monetary compensation for that class, other than dues,

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1 agency fees and attorney's fees?
2 MS. FLOOD: Form.
3 THE WITNESS: Kind of the same kind of answer;
4 that's not our primary goal. Our primary goal is to have
5 the breach of duty of fair representation cease through
6 injunctive relief through the court.
7 Q. BY MR. SEHAM: Okay. And then whether or not
8 it's your primary goal, is it one of your goals to obtain
9 monetary relief for the class that you represent?
10 MS. FLOOD: Form.
11 THE WITNESS: You know, I would say that's not a
12 goal. I would say that that's something that has come up
13 and is a possibility down the road as a -- as a remedy,
14 but no, I would say that the primary goal is the
15 injunctive relief and the ceasing of the breach of the
16 duty of fair representation.
17 Q. BY MR. SEHAM: Okay. When did you first decide
18 to take legal action in this matter?
19 A. Well, I didn't decide to take legal action
20 personally.
21 Q. Who did?
22 A. Leonidas.
23 Q. And then how did you get involved subsequently to
24 Leonidas' decision?
25 A. My involvement was probably two months, maybe

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1 three months prior to the litigation in September, and I
2 contacted members of Leonidas with regard to the -- I
3 didn't agree with what was happening and didn't agree with
4 what looked like was coming down the road, and as a result
5 of those conversations I wanted to get involved. And
6 subsequent to those discussions, I became a Plaintiff.
7 Q. BY MR. SEHAM: Okay. And how is it determined
8 that you would be one of the Plaintiffs?
9 MS. FLOOD: Form.
10 THE WITNESS: Well, I can't speak to how, you
11 know, individuals determined that I would become a
12 Plaintiff. I know that I spoke with them and discussed my
13 situation, and told them that I was interested in doing
14 something that would undo what we believed to be or what I
15 believed to be a breach, and got involved as a Plaintiff
16 as a result.
17 Q. BY MR. SEHAM: Okay. So it was Leonidas that
18 made the determination that you should be one of the named
19 Plaintiffs?
20 MS. FLOOD: Form.
21 THE WITNESS: I -- you know what? I can't speak
22 to how they determined or who they spoke with. I know
23 that Eric and Jeff were the original two that founded
24 this, and what steps they took and who they contacted,
25 that would be a question for them.

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Don ADDINGTON, et al., Plaintiffs, vs. US AIRLINE PILOTS ASSOCIATION, and US AIRWAYS, INC., Defendants.	CONSOLIDATED CASES NO. 2:08-CV-1633-PHX-NVW; 2:08-CV-1728-PHX-NVW
Don ADDINGTON, et al., Plaintiffs, vs. Steve H. Bradford, et al., Defendants.	

DEPOSITION OF AFSHIN IRANPOUR-MASHAK

Phoenix, Arizona
January 28, 2009
1:24 p.m.

PREPARED BY:
Sabre D. Deterding, RPR
Certified Reporter
Certificate No. 50492

PREPARED FOR:

The Court

(Original)

Page 10

1 A. -- before they were filed or after they were
2 filed.
3 Q. That was -- you're anticipating my next
4 question.
5 Do you recall reviewing any documents
6 drafted by Shughart prior to their being filed?
7 A. Yes. Some of the documents I have.
8 Q. Okay. Can you identify which those documents
9 were?
10 A. No, I don't recall.
11 Q. Okay. Was that the exception to the general
12 rule, was the general practice that you would review
13 them after they were filed?
14 MS. FLOOD: Form.
15 THE WITNESS: Not -- not necessarily.
16 I mean, there are times when I'm flying or
17 I'm not available that I don't get to see the
18 document before they're filed.
19 BY MR. SEHAM:
20 Q. Okay. Are you able to break that down in
21 terms of percentage or a percentage of document --
22 A. No.
23 Q. Okay. You have no idea what percentage of
24 documents that you reviewed as drafted by Shughart prior
25 to their being filed?

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1 A. No.
2 Q. Okay. How much time did you spend preparing
3 for this deposition?
4 A. I would say a few hours, maybe four or five
5 hours.
6 Q. And did you prepare alone or were you assisted
7 in any way by other people?
8 A. I meet with -- with my attorney for about two
9 hours.
10 Q. And which attorney did you meet with?
11 A. Ms. Flood.
12 Q. And when did you meet with her?
13 A. Last week, on Wednesday.
14 Q. Was anyone else present during that review?
15 A. No.
16 Q. Did you talk to anyone else besides Ms. Flood
17 to prepare for your deposition?
18 A. No.
19 Q. Where were you born?
20 A. In Iran.
21 Q. What city?
22 A. Tehran.
23 Q. And where do you currently live?
24 A. I live in Peoria, Arizona.
25 Q. And how long have you lived there?

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1 A. About three and a half years.
2 Q. Have you ever been disciplined by an employer
3 who employed you as a pilot?
4 A. No.
5 Q. Have you ever been disciplined by a labor
6 union?
7 A. No.
8 Q. Do you -- do you understand what it means to
9 be a class representative?
10 MS. FLOOD: Form.
11 THE WITNESS: I do.
12 BY MR. SEHAM:
13 Q. Can you explain to me what your understanding
14 is.
15 A. My understanding is that, as a class
16 representative, I'm representing a group of pilots on
17 the America West seniority list that have been -- that
18 have suffered the same consequences that I have as
19 spelled out in the claims that we have filed.
20 Q. The group of pilots, how would you identify
21 this group of pilots?
22 MS. FLOOD: Form.
23 THE WITNESS: They're pilots that have either
24 been furloughed or are subject to furlough; or who have
25 seen their seniority rights ignored and who have been

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1 misrepresented or not represented over the past few
2 months.
3 BY MR. SEHAM:
4 Q. Would this include all West Pilots?
5 A. It would.
6 Q. Are you familiar with the term used in this
7 litigation "new hire pilots"?
8 A. I am.
9 Q. Okay. And would you agree with me that that
10 term has been used to indicate pilots who have been
11 hired by the company subsequent to the merger of America
12 West and US Airways?
13 A. I don't know what your definition of the new
14 hire pilot is, so I can't really say that I agree with
15 you with the way that you're characterizing that.
16 Q. Well, what is your understanding of the term
17 "new hire pilot"?
18 A. My understanding of new hire pilot is all
19 pilots that have been not only hired after the merger
20 but also the CEL pilots who never flew main line jets
21 prior to the merger, and as well as the -- well, in my
22 case, I think the furlough pilots as well should be
23 included in that.
24 Any pilot that was not on the property
25 prior to the merger.

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1 BY MR. SEHAM:
2 Q. And do you know why it was done at that
3 time -- excuse me.
4 Actually, do you -- do you recall when
5 that conversion occurred from nonclass action to
6 class action in the federal lawsuit?
7 MS. FLOOD: Form.
8 THE WITNESS: I do not. I don't have the
9 exact dates. And with that, I would like to take a
10 break.
11 MR. SEHAM: Oh, sure. Yes.
12 (Recess taken from 3:47 p.m. to 3:55 p.m.)
13 BY MR. SEHAM:
14 Q. And pardon me if I've asked a variant of this
15 before, I just can't recall.
16 Did you -- you authorize Shughart to
17 convert the litigation to a class action?
18 MS. FLOOD: Form.
19 THE WITNESS: Not I personally. We as a
20 group.
21 BY MR. SEHAM:
22 Q. Okay. And when -- and when you say "group,"
23 you mean the plaintiffs and the control group together?
24 A. Yes.
25 Q. And when did that happen?

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1 A. As I said, I don't recall the exact dates.
2 Q. Did you have a face-to-face meeting with
3 Shughart to discuss the reasons for the conversion of
4 the federal lawsuit to a class action lawsuit?
5 MS. FLOOD: Form.
6 THE WITNESS: Yes, we did.
7 BY MR. SEHAM:
8 Q. How frequently do you communicate with the
9 attorneys from Shughart?
10 A. It varies. I would say several times a week.
11 Q. And last communication with them was when?
12 A. This morning.
13 Q. Prior to that?
14 A. I'm sorry?
15 Q. Prior to that?
16 A. Yesterday.
17 Q. Okay. Now, pursuant to this class action
18 lawsuit, you were seeking reimbursement of dues and
19 agency fees to the class members; is that correct?
20 A. To those who have paid dues, yes.
21 Q. Who decided to incorporate the dues and agency
22 fee demand into the class action remedies?
23 MS. FLOOD: Form.
24 THE WITNESS: We decided that as a group.
25 ....

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1 BY MR. SEHAM:
2 Q. Okay. And the group you're referring to again
3 would be the six plaintiffs and the four persons on the
4 control group?
5 A. Along with our attorneys.
6 Q. Okay. Was this demand for dues and agency
7 fees restitution part of the original complaint that was
8 filed?
9 MS. FLOOD: Form.
10 THE WITNESS: I don't recall.
11 BY MR. SEHAM:
12 Q. Do you recall when the decision was made to
13 add the dues and the agency fee demand as part of this
14 lawsuit?
15 MS. FLOOD: Form.
16 THE WITNESS: I don't recall the date.
17 BY MR. SEHAM:
18 Q. Do you recall the month?
19 MS. FLOOD: Form.
20 THE WITNESS: No, I do not.
21 BY MR. SEHAM:
22 Q. Do you recall the season?
23 MS. FLOOD: Form.
24 THE WITNESS: Well, in Arizona we only have
25 two seasons, so I'm not really sure if that translates

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1 well.
2 BY MR. SEHAM:
3 Q. Looking at the calendar, do you recall whether
4 it was what we in the northeast refer to as summer
5 months, June, July, August; was it fall months, such as
6 September, October, November; or winter months such as
7 December, January?
8 MS. FLOOD: Form.
9 BY MR. SEHAM:
10 Q. You could call them quarters, if you want,
11 instead of seasons. But can you narrow it down to a
12 pair of months in this decision to --
13 A. Sure. I would -- I can give you November to
14 December time frame.
15 Q. When a decision was made to add the dues,
16 agency fees component to this litigation?
17 MS. FLOOD: Form.
18 THE WITNESS: To the best of my recollection.
19 As I said before, I don't recall if it was
20 included in the original complaint.
21 BY MR. SEHAM:
22 Q. Okay. Do you understand the concept of being
23 a member in good standing of a labor union?
24 A. I do. I was a member in good standing of ALPA
25 for many years.

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF ARIZONA

Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI, Plaintiffs, v. US AIRLINE PILOTS ASSOCIATION, US AIRWAYS, INC., Defendants.	2:08-cv-1633-PHX-NVW (Consolidated)
(AND RELATED ACTIONS.)	

DEPOSITION OF JOHN ALEXANDER BOSTIC, JR.

Phoenix, Arizona
January 27, 2009
1:34 p.m.

MELISSA GONSALVES, RMR, CRR

Certified Reporter

Certificate Number 50070

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1 MS. FLOOD: Form.
2 THE WITNESS: The volume of information, you
3 know --
4 Q. BY MR. SEHAM: How about to the best of your
5 knowledge?
6 A. Thank you.
7 Q. Just trying to help you get there.
8 A. Sure, whatever gets us out of here.
9 Q. To your knowledge, this is the one retainer that
10 you signed with respect to representation by Shughart?
11 MS. FLOOD: Form.
12 THE WITNESS: Yes.
13 Q. BY MR. SEHAM: Who made the decision to convert
14 the federal action to a class action?
15 MS. FLOOD: Form.
16 THE WITNESS: As -- between the plaintiffs?
17 Between the attorneys?
18 Q. BY MR. SEHAM: It was -- I can really only repeat
19 the question. The federal action was converted into a
20 class action. Who made the decision to do that?
21 A. I believe it was under advisement of STK.
22 Q. And after that advisement, as you put it, who
23 authorized STK to implement that decision?
24 MS. FLOOD: Form.
25 THE WITNESS: Plaintiffs and control group

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1 discussed it.
2 Q. BY MR. SEHAM: So the group of 10?
3 MS. FLOOD: Form.
4 THE WITNESS: Correct.
5 Q. BY MR. SEHAM: Do you know what the reasons were
6 for converting the federal action to a class action
7 lawsuit?
8 MS. FLOOD: I'm starting to stick my hand in
9 there because it's an attorney-advised issue. You can
10 answer "yes" or "no," and again, you can describe sort of
11 topics, but any advice that was given to you by counsel,
12 don't answer that.
13 THE WITNESS: I have a gist why, yes.
14 Q. BY MR. SEHAM: Well, what do you understand to be
15 the reason?
16 A. I believe that falls under attorney-client
17 privilege.
18 Q. Did you have a reason on your own for doing this?
19 Do you have your own rationale as to why you
20 did this, other than your lawyers told you to do it?
21 MS. FLOOD: Form.
22 THE WITNESS: Yes, for the group.
23 Q. BY MR. SEHAM: For the group.
24 So why didn't you originally file it that
25 way?

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1 MS. FLOOD: Form.
2 THE WITNESS: Because it's an evolving process.
3 Q. BY MR. SEHAM: Well, how did things evolve in a
4 way that you chose a strategy different from the one that
5 you started with?
6 MS. FLOOD: Form.
7 THE WITNESS: As things progressed, this seemed
8 to be the better option.
9 Q. BY MR. SEHAM: Well, what changed in the passage
10 of time from the filing to the conversion to a class
11 action that made you decide to convert?
12 MS. FLOOD: Form.
13 THE WITNESS: Counts one and two, for one thing,
14 going to arbitration. Probably Judge Wake consolidating
15 it. Essentially those things.
16 Q. BY MR. SEHAM: Did you have -- well -- how
17 frequently do you communicate with attorneys from
18 Shughart?
19 A. Daily.
20 Q. And what was your last communication?
21 A. Meet you for lunch at Cibo; leave me alone, I'm
22 driving.
23 Q. Are all filings by Shughart with the federal
24 court subject to your prior review?
25 MS. FLOOD: Form.

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1 THE WITNESS: Yes.
2 Q. BY MR. SEHAM: And you have -
3 A. Or, you know -- yes.
4 Q. So you have, in fact, reviewed all filings from
5 Shughart on your behalf in the federal court?
6 MS. FLOOD: Form.
7 THE WITNESS: Yes.
8 Q. BY MR. SEHAM: What efforts have you made
9 personally, other than this lawsuit, to influence the
10 bargaining position of USAPA in its current negotiation
11 process?
12 MS. FLOOD: Form.
13 THE WITNESS: What -- repeat the question.
14 Q. BY MR. SEHAM: What efforts have you made
15 personally, other than this lawsuit, to influence the
16 bargaining position of USAPA in its collective bargaining
17 process.
18 MS. FLOOD: Form.
19 THE WITNESS: None.
20 Q. BY MR. SEHAM: What damages -- strike that.
21 Now, you're seeking reimbursement of dues
22 and agency fees as part of this class action?
23 A. The class, yes.
24 Q. For both yourself and the entire class?
25 A. I haven't paid dues.

EXHIBIT F

1 **WO**

2

3

4

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6 IN THE UNITED STATES DISTRICT COURT

7 FOR THE DISTRICT OF ARIZONA

Don Addington; John Bostic; Mark Burman; Afshin Iranpour; Roger Velez; Steve Wargocki, Plaintiffs, vs. US Airline Pilots Association; US Airways, Inc., Defendants.	No. CV 08-1633-PHX-NVW (consolidated) **FINDINGS OF FACT AND CONCLUSIONS OF LAW and ORDER**
Don Addington; John Bostic; Mark Burman; Afshin Iranpour; Roger Velez; Steve Wargocki, et al., Plaintiffs, vs. Steven Bradford; Paul Diorio; Robert Frear; Mark King; Douglas Mowery; John Stephan, et al., Defendants.	CV08-1728-PHX-NVW

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I. INTRODUCTION

Plaintiff pilots brought this suit on behalf of a class of similarly situated pilots formerly employed by America West Airlines. They allege that their current union, the US Airline Pilots Association ("USAPA") breached its duty of fair representation. The case was tried to a jury. On May 13, 2009, the jury found in Plaintiffs' favor that USAPA had breached its duty by abandoning an arbitrated seniority list in favor of a date-of-hire list solely to benefit one group of pilots at the expense of another. At the conclusion of the jury trial, a bench trial was held to determine the propriety, nature, and scope of any injunctive relief that would issue. The Court will now award injunctive relief as supported by the following findings of fact and conclusions of law. These findings are entered as required by Federal Rules of Civil Procedure 52(a) and 65(d), consistent with and supplementary to the facts already found by the jury in this case. The nature and scope of relief depends upon the specific facts underlying liability.

II. FINDINGS OF FACT

This dispute arises out of a particularly fraught area of labor relations: the integration of pilot seniority lists upon the merger of two airlines. From the perspective of the individual airline pilot, seniority is of the utmost importance. Wages improve with a pilot's position on the seniority list. So do working conditions. Seniority gives pilots priority for bidding on work opportunities—the more senior the pilot, the better the choices. Seniority impacts the rank a pilot may take, the aircraft a pilot may fly, and the control a pilot has over the work schedule. Seniority also determines the availability of preferred routes and "domiciles"—the locales where pilots are based. Seniority represents a significant investment of time in an industry where many pilots spend the bulk of their career at one airline. Most importantly, a pilot's position on the seniority list creates or limits exposure to demotions and "furloughs," the airline industry's euphemism for layoffs. Generally, the most junior pilots are furloughed first. Furloughed pilots enjoy a right of recall when hiring resumes, but until then they are out of work at the airline.

1 For all of these reasons, the process of combining two seniority lists during an airline
2 merger raises stakes, emotions, and the risk of betrayal of principle to new heights. Such
3 is the case here.

4 **A. The Merger**

5 In May 2005, two airlines, America West and US Airways, merged to become a
6 single airline known as US Airways ("the Airline"). The America West pilots who were
7 on the America West seniority list at the time of the merger are known as West Pilots.
8 The US Airways pilots who were on the US Airways seniority list at that time are known
9 as the East Pilots. As part of the merger, the two airlines planned to combine their
10 operations into one, and as part of that process, the seniority lists of the two airlines
11 would be integrated into a single list. As with any attempt to combine two separate
12 seniority lists, this process pitted the seniority interests of the East Pilots against the
13 seniority interests of the West Pilots. Any gain for one side would come at the expense of
14 the other.

15 Adding tension was the comparative makeup of each pilot workforce. At the time
16 of the merger and now, the East Pilots have been the bigger group: about 5100 pilots
17 compared to about 1900 West Pilots. America West not only was the smaller of the two
18 airlines, but it also was the younger. The 1900 West Pilots were generally hired within a
19 more recent time frame than the East Pilots. The two groups differed in their wages and
20 work status. The America West wages in place at the time of the merger were
21 significantly more favorable than the US Airways wages. And all West Pilots were
22 actively flying at the time of the merger, with hiring ongoing at the airline and a
23 negligible history of furloughs. US Airways, on the other hand, found itself in the midst
24 of bankruptcy proceedings with approximately 1700 of its pilots on furlough and no recall
25 in sight. Many of the furloughed pilots had not flown for US Airways for years.

26 From the time of the merger until April 2008, both pilot groups were represented
27 by one union: the Air Line Pilots Association ("ALPA"). The internal structure of ALPA
28 played a central role in the seniority integration process. Two different Master Executive

Councils ("MECs") pursued the interests of each pilot group: the US Airways Master Executive Council ("the East MEC") and the America West Master Executive Council ("the West MEC"). The union members of each pilot group elected representatives who chose officers for their respective MECs. The MECs, in turn, appointed individuals to various union committees. For instance, the MECs each appointed individuals to a single Joint Negotiating Committee charged with negotiating collective bargaining terms with the Airline on behalf of both groups. The MECs also appointed individuals to separate standing Merger Committees. Each pilot group's Merger Committee consisted of two pilot Merger Representatives who would participate in the integration process for the two seniority lists. Under ALPA's structure, any new collective bargaining agreement ("CBA") would require ratification by a majority of pilots in each of the two pilot groups.

On September 23, 2005, ALPA and the two merging airlines entered into a Transition Agreement setting forth the process of achieving the operational integration of the two airlines. The chairman of each MEC signed the agreement, witnessed by other union officials. The Transition Agreement provides that until operations are combined, "[t]he pilot workforces of America West and US Airways will remain separate and covered by their respective collective bargaining agreements." With few exceptions, this status of separate operations places a fence between the former America West operations and the former US Airways operations so that pilots for one side cannot fly the other side's routes or aircraft.

The Transition Agreement requires three conditions to be met before operational integration can take place. First, an integrated seniority list must be created. Second, the union must conclude a single CBA for both pilot groups, incorporating the integrated seniority list. Third, the Airline must obtain a single FAA operating certificate, which it has done. Because no new CBA is in place, the Airline carries on in a state of separate operations. Efforts toward a new CBA have been complicated by the process of deciding what seniority list the CBA will include.

1 **B. The Nicolau Award**

2 The Transition Agreement also specifies how to integrate the two seniority lists:
3 "The seniority lists of America West pilots and US Airways pilots will be integrated in
4 accordance with ALPA Merger Policy and submitted to the Airline Parties for
5 acceptance." In turn, ALPA Merger Policy [ex. 3, hereinafter cited as "MP"] provides a
6 step-by-step process of integrating the lists. At the first stage, the parties attempt to
7 negotiate a single list. [MP pt. 1.G.] If negotiations fail, a mediator is selected from a
8 predetermined list through a series of strikes, and mediation ensues. [MP pt. 1.H.] If
9 mediation fails, the mediator conducts a "final and binding" arbitration to arrive at a
10 merged list, sitting as the chairman of a three-person arbitration board. [MP pt. 1.H.]
11 Once the representatives conclude the process of integrating the seniority lists, the list is
12 not subject to a separate ratification vote by the union membership. [MP pt. 1.D.] The
13 integrated list is to be presented as part of any new CBA, however, which is subject to
14 membership ratification.

15 In accordance with the Transition Agreement and ALPA Merger Policy, the
16 Merger Representatives for the East and West Pilots began negotiating over seniority in
17 August 2005. The circumstances of the two pilot groups prevented the two sides from
18 reaching agreement. In particular, the East Merger Representatives thought that East
19 Pilots were entitled to seniority rights based upon their dates of hire, including East Pilots
20 who were on furlough at the time of the merger. The West Merger Representatives
21 thought that these furloughees should be placed at the bottom of the list, with the
22 remaining pilots merged into one list according to their relative positions on the original
23 seniority lists for each of the merging airlines.

24 Failing to reach any negotiated compromise, the Merger Representatives began the
25 next step of the ALPA Merger Policy process: mediation. By alternating strikes from the
26 predetermined list of mediators, George Nicolau was selected as the mediator. Mediation
27 took place in October 2006. Like negotiation, the mediation failed to produce an agreed-
28 upon, integrated seniority list. The Merger Representatives then proceeded to the third

1 step of the ALPA Merger Policy process, entering into arbitration (the "Nicolau
2 Arbitration") with George Nicolau presiding along with two non-voting pilot
3 representative from other airlines, one designated by each pilot group. The arbitration
4 proceedings began in December 2006 and concluded in February 2007.
5 The Nicolau Arbitration panel issued its award (the "Nicolau Award") in the first
6 week of May 2007. The award struck a compromise between the requests of both sides.
7 It placed about 500 senior East Pilots at the top of the list, against the wishes of West
8 Pilots, because of their special experience with wide-body international aircraft that
9 America West was not operating before the merger. It placed approximately 1700 East
10 Pilots who had been furloughed at the time of the merger at the bottom of the list because
11 of their greatly diminished career expectations. Then it blended the remainder of the East
12 Pilot list with the West Pilot list generally according to the relative position of the pilots
13 on their original lists.
14 Before, during, and after the arbitration, both sides understood that any arbitrated
15 result would be final and binding as provided in ALPA Merger Policy, and that the
16 Transition Agreement required implementation of the Nicolau Award along with any new
17 single CBA. Each side presented exhaustive proof in support of its case over the course
18 of 18 days of hearings, with 20 witnesses and 14 volumes of exhibits. They filed
19 comprehensive post-hearing briefs. There is no persuasive evidence that any East or
20 West Pilot doubted the finality of the arbitration before it took place.
21 The Nicolau Award caused outrage among many East Pilots. The East Merger
22 Representatives sought to have the award overturned and petitioned ALPA to revisit it.
23 Emotions flared for weeks and months to follow while ALPA attempted to broker a
24 compromise between the two pilot groups. Understanding that ratification of any single
25 CBA by both pilot groups was essential, ALPA's Executive Council passed a resolution
26 on May 24, 2007, urging both MECs to "explore consensual approaches that promote
27 career protection and mutual success, and achieve an acceptable single [CBA] that
28 improves pay, benefits, work rules, and job security for both pilot groups." Further

efforts at compromise took place at certain union-organized conferences over the summer. No compromise resulted.

While the arbitration was pending, negotiations with the Airline progressed. In May 2007, the ALPA Joint Negotiating Committee received a comprehensive CBA proposal from the Airline known as the Kirby proposal. [Ex. 98.] While the union and the Airline remained far apart on many terms of employment, this proposal represented significant progress in negotiations and included a pay increase for both pilot groups worth $122 million per year. The West Pilots' increase was modest, but the introduction of equal pay for both pilot groups would mean a pay increase for East Pilots worth $108 million per year. This proposal has remained on the table.

On August 15, 2007, the East MEC withdrew its representatives from the Joint Negotiating Committee. This tactic halted negotiations between the union and the company toward a single new CBA. By October 1, 2007, the ALPA Executive Council had determined that there were no grounds under ALPA Merger Policy for setting aside the Nicolau Award. ALPA's president criticized the East MECs actions and stated that it was "time for the [East] MEC to comply with its representational and legal obligations under the Constitution & Bylaws, ALPA Merger Policy, the Transition Agreement, and implementing resolutions of the Executive Council" and "adopt a resolution . . . reversing all prior efforts to bar or precondition the continuation of joint negotiations." [Ex. 19.]

The East MEC never returned to negotiations. ALPA submitted the Nicolau Award to the Airline in late 2007. The Airline accepted the award on December 20, 2007, as it was required to do if the award complied with certain basic requirements of the Transition Agreement.

C. The Formation and Election of USAPA

Another story was unfolding during this course of events. On May 16, 2007, shortly after the issuance of the Nicolau Award, East Pilot Stephen Bradford wrote a letter to the ALPA Executive Board announcing his intent to leave ALPA. He voiced hostility to the Nicolau Award, claiming that he did not want to leave the union but that

the Nicolau Award left him little choice. In his view, it was necessary to leave in order to "write our own merger policy into our bylaws" and "just to protect what little we [East Pilots] have left." [Ex. 107 at 1-2.] He asserted that the East Pilots' majority status in the union would enable them to achieve their aims. He and other East Pilots formed a committee to explore how to prevent implementation of the Nicolau Award by forming and certifying a new union with a different seniority objective. They received advice from a lawyer to take care with "the language you use in setting up your new union" and not to "give the other side a large body of evidence that the sole reason for the new union is to abrogate an arbitration." [Ex. 14.]

Mr. Bradford and other East Pilots proceeded to form Defendant USAPA. On August 10, 2007, they announced that they held nearly enough popular support to force a representation election. On November 29, 2007, the National Mediation Board certified a representation election. USAPA's campaign purported to address other areas of pilot discontent, but it communicated a clear message to East Pilots that its seniority policy would be more favorable to them than the Nicolau Award. USAPA promised that as certified bargaining representative, it would negotiate for a date-of-hire seniority integration rather than the Nicolau Award. Many West Pilots opposed the campaign, and ALPA objected to the East MECs "failure to respond to and defend against" it. [Ex. 19.] USAPA won the election, and the National Mediation Board certified USAPA as the East and West Pilots' collective bargaining representative on April 18, 2008, with Mr. Bradford as its president.

Five months later, USAPA adopted and presented to the Airline its own seniority proposal. This proposal constructs a seniority list based upon each pilot's date of hire, with West Pilots generally falling to the bottom of the list. The proposal also includes certain conditions and restrictions providing limited protection to West Pilots. For example, it provides that reductions in the number of captain positions would be shared between the two pilot groups on a pro rata basis. Also, West Pilot positions in existence on June 1, 2008, are protected such that East Pilots cannot bid into those positions. But

significant limitations attend these protections. First, they expire after ten years. Second, a West Pilot "forfeit[s] his/her right with respect to all protected position provisions" if he or she fails to bid on or accept an available protected position or bids on a non-protected position. Third, the date-of-hire list supersedes all conditions and restrictions, including the pro rata allocation of position reductions, in the event of a catastrophic reduction of 25% or more of the total number of pilot positions. Finally, all furloughs and recalls still are implemented "on an integrated [date-of-hire] seniority list basis" regardless of protected position provisions.

Taking all of the conditions and restrictions into account, the Court finds that the terms of USAPA's seniority proposal are substantially less favorable to West Pilots than the Nicolau Award. The ten-year period of conditions and restrictions provides some protection to West Pilots, but once that period expires, even assuming rapid attrition of senior East Pilots, the West Pilots find themselves with diminished career opportunities relative to their position on the Nicolau List. More importantly, USAPA's proposal exposes the West Pilots to grave new economic perils. Any furlough will take a disproportionate toll on West Pilots, as will any catastrophic reduction in force—both realistic possibilities. At the time of the merger, 33% of East Pilots were on furlough status, a number roughly corresponding to 24% of the merged pilot workforce and 89% of the West Pilot workforce. If the very circumstances at the time of the merger were to recur under USAPA's seniority proposal, many of the West Pilots would lose their jobs to now-working East Pilots who were unemployed at the time of the merger. While all of these factors support the finding, they are not all necessary. The sole fact that USAPA's seniority proposal disfavors West Pilots for furlough purposes compels, on its own, the conclusion that the proposal is far less favorable to West Pilots than the Nicolau Award. *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 796, 800 (7th Cir. 1976).[1]

[1] USAPA also argues that the minimum fleet requirements of the Transition Agreement prevent any further significant furloughs. This argument has little force because

The Airline has received USAPA's seniority proposal but has not responded to it. USAPA and the Airline continue to negotiate toward a new CBA. Any new CBA is now subject to USAPA's ratification process, which differs from ALPA's. Under USAPA's constitution, ratification requires a majority vote of the entire union membership, not separate votes of the two pilot groups. This system deprives both pilot groups of their separate veto powers.

D. USAPA's Objectives

USAPA's sole objective in adopting and presenting its seniority proposal to the Airline was to benefit East Pilots at the expense of West Pilots, rather than to benefit the bargaining unit as a whole. Its constitution includes a commitment "to maintain uniform principles of seniority based on date of hire and perpetuation thereof, with reasonable conditions and restrictions to preserve each pilot's un-merged career expectations." USAPA officers have promised to "overturn" the Nicolau Award, and USAPA considers itself constitutionally bound never to implement it. Counsel for USAPA concedes that the union will never do so. [Doc. # 574 at 1047.]

As explained below, other motivations USAPA presented at trial were insufficient as a matter of law to justify its course of action. Some were simply pretextual.

E. Furloughs of West Pilots

Continuing in a state of separate operations, economic forces have caused the Airline to reduce flying. Most of these reductions have occurred in the western operations. As a result, the Airline has announced plans to furlough 300 pilots, including approximately 175 West Pilots. The Transition Agreement generally prevents East and West Pilots from flying in the other group's operations, so furloughs take place in the locales where flying is reduced, according to the two separate seniority lists.

USAPA's integrated seniority proposal only goes into effect when operations are integrated after the conclusion of a single new CBA, which may or may not have its own fleet requirements. The fleet requirements of the Transition Agreement are expressly limited to the period of separate operations. [Ex. 21, at II.B.]

1 Approximately 140 West Pilots had been furloughed by the time of trial. The group of
2 presently furloughed pilots includes Plaintiff Worgocki, Plaintiff Bostic, and Plaintiff
3 Iranpour. If a single CBA that incorporated the Nicolau Award were in place and
4 operations integrated, none of the West Pilots would be furloughed at this time.

5 **F. Procedural History**

6 On September 4, 2008, in response to USAPA's actions, six individual West Pilot
7 Plaintiffs brought this action against USAPA and the Airline alleging that USAPA had
8 breached its duty of fair representation and that the Airline had breached a CBA. The
9 complaint sought damages as well as injunctive relief. Plaintiffs also moved for a
10 preliminary injunction to restrain the Airline from furloughing West Pilots ahead of East
11 Pilots who had been on furlough at the time of the merger. The Court granted the
12 Airline's motion to dismiss for failure to exhaust administrative remedies. It denied
13 USAPA's motion to dismiss the fair representation claim under Fed. R. Civ. P. 12(b)(1)
14 and (6); that claim is the subject of this trial.

15 Around the same time, Plaintiffs also filed a state court action on behalf of a class
16 of West Pilots against a class of East Pilots. This complaint alleged various state law
17 causes of action against the East Pilots. After removal and consolidation, the state-law
18 causes of action were dismissed as preempted by the Railway Labor Act.

19 On November 21, 2008, trial in the fair representation case was accelerated and
20 bifurcated into two stages to expedite resolution of this urgent case. The first stage would
21 address the liability of the union and the propriety of injunctive relief. In the event of a
22 verdict finding USAPA liable, the second stage would address the causation and
23 quantification of any damages owed to Plaintiffs. Trial on liability was set to occur no
24 later than February 17, 2009. One week after trial was set, Plaintiffs filed an amended
25 complaint in the fair representation action, specifying that the suit was brought on behalf
26 of a class of similarly situated West Pilots. Because of the surprise to USAPA and the
27 need for class discovery, trial was continued. Briefing followed on certification as well as
28 the right to a jury trial. The Court certified the class of West Pilots and granted USAPA's

request for a jury trial under the Seventh Amendment. The Ninth Circuit denied USAPA's request for interlocutory review of the certification order. Because the class was not certified as to Plaintiffs' compensatory damages claims, the jury trial right attached only to the damages claims of the six individual Plaintiffs.[2] A jury trial would nonetheless be held at the liability stage because the damages claims would hinge on the adjudication of liability.

On March 3, 2009, shortly before the class was certified, a new trial date was set. Over USAPA's objection, trial on the liability facts and injunctive relief would now take place beginning April 28, 2009. The parties proceeded to and through trial according to plan. The jury retired after approximately nine days of evidence and returned a verdict for Plaintiffs. Bench proceedings then were held respecting the propriety and scope of injunctive relief. No new evidence was introduced at the bench trial beyond that presented to the jury.[3]

III. CONCLUSIONS OF LAW

"In chasing down the myriad arguments of the parties, [the Court has] pursued both the fox of enlightenment and the hare of obfuscation through the bramble of labor law." *Teamsters Local Union No. 42 v. NLRB*, 825 F.2d 608, 609 (1st Cir. 1987). The First Circuit wrote those words about a contentious union seniority case, and the same sort of chase has occurred here. While neither side has refrained from taking dubious legal positions, USAPA has at various stages misstated law, facts, and procedural history, with frequent recourse to the "contradiction or confusion . . . produced by a medley of

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[2] Plaintiffs' motion to certify the class also referred to a class-wide refund of union dues and fees. USAPA's Motion for Judgment on the Pleadings was granted as to this claim.

[3] Plaintiffs offered new testimony of Brian Stockdell regarding certain Airline logistics but withdrew the request for relief for which it was offered. Therefore, this withdrawn testimony is not considered and has no effect upon the present order. Cross-examination of Stockdell was not permitted when USAPA could not state any purpose for cross-examining other than to refute his withdrawn testimony concerning the withdrawn remedy.

judicial phrases severed from their environment." *Guaranty Tr. Co. of N.Y. v. York*, 326 U.S. 99, 106 (1945) (Frankfurter, J.). It is therefore necessary to cut a path through much labor law bramble on the way to granting relief. First, this Order explains the theory supporting liability. Second, it reaffirms and elaborates upon the subject matter jurisdiction and ripeness, best understood in light of the merits. Third, it outlines the propriety, scope, and nature of relief granted.

A. Duty of Fair Representation

A jury has already found that USAPA breached its duty of fair representation with respect to the West Pilots. In short, USAPA violated the duty because it cast aside the result of an internal seniority arbitration solely to benefit East Pilots at the expense of West Pilots. USAPA failed to prove that any legitimate union objective motivated its acts.

In general, a union owes a duty of fair representation to all members of the bargaining unit it represents. *McNamara-Blad v. Ass'n of Prof'l Flight Attendants*, 275 F.3d 1165, 1169 (9th Cir. 2002). This duty "arises from a union's statutory role as the exclusive bargaining representative for a unit of employees"; it attaches only at the time that a union becomes certified as the exclusive bargaining representative for the bargaining unit. *See id.* at 1169-71. The duty has evolved as a judicial check on the union "to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Id.* at 1169 (quoting *Vaca v. Sipes*, 386 U.S. 171, 177 (1967)).

"Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca*, 386 U.S. at 177. Put another way, the duty prohibits unions from acting in a way that is "arbitrary, discriminatory, or in bad faith." *Beck v. United Food & Commercial Workers Union, Local 99*, 506 F.3d 874, 879 (9th Cir. 2007) (quoting *Vaca*, 386 U.S. at 190).

1. Bargaining Backdrop

"The integration of a seniority list is a difficult undertaking because of the inevitability that some individual employees will be disadvantaged in comparison to others. In these circumstances, a union does not breach its duty of fair representation to others as long as it proceeds on some reasoned basis." *Herring v. Delta Air Lines, Inc.*, 894 F.2d 1020, 1023 (9th Cir. 1990). For this reason, ALPA had established an internal procedure for the integration of seniority lists in the merger scenario. *Bernard v. Air Line Pilots Ass'n, Int'l*, 873 F.2d 213, 217 (9th Cir. 1989); *see also Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1107 (2d Cir. 1991).

The Nicolau Arbitration was intended to provide a conclusive resolution of the conflicting seniority interests of the East Pilots and the West Pilots. The Transition Agreement generally required the parties to follow ALPA Merger Policy to integrate the seniority lists. The parties bound by that agreement included the union "by and through the Master Executive Councils of the America West and US Airways pilots." Both MEC chairmen signed the agreement with the ALPA President, witnessed by other union officials.

ALPA Merger Policy (cited as "MP") provided for the procedures leading up to and resulting in the issuance of the Nicolau Award. It also dictated the award's significance. "The purpose of arbitration shall be to reach a fair and equitable resolution consistent with ALPA policy." [MP § 1.H.I.b.] "The Award of the Arbitration Board shall be final and binding on all parties to the arbitration and shall be defended by ALPA." [MP § 1.H.5.] "The merged seniority list will be presented to management and ALPA will use all reasonable means at its disposal to compel the company to accept and implement the merged seniority list." [MP § 1.I.1.] "The arbitration award issued after proceedings under [the Merger Policy] shall be the position of ALPA with management . . . ." [MP § 1.I.7.] The Policy Compliance provision states that "[a]ny attempt by a member or members of ALPA to obtain an agreement which would operate to frustrate the objectives

of this policy shall be considered an act contrary to the best interests of ALPA and its members." [MP § 3.C.]

USAPA does not dispute that it succeeded to ALPA's rights and obligations under the Transition Agreement. Nonetheless, USAPA contends that the Nicolau Award does not limit USAPA in any sense. USAPA relies heavily on the following stipulation: "The parties to the Nicolau Arbitration were stated to be 'the US Airways Pilot Merger Representatives and the America West Pilot Merger Representatives.'" USAPA suggests that the Nicolau Award bound only the merger representatives, with the sole effect of precluding those representatives from asserting the existence of any disagreement between them regarding the Nicolau Award. The award, according to USAPA, was imposed on the East Pilots without their consent; ALPA, and by extension USAPA, remained free to order its affairs as though the award had never happened.

This argument offends common sense, the evidence, and fundamental principles of law. In the context of labor rights, it is both discordant and irrelevant. Generally, properly appointed representatives acting within the scope of their authority do bind those they represent. ALPA Merger Policy provides that the Merger Representatives "shall have complete and full authority to act for and on behalf of the flight deck crew members of their respective airlines for the purpose of concluding a single flight deck crew member seniority list, which shall not be subject to ratification." [MP § 1.D.3.] This is not a dispute about the personal contractual obligations of East Pilots.[4] The East Pilots took on the benefits and burdens of ALPA's representative actions when they elected to be represented by that union. They gave their political consent to the actions of the merger representatives when they elected the East MEC that appointed them. *Cf. Ackley v. W. Conference of Teamsters*, 958 F.2d 1463, 1478 (9th Cir. 1992) (explaining that unions exist and take action subject to union members' voting rights); 45 U.S.C. § 152 Fourth

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[4] As already noted, Plaintiffs' parallel suit alleging state law claims against a putative class of East Pilots was dismissed as preempted by the statutory duty of fair representation.

(protecting a bargaining unit's right to choose a union by majority vote). The East Pilots and ALPA were therefore bound, in the legislative sense of collective bargaining, by ALPA's Transition Agreement commitment "by and through" the East MEC to follow ALPA Merger Policy in merging the seniority lists. *See Humphrey v. Moore*, 375 U.S. 335, 337-38, 347-48 (1964) (holding that union discharged its duty of fair representation by resolving a seniority dispute in accordance with negotiation and arbitration procedures of a CBA negotiated by a multi-local union and executed by each appropriate local union).

Although the Court finds that the unambiguous language of the Transition Agreement resolves the question on its own, the East MECs course of conduct during and after the Nicolau Proceedings confirms that the award was intended to be "final and binding" as to the two pilot groups. USAPA presented no evidence that the East MEC or any East Pilots regarded the Nicolau Arbitration as an academic exercise before or while it took place. To the contrary, the East Pilots exhibited a solemn resolve to make their case. Both sides presented voluminous economic evidence over the course of several weeks of hearings. The East MEC pressed hard to have the award overturned within the ALPA framework. Finally, the East MEC attempted to subvert the award's implementation by withdrawing from merger negotiations altogether. Rather than cast doubt on the final and binding nature of the award, these actions show that from the East MECs perspective, the award was most final and most binding. ALPA's attempts to negotiate a compromise between the two pilot groups do not belie the award's finality; those attempts reflect an understanding that the West Pilots, through the West MEC, were entitled to sit on their rights. At no time did ALPA assert the power to impose a different seniority proposal on the West Pilots without their consent.

The award shapes USAPA's duty here even though the Transition Agreement could be amended by mutual agreement of the union and the Airline. US Airways has already accepted the Nicolau seniority list, and the evidence shows no reason for amendment other than USAPA's internal purposes. As explained further on, amendment

needs some legitimate union objective. Amendment is not a sufficient purpose unto itself, a kind of union wild card that covers for any purpose, good or ill. The power of amendment does not trump the union's duty of fair representation; it must serve it.

2. Theory of Liability

In general, a union meets its duty of fair representation as long as its actions fall within a "wide range of reasonableness." *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 78 (1991). This latitude includes a right on the part of the union to change bargaining positions midstream. *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 800 (7th Cir. 1976). There is nothing intrinsically wrong with bargaining for seniority integration based upon the date of hire; date-of-hire seniority is "generally . . . an equitable and feasible solution" to the problem of merging seniority lists. *Truck Drivers, Local Union 568 v. NLRB*, 379 F.2d 137, 143 n.10 (D.C. Cir. 1967); *see also Laturner v. Burlington N., Inc.*, 501 F.2d 593, 598-603 (9th Cir. 1974). Seniority rights do not "vest" with the union members in any proprietary sense. *See Hass v. Darigold Dairy Prods. Co.*, 751 F.2d 1096, 1099 (9th Cir. 1985). Even when an internal union arbitration resolves a seniority dispute, it is not necessarily improper for a union to pursue an alternative outcome. *Associated Transport, Inc.*, 185 NLRB 631, 635 (1970) (unfair labor practice case).

USAPA clings to these generalities, but they give no protection here. The question is not whether USAPA made a seniority proposal that is acceptable in the abstract, or whether USAPA deprived certain employees of their property rights, or what position it could have taken before agreement to a different final and binding process. The question is not whether USAPA has the right to adjust its bargaining position, even after playing out an agreed final and binding process, for some good reason. The legal question is whether USAPA—or any union—violates its duty of fair representation by adopting and promoting a certain integrated seniority list for no reason other than to favor one group of employees at the expense of another. An established genre of fair representation decisions says yes.

1 The first is *Bernard v. Air Line Pilots Association, International*, which concerned
2 the merger of Alaska Airlines and Jet America, Inc. 873 F.2d 213 (9th Cir. 1989). ALPA
3 was the certified bargaining representative for all Alaska Airlines pilots, but the Jet
4 America pilots were not members of the union. *Id.* at 214. Nonetheless, ALPA owed a
5 duty of fair representation to the Jet America pilots. *Id.* at 216. When it came time to
6 integrate the seniority lists of the two airlines, ALPA did not follow its own policy,
7 namely the process of negotiation, mediation, and, if necessary, arbitration. *Id.* at 215.
8 The employer excluded all Jet America pilots from seniority negotiations. *Id.* The Jet
9 America Pilots succeeded in their fair representation action because they had been
10 excluded from negotiations and because ALPA did not follow its own policy. *Id.* at 216-
11 17. The court rejected the union's purported justifications for its actions: that it was
12 reasonable to "speak[] to management as one voice," that the union's seniority decisions
13 were consistent with the respective career expectations of the pilot groups, and that
14 ALPA's duty to the Jet America Pilots was no broader than its general duty to the pilot
15 group as a whole. *Id*. ALPA had disregarded its neutral merger policy to discriminate
16 against the previously non-unionized pilots. *Id.* at 217. Indeed, at the time of the
17 seniority negotiation, ALPA's president had disclaimed any duty to the Jet America
18 pilots. *Id.* Under *Bernard*, a union may not diverge from its merger policy solely to
19 advance the seniority rights of union members at the expense of non–union members. *Id.*
20 A similar rule finds expression in *Truck Drivers, Local Union 568 v. NLRB*, 379
21 F.2d 137 (D.C. Cir. 1967).[5] *Truck Drivers* holds that a union's fulfillment of its promise
22 to "renounce[] any good faith effort to reconcile" the seniority interests of two employee
23 groups would lead to a violation of its duty of fair representation. *Id.* at 142-43. Of
24 particular relevance was the union's sole motivation to "win[] an election by a promise of
25 preferential representation to the numerically larger number of voters." *Id.* at 143; *see*
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27
28

[5] *Truck Drivers* concerned allegations of unfair labor practices, but the Board's imposition of liability was affirmed with reference to standards of fair representation.

1 *also Hardcastle v. W. Greyhound Lines*, 303 F.2d 182, 186-87 & n.10 (9th Cir. 1962)
2 (affirming grant of summary judgment for defendants in fair representation claim because
3 plaintiffs failed to show a lack of "discriminatory action in favor of one politically
4 stronger local or faction of the union against a politically weaker local or faction");
5 *Associated Transport*, 185 NLRB at 635 (union may not revisit seniority for improper
6 purpose).

7 The Seventh Circuit has embraced the same principle. In *Barton Brands*, two
8 seniority lists were dovetailed, that is, combined on a date-of-hire basis, upon the merger
9 of two companies. 529 F.2d at 795-96. Layoffs began, and the larger of the two merged
10 workforces decided that the existing seniority integration was unfair. *Id.* at 796. The
11 union formulated a new proposal that dovetailed the two lists for most purposes, but
12 placed the smaller workforce at the bottom of the list for layoff purposes. *Id.* A majority
13 of the union membership ratified the new arrangement. *Id.* The union met judicial
14 rebuke. Abridging "the established seniority rights of a minority of the Barton employees
15 . . . for no apparent reason other than political expediency" constituted an unfair labor
16 practice reflective of fair representation doctrine. *See id.* (citing *Hargrove v. Bhd. of*
17 *Locomotive Engineers*, 116 F. Supp. 3 (D.D.C. 1953) (fair representation case)). On
18 remand, the Board was instructed "that in order to be absolved of liability the Union must
19 show some objective justification for its conduct beyond that of placating the desires of
20 the majority of the unit employees at the expense of the minority." *Id.*

21 The Seventh Circuit has reaffirmed this theory of liability, addressing USAPA's
22 very posture in dictum. In *Air Wisconsin Pilots Protection Committee v. Sanderson*, 909
23 F.2d 213 (7th Cir. 1990) (Posner, J.), two airlines merged, and both pilot groups were
24 represented by ALPA. ALPA followed its merger policy and the seniority integration
25 issue went to arbitration. *Id.* at 215. "The arbitrators split the difference," giving each
26 group of pilots less than it had asked for. *Id.* Some pilots from one of the merging
27 airlines "tried to replace ALPA as a collective bargaining representative . . . with a newly
28 created union" but they were outvoted. *Id.* When the MEC for the disgruntled pilot

group proposed replacing the arbitrated list with a list based on length of service—a proposal corresponding to their position before the arbitration panel—ALPA placed the MEC in trusteeship. *Id.* at 216. Then, as now, ALPA MECs may be placed in trusteeship if they fail to comply with ALPA's Constitution, By-Laws, or representational obligations. *Id.* at 215.

The disgruntled pilots brought a fair representation suit, and its dismissal was affirmed. The court reasoned that the arbitration process was fair and the arbitrators' award definitive under ALPA policy. *Id.* at 216. "If ALPA were free to ignore the merged seniority list, the employees of the post-merger airline would have very little job security" and "disputes over seniority would fester—as they have done in this case." *Id.* In a concluding dictum, the court noted that "an attempt by a majority of the employees in a collective bargaining unit to gang up against a minority of employees in the fashion apparently envisaged by plaintiffs," that is, by "ousting ALPA in favor of a union not pledged to defend the arbitrators' award [,] . . . could itself be thought a violation of the duty of fair representation by the union that the majority used as its tool." *Id.* at 217.

In *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524 (7th Cir. 1992), ALPA was allowed to depart from its Merger Policy and to change its negotiating position midstream by promoting a seniority list that favored the preference of a majority of the employees in the bargaining unit. *Rakestraw* did not abandon or undercut the rule that a union may not reshuffle a seniority list for improper reasons. To the contrary, it reaffirmed *Barton Brands*, holding that "a union may not juggle the seniority roster for no reason other than to advance one group of employees over another," and it cited *Air Wisconsin* without criticism. *Rakestraw*, 981 F.2d at 1530, 1533, 1535. There was no breach of duty where no ill motive existed or where ALPA acted, at least in part, to "rationally promote the aggregate welfare of employees in the bargaining unit" by pursuing "two rational and appropriate objectives" without discrimination between different groups of employees. *Id.* at 1535.

1 The influence of *Barton Brands* extends well beyond the Seventh Circuit. The
2 Second Circuit follows its holding. *See Ramey v. Dist. 141, Int'l Ass'n of Machinists*, 378
3 F.3d 269, 277 (2d Cir. 2004). So too does the First Circuit. *See Teamsters Local Union*
4 *No. 42 v. NLRB*, 825 F.2d 608, 611 (1st Cir. 1987).[6] "Union members are to be accorded
5 equal rights, not subjugated arbitrarily to the desires of a 'stronger, more politically
6 favored group . . . .'" *Id.* (quoting *Barton Brands*, 529 F.2d at 799) (alterations original).

7 **3. Legitimate Union Objectives**

8 The question then arises, what kind of justification can the union rely upon to
9 avoid liability? USAPA has advanced a broad reading of *Rakestraw* under which any
10 rational relation to a legitimate union objective will suffice, regardless of the union's
11 actual motives. Plaintiffs, on the other hand, proposed an alternate view where the court
12 would evaluate a union's primary motive for the actions it takes. Neither approach is
13 reflected in the case law. Liability attached because USAPA's only actual motivation in
14 adopting and presenting its seniority proposal was to benefit East Pilots at the expense of
15 West Pilots.

16 Union liability for discrimination or bad faith requires a subjective examination of
17 the union's actual motives and purposes. *Simo v. Union Needletrades, Indus. & Textile*
18 *Employees, Sw. Dist. Council*, 322 F.3d 602, 618 (9th Cir. 2003). *Rakestraw* consones to
19 this rule, resting not on hypothetical connections to legitimate union objectives, but rather
20 on the actual reasons the union had for choosing its course of action. 981 F.2d at 1532.
21 That case took up two fact situations addressing the same legal issue. In the first, a larger
22 airline acquired a smaller airline. *Id.* at 1526. ALPA disregarded its Merger Policy in the
23 process of integrating the seniority lists, and the smaller pilot group acquiesced in the
24 result—a date-of-hire list favoring the majority. *Id.* at 1527. Later, the minority brought
25 suit against the union. *Id.* The union was held to be in pursuit of a legitimate objective
26
27 [6] Like *Truck Drivers*, this unfair labor practices case relies upon fair representation
28 principles.

because the larger, acquiring airline did not need the smaller group of pilots and was unlikely to agree to any arrangement disfavoring its own pilots. *Id.* at 1533. Moreover, "there [was] no evidence that ALPA's leaders had it in for the [smaller pilot group]." *Id.* at 1527.

In the second *Rakestraw* situation, ALPA was in the process of negotiating a post-merger CBA, including a date-of-hire seniority list. *Id.* at 1527. Negotiations broke down and the pilots went on strike. *Id.* at 1528. In response, the airline employer hired 219 replacement pilots. It also hired 320 student pilots who did not begin work during the strike. *Id.* At the same time, almost all 570 striking pilots honored the picket line. *Id.* After the strike, no CBA was in place, and ALPA had no alternative but to accept the airline's proposed seniority list with strike-breakers and student trainees at the top of the list. *Id.* at 1528-29. The striking pilots, constituting a majority in the union, made aggressive protest. *Id.* at 1529. Ultimately, management and the union agreed to put the 570 striking pilots at the top of the list according to date of hire, above the 219 strike-breakers and the 320 student pilots. *Id.* The strike-breakers brought a fair representation claim. *Id.*

The union "detested" the strike-breakers and "[t]his loathing played a role in the union's efforts to increase the seniority of the Group of 570." *Id.* Nonetheless, ill will or a desire for retribution does not "spoil an agreement that rationally serves the interests of labor as a whole, and that treats employees who are pariahs in the union's eyes no worse than it treats similarly situated supporters of the union."[7] 981 F.2d at 1532, 1535. Critical to the court's reasoning was that "ALPA had at least two rational and appropriate objectives" satisfying the rule of *Barton Brands*. *Id.* at 1535. It wanted to harm the strike-breakers, and it also sought to restore the seniority of the 570 pilots that it had defended before the strike. By punishing employees who crossed the picket line, the

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[7] Analogizing to the legislative sphere, the court stated, "A discriminatory motive without a discriminatory rule does not condemn a statute." *Rakestraw*, 981 F.2d at 1532.

union could "strengthen the hand of organized labor in future conflicts with management," in effect "shor[ing] up the monopolistic quality of organized labor." *Id.* By acting to restore a seniority system vis-a-vis newly hired pilots, the union served the legitimate objective of "stability" by protecting long-term employee expectations against outright erasure. *Id.* (citing *McCann v. City of Chicago*, 968 F.2d 635 (7th Cir. 1992) (equal protection case) and *Nordlinger v. Hahn*, 505 U.S. 1 (1992) (same)). No holding of *Rakestraw* precludes liability for discriminatory or bad faith action when a union's sole motivation is improper.

In *Ramey v. District 141, International Association of Machinists*, the Second Circuit considered *Rakestraw*'s statement that "[a] rational person could conclude that dovetailing seniority lists in a merger . . . serves the interests of [the union membership] as a whole." 378 F.3d 269, 277 (2d Cir. 2004) (alterations original). The *Ramey* court distinguished between a bare challenge to union action and a challenge to union action with evidence of an improper purpose. "Unlike in Rakestraw," where the first fact pattern presented no evidence of hostility in merging seniority lists on a date-of-hire basis, "plaintiffs here do not suggest that [the union] acted improperly merely by dovetailing the seniority lists." *Id.* "Rather, they argue that [the union] was motivated by retaliatory animus in choosing which seniority dates to apply." *Id.* Liability attached because the alteration of seniority based solely on retaliatory animus was not objectively reasonable. *Id.* Once the jury rejected the union's purported neutral motivation as pretext, it could conclude that hostile motives alone motivated the union action. *Id.* at 284. A rational relation to purportedly neutral purposes could not defeat liability where the only actual motive was improper. *Id.*[8]

[8] *Ramey* imposed liability because the union was motivated to punish employees who had been affiliated with another union. These employees had also refused to participate in a strike. *Ramey* does not address *Rakestraw*'s holding that punishing strike-breakers is a legitimate union objective, and that issue is not before the Court.

For these reasons, the jury in this case was instructed as follows: "Even if the union's conduct could be rationally related to a legitimate union objective, the union can be liable for violating its duty of fair representation if its actions are shown to be solely motivated by objectives that are not legitimate union objectives." To the extent USAPA reads a stronger rule into *Rakestraw*, a rule that would validate all union conduct that could be rationally related to legitimate union objectives irrespective of actual motive, USAPA's reading is rejected and would not be persuasive if accepted because it runs against the scheme of fair representation doctrine already discussed, including Ninth Circuit precedent. *See Rakestraw*, 989 F.2d 944, 945-48 (7th Cir. 1993) (Ripple, J., dissenting from denial of rehearing *en banc*) (interpreting the panel decision in this strong manner and arguing that it violates Supreme Court and Seventh Circuit precedent); *Bernard*, 873 F.2d at 216-17 (looking beyond plausibly rational basis to actual union motive); *Simo*, 322 F.3d at 618 (requiring this inquiry in the Ninth Circuit); *Associated Transport*, 185 NLRB at 635 (examining actual union motive). USAPA's proposed rule would collapse "bad faith" and "discrimination" into an arbitrariness inquiry that does not apply. *See Beck v. United Food & Comm. Workers Union, Local 99*, 506 F.3d 874, 879 (9th Cir. 2007).

Conversely, this Court rejected the Plaintiffs' suggestion that a bad motive combined with a good motive could still produce liability where the bad motive predominates. *See Rakestraw* 981 F.2d at 1534 (rejecting mixed-motive liability); *Ramey* 378 F.3d at 284 (relying upon a showing of pretext); *Barton Brands*, 873 F.2d at 217 (noting that ALPA acted solely on the basis of union membership). It may be possible and desirable to fashion a framework for adjudicating mixed-motive fair representation cases, but Plaintiffs cite nothing allowing this Court to thus better the precedents. Regardless, the jury found that only an improper motive, and no proper motive animated USAPA's seniority agenda.

1 **4. USAPA's Seniority Objective**

2 There is no merit to USAPA's argument that the pursuit of date-of-hire seniority
3 principles automatically legitimates USAPA's actions because date-of-hire seniority is
4 "the gold standard" of integration methods. [Doc. # 482, at 1902.] The jury was
5 instructed that "[i]n this case, a general preference for any particular seniority system
6 other than the Nicolau Award, standing alone, is not a legitimate union objective."
7 USAPA's argument is little more than a circular rationalization for its departure from the
8 Nicolau Award to favor the majority. The Nicolau Arbitration occurred on the premise
9 that insisting in advance on one seniority system or another could not reconcile the
10 interests of the two pilot groups. The decision to follow a given seniority philosophy in
11 this case could always be viewed as politically motivated by the interests of one pilot
12 group or the other. Fairness could be found only in an agreed procedure, not in an agreed
13 outcome. The Transition Agreement and the Nicolau Arbitration provided USAPA with
14 a "final and binding" internal compromise. The union no longer lacked an appropriate
15 resolution of these irreconcilable interests.

16 There is no authority for a magic rule that date-of-hire stops all inquiry on the duty
17 of fair representation, in disregard of circumstances. The significance of date-of-hire
18 seniority varies from one labor negotiation to the next. The bankrupt position of US
19 Airways at the time of the merger, with almost as many furloughed pilots as America
20 West had working, and with a significant furlough history, lent date-of-hire integration
21 some hues of inequity it might not have had in another merger. The question before the
22 arbitrator was not whether date-of-hire seniority, in the abstract, was a desirable thing, but
23 whether it would provide a fair and equitable answer to the career expectations of the
24 unmerged pilot groups.
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1 USAPA has maintained from the beginning that no union has ever faced liability
2 based on the pursuit of date-of-hire principles.[9] *Ramey* refutes this in its holding. 378
3 F.3d at 274-75.[10] The union in *Ramey* was liable, notwithstanding its date-of-hire list,
4 because it drew up that list so as to punish inimical employees. *Id.* A date-of-hire
5 proposal does not immunize or condemn union action; the policy preference is generally
6 permissible. It is the manipulation of the seniority proposal in context that gives rise to
7 the claim. USAPA's date-of-hire agenda is just a means of changing the arbitrated
8 outcome for no purpose other than to favor the majority.
9 USAPA concedes the broad sweep of its argument, which implies that the Railway
10 Labor Act does not permit "hopelessly irreconcilable labor groups to enter into a binding
11 neutral process to resolve their mutual disagreement so they can go forward on their areas
12 of mutual interest." [Doc. # 574, at 1071 (question from the Court).] To agree with this
13 conclusion would dismantle the framework of honest intentions and fair dealing, of
14 stability and consistency, that is the premise of all bargaining, not less labor negotiations.
15 To this extent—an extent as limited and minimal as it is important—the Nicolau Award
16 constrains USAPA as a preexisting discharge of its duty, not to be abandoned without
17 justification.
18 Practical problems also dog USAPA's argument. Even if date-of-hire seniority
19 were a *per se* legitimate union objective, what about qualified date-of-hire seniority?
20 USAPA's own proposal includes conditions and restrictions professed to mitigate its
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23 [9] The record contains at least twelve representations to this effect. [*See, e.g.*, doc. ## 80 at 61, 149, 162; 215 at 5 & n.5; 348 at 96; 351 at 3, 8; 359 at 2; 389 at 55; 444 at 6-7; 482 at 1757; 495 at 4-5.] USAPA quite recently stated, "The mere fact that—the mere evidence that Date-of-Hire was preferred by USAPA, that's not itself evidence of anything other than that they preferred an entirely legitimate end. Your Honor, there has never been a case finding Date-of-Hire in a merger context of [sic] violation of the duty." [Doc. # 482 at 1757.]
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27 [10] *Air Wisconsin* also notes in dictum that liability could attend a length-of-service seniority list, that is, a list based upon date-of-hire that accounts for time spent on furlough. 909 F.2d at 215, 217.
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1 date-of-hire aspect. At what point would such conditions and restrictions forfeit the date-
2 of-hire immunity? The fact is, USAPA's very decision to include conditions and
3 restrictions is an acknowledgment that the date-of-hire method is sometimes a
4 Procrustean fit.

5 **5. USAPA's Impasse-Related Objective**

6 USAPA asserts that its seniority proposal was justified by its necessity to get any
7 new single CBA. In USAPA's view, ALPA's system of requiring both pilot groups to
8 ratify any new CBA doomed all progress. First, the East MEC had withdrawn its
9 representatives from the Joint Negotiating Committee, halting CBA negotiations
10 indefinitely. Second, USAPA asserts that the East Pilots would never ratify the arbitrated
11 seniority proposal as part of any new CBA. The evidence of a supposed impasse
12 requiring sacrifice of the West Pilots to angry East Pilots was pretextual; in any event, it
13 did not persuade the jury or the Court that an actual impasse existed; and the so-called
14 impasse could not, as a matter of law, justify USAPA's actions toward the West Pilots
15 and the Nicolau Award.

16 **i. Pretext**

17 The evidence well supports the conclusion, implicit in the verdict and persuasive
18 to the Court, that any asserted impasse was a pretext for bare favoritism of the East Pilots.
19 As soon as the Nicolau Award was announced, USAPA's founder and future president
20 Mr. Bradford wrote that it was necessary to leave ALPA "if this award stands" and "just
21 to protect what little we have left." [Ex. 107 at 1-2.] Later, an attorney advised Mr.
22 Bradford to conceal this objective. [Ex. 14.] A USAPA memo dated February 10, 2008,
23 stated that an attorney had advised USAPA that "if we could replace ALPA as the
24 bargaining agent we could prevail in achieving a Date of Hire seniority integration." [Ex.
25 315 at 4.] The same memo states, "If ALPA is not there, the award is not there." It shows
26 a deleted sentence stating that "USAPA would not exist" if any lawyer had advised that
27 the renegotiation of seniority was "not possible or very dangerous and likely to fail."
28 Editorial annotations explain that the deletion was necessary to avoid the appearance that

1 "Ni[c]olau is the only reason for USAPA's existence." [Ex. 315 at 5.] USAPA publicly
2 expressed the sentiment that "ALPA = Nicolau." [Ex. 39.] Some pre-election USAPA
3 correspondence refers to an impasse, but USAPA's "Frequently Asked Questions" pages
4 from the campaign invoke date-of-hire seniority without any discussion of impasse. [Ex.
5 37, 39, 96, 100-105.] When USAPA does talk about the impasse, it promises to
6 "overturn" the Nicolau Award without any explanation of why this step is needed to get
7 around ALPA's dual-ratification structure. [Ex. 39.] Mr. Bradford, who is beyond the
8 subpoena power of this Court, missed an opportunity for persuasion when he declined to
9 testify and be cross-examined at trial concerning motives and pretext in defense of the
10 union he founded and governed.

11 **ii. Non-persuasion**

12 The East MEC's walkout from the negotiations did not create an impasse. ALPA
13 possessed the constitutional power to place the recalcitrant East MEC into trusteeship to
14 continue negotiations toward a single new CBA. [Ex. 509/2189 at 89-90.]; *see also Air*
15 *Wisconsin*, 909 F.2d at 215 (describing use of trusteeship powers to resolve seniority
16 dispute). The former chairman of the West MEC Negotiating Committee testified that
17 ALPA officials were discussing that possibility after negotiations broke down. [Doc. #
18 475, at 372.] Before certification, USAPA repeatedly asserted that a contract was likely to
19 be presented for ratification soon. [*E.g.*, ex. 100 at 3, 7.] And Doug Mowery, an East
20 Pilot formerly on ALPA's Joint Negotiating Committee, lamented in a March 2008 letter
21 that the East MEC was likely to be placed in trusteeship. [Ex. 20, at 2.][11]
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24 [11] USAPA had every opportunity to present evidence that ALPA had abandoned use
25 of its trustee powers, but USAPA did not present any, relying instead upon
26 misrepresentations of the record. [*E.g.*, Doc. ## 451 at 10-11; 482 at 1774-81, 1789-94,
1798-1802]. ALPA pledged not to deprive the two pilot groups of their separate ratification
27 rights, but that pledge would not be inconsistent with imposing a trusteeship on the East
MEC in order to conclude, short of ratification, a single CBA incorporating the Nicolau
28 Award.

1 Nor did the evidence show that the two pilot groups would never ratify a single
2 CBA under ALPA. It is wholly speculative to say the East Pilots would vote against any
3 single CBA incorporating the Nicolau Award no matter how long separate operations
4 continued and no matter the cost to them. The East MEC passed a resolution stating that
5 the East Pilots would never ratify a CBA containing the Nicolau Award, but this self-
6 serving statement about an unknown future is not binding or even persuasive.
7 Moreover, speculation about what could have been ratified under the ALPA voting
8 system became irrelevant when USAPA was certified as bargaining representative on
9 April 18, 2008. USAPA's structure allows a simple majority of the membership to ratify
10 a new CBA. The lack of an actual and legitimate union purpose for jettisoning the
11 Nicolau Award and the promised improvements in wages and working conditions from a
12 new CBA may yield a majority coalition of East and West Pilots, if not at first, at least
13 eventually.

14 **iii. Legal insufficiency**

15 Even if an impasse did exist, it would not justify USAPA's actions as a matter of
16 law. Majority opposition does not defeat the duty of fair representation; the duty exists to
17 restrain the majority. *Air Wisconsin*, 909 F.2d at 216. USAPA's argument would allow a
18 union to punish any disfavored minority by pointing to the majority preference in the
19 union as long as that majority threatens to obstruct the collective bargaining process, in
20 this case by hijacking contract ratification. Discrimination and bad faith would be
21 permitted as long as a zealous majority of union members insisted. Majority will alone
22 does not corrupt union action. *See Rakestraw*, 981 F.2d at 1533 ("If the union's leaders
23 took account of the fact that the workers at the larger firm preferred this outcome, so
24 what? Majority rule is the norm."). It does not exculpate all union action, either. The
25 union's obligation to federal labor law includes an obligation to stand up to its
26 membership. USAPA argues that ALPA's merger policy only requires the union to use
27 "all reasonable means" to implement the Nicolau Award, but this phrase is quoted out of
28 context. The policy requires the union to use "all reasonable means . . . to compel the

company to accept and implement the merged seniority list." [MP Pt. 1.I.1.] It does not allow the union to capitulate to an abusive majority.[12]

This principle goes to the core of union politics and bargaining assumptions. A union is required to explain agreements to union members prior to a mandatory ratification vote. *White v. White Rose Food, a Div. of DiGiorgio Corp.*, 237 F.3d 174, 183 (2d Cir. 2001). Before and after its election, USAPA has misled the majority about its power to improve their seniority prospects at the expense of the West Pilots. The will of the East Pilots springs from a mistaken understanding of the law and mismanaged expectations. If this is an impasse, it is one USAPA goaded on.

If the membership were correctly advised on the limits of fair representation that constrain the agreement—and all the collective bargaining of every union—then they would perceive no incentive to hold out for an improper bargaining objective. Those employees would be left with a choice: To vote in favor of ratifying a single CBA that incorporated the Nicolau Award, or to vote against it. What they could not do is vote against it and expect the next CBA or the next union to violate the duty of fair representation in the very same way as the first one could not. In effect, USAPA claims that the East Pilots hold such strong objections to the Nicolau Award that they always will vote as a bloc against any new CBA with it, enjoying the self-denial of a single CBA with improved wages and working conditions into perpetuity. Even if this unbelievable story is believed, it only means that the East Pilots have the power of self-inflicted harm. It does not mean that the union's duty of fair representation falls victim to self-hostage-taking.

Whether considered as a matter of fact or law, the asserted impasse does not absolve USAPA from liability.

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[12] As a historical matter, the duty of fair representation could not have developed if this impasse theory were valid. Surely, in those early cases, unions that discriminated against black workers were catering to a stubborn racism of the majority. The duty would mean nothing if a majority could undo it by force of stubbornness.

1 **6. USAPA's Other Objectives**

2 USAPA asserted a range of other union objectives. These included compliance
3 with its union constitution, compliance with majority will, dissatisfaction with ALPA
4 policies and procedures, and dissatisfaction with the procedures of the Nicolau
5 Arbitration. All of these objectives were rejected as a matter of law.

6 (1) USAPA's constitutional commitment to date-of-hire seniority does not excuse
7 its acts. "The interpretation or construction of the constitution and laws of a union is for
8 the union." *Laturner v. Burlington N., Inc.*, 501 F.2d 593 (9th Cir. 1974) (quoting *Wirtz*
9 *v. Local Union No. 125, Int'l Hod Carriers B. & C.L.U.*, 270 F. Supp. 12, 16 (N.D. Ohio
10 1966)). However, that interpretation does not govern if it would cause the union to
11 "transgress the bounds of reason, common sense, or fairness, or act arbitrarily, or
12 contravene public policy or the law of the land." *Local Union No. 125*, 270 F. Supp. at
13 16 (quoting 87 C.J.S. Trade Unions § 13, at 766 (late ed.)); *Retana v. Apartment, Motel,*
14 *Hotel & Elevator Operators Union, Local No. 14*, 453 F.2d 1018, 1024-25 (9th Cir. 1972)
15 (union's internal policies and practices are subject to the duty of fair representation).

16 (2) Political expediency standing alone—whatever it takes to win an
17 election—does not provide a legitimate union objective. *Truck Drivers*, *Teamsters Local*
18 *Union No. 42*, *Barton Brands*, and the Ninth Circuit's *Hardcastle* case say with one voice
19 that a union cannot act solely to benefit a majority of employees in the bargaining unit at
20 the expense of the minority.

21 (3) Dissatisfaction with ALPA policies and procedures, unrelated to the Nicolau
22 Award, could not provide a legitimate objective. The evidence suggested that some East
23 Pilots had general complaints about ALPA and that the seniority issue was just the last
24 straw. The testimony centered on a lack of direct representation, extravagant lifestyles of
25 union officials, loss of pension rights, inadequate contract terms, and inferior safety
26 policies. They also complained that more than a decade ago ALPA, instigated by other
27 pilot groups, subverted a merger that would have benefitted US Airways pilots. The
28 pilots may have had many reasons for abandoning ALPA and they were entitled to do so.

1 But this case does not turn on the rejection of ALPA. It turns on USAPA's consequent
2 motivation to present a new seniority proposal to the airline. For these reasons, the
3 instructions prevented the jury from finding that "dissatisfaction with the practices or
4 policies of the previous union, ALPA, unrelated to the merged pilot seniority list" was a
5 legitimate union objective in this case.

6 (4) Dissatisfaction with the previously agreed-upon ALPA merger procedures was
7 not a legitimate union objective. Honest disagreement required honesty up front. It was
8 only after the Nicolau Award was issued, and the pilots lost their veil of ignorance, that so
9 many East Pilots decided that the procedures were inherently unjust. The union cannot
10 satisfy its duty by catering to this self-interested hindsight.[13]

11 **7. Taxonomy of Liability**

12 It is clear that USAPA's conduct violates its duty as set forth in a special genre of
13 fair representation cases. It is less clear what subheading of liability applies: The duty of
14 fair representation prohibits conduct that is arbitrary, discriminatory, or in bad faith.
15 This metaphysical question has no impact on the outcome under existing law, but it has
16 enthralled both parties.

17 At the outset, USAPA's failure to adopt the Nicolau Award is not "arbitrary" in
18 the technical sense. The exercise, even the wrongful exercise, of a union's policy
19 judgment—including CBA interpretation—is virtually immune to charges of
20 arbitrariness; liability under this heading has been limited to procedural or ministerial
21 acts. *See Beck v. United Food & Commercial Workers Union, Local 99*, 506 F.3d 874,
22 879 (9th Cir. 2007); *Peters v. Burlington N. R.R.*, 931 F.2d 534, 540 (9th Cir. 1990). The
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26 [13] The evidentiary and legal failure of all of USAPA's alleged objectives might have supported summary judgment or judgment as a matter of law. However, the urgency of the
27 case did not leave time to brief and decide summary judgment motions before trial, and Plaintiffs' motion for Judgment as a Matter of Law did not address the issues necessary for
28 such a ruling. [Doc. # 446.]

1 question then remains whether such union actions may be considered "discriminatory" or
2 "in bad faith."
3 In truth, both headings support liability, separately and together. The original fair
4 representation cases concerned racial discrimination, *see Vaca v. Sipes*, 386 U.S. 171, 177
5 (1967), and clearly the duty excludes all forms of invidious discrimination based upon
6 protected classes. *Simo v. Union of Needletrades, Indus. & Textile Employees, Sw. Dist.*
7 *Council*, 322 F.3d 602, 618 (9th Cir. 2003). However, the Ninth Circuit has expressly
8 held that it is "too restrictive" to limit liability to cases of invidious discrimination, and
9 that impermissible discrimination may take other forms. *Id.* at 618-19. For this reason,
10 the jury was instructed that "discriminatory" action could be a basis for liability. The
11 instructions articulated the difference between lawful and unlawful treatment of different
12 employee groups, granting the union wide latitude to resolve conflicting interests even if
13 the resolution adversely affects one group, as long as the union took action to further a
14 legitimate union objective. Contrary to the objections of USAPA, these instructions
15 articulated the contours of unlawful "discrimination" as expressed in the applicable cases.
16 *See Bernard*, 873 F.2d at 216 (prohibiting discrimination "on the basis of union
17 membership"); *Barton Brands*, 529 F.2d at 799 (prohibiting discrimination against the
18 smaller of two merging workforces); *Air Wisconsin*, 909 F.2d at 217 (union's duty
19 prohibits discrimination against "a group of dissidents on the outs with union's
20 leadership"); *Truck Drivers*, 379 F.2d at 144 ("campaign promise to discriminate" against
21 politically weaker employee group is a promise to breach duty of fair representation);
22 *Ramey*, 378 F.3d at 277 (holding that "a union violates [its duty] when it causes an
23 employer to discriminate against employees on arbitrary, hostile, or bad faith grounds")
24 (quoting *Barton Brands*, 529 F.2d at 799); *Teamsters Local Union No. 42*, 825 F.2d at
25 611-12 (holding, without limitation, that "discrimination" on the basis of union
26 membership is an unfair labor practice) (citing fair representation cases). USAPA
27 "discriminated" when it adopted a seniority proposal for no reason other than to
28 advantage the majority East Pilots at the minority West Pilots' expense.

1 USAPA also complained at the instruction stage that the jury was given no
2 definition of "bad faith." The Supreme Court has defined "bad faith" in this context as
3 requiring a showing of "fraud, deceitful action, or dishonest conduct," or personal
4 hostility. *Humphrey v. Moore*, 375 U.S. 335, 348, 350 (1964); *accord Conkle v. Jeong*,
5 73 F.3d 909, 916 (9th Cir. 1995) (referring to "personal animus" as a basis for "bad faith"
6 liability). At the same time, the Supreme Court has often resorted to the rule that a
7 union's discretion is subject to "good faith and honesty of purpose." *See Air Line Pilots*
8 *Ass'n v. O'Neill*, 499 U.S. 65, 75-76 (1991); *Metro. Edison Co. v. NLRB*, 460 U.S. 693,
9 707 (1983); *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 67 n.2 (1981); *Hines v.*
10 *Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976); *Humphrey*, 375 U.S. at 342; *Ford*
11 *Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).
12 In civil law, the forms of fraud range to the bounds of human imagination. 17 Am.
13 Jur. *Fraud* § 1 (2009). "In fact, the fertility of people's invention in devising new
14 schemes of fraud is so great that courts have always declined to define the term, reserving
15 to themselves the liberty to deal with fraud in whatever form it may present itself." *Id.*
16 (listing nineteen judicial definitions of fraud); *see also Keith v. Murfreesboro Livestock*
17 *Market, Inc.*, 780 S.W.2d 751, 754 & n.2 (Tenn. App. 1989) (citing Dante Alighieri's
18 personification of fraud as the demon Geryon, a reptile-scorpion-mongrel of a man, to
19 illustrate why fraud is not subject to a "hidebound definition"). The "fraud" or "bad
20 faith" at issue here is an abuse of trust akin to a deliberate breach of fiduciary duties.
21 "Just as a trustee must act in the best interests of the beneficiaries, a union, as the
22 exclusive representative of the workers, must exercise its power to act on behalf of the
23 employees in good faith." *Chauffeurs, Local No. 391 v. Terry*, 494 U.S. 558, 567 (1990)
24 (citation omitted); *accord O'Neill*, 499 U.S. at 75. The jury instructions omit the phrase
25 "fraud, deceitful action, or dishonest conduct" because those terms add nothing to the
26 analysis. Instead, the jury was instructed on a union's duty to represent with "good faith
27 and honesty of purpose," a phrase better suited to the situation here where the union is
28 accused of brandishing a pretext to justify majority self-dealing at the expense of West

Pilots. Much as a definition of fraud would add nothing to an adequate instruction on embezzlement, no further definition of "bad faith" was needed. The instructions predicate any liability on the specific facts of USAPA's conduct.

Seniority dispute cases are conceived in terms of both "bad faith" and "discrimination." Cases imposing liability cite both standards. *See Bernard*, 873 F.2d at 216 (holding that union may treat groups of employees differently "as long as such conduct is not arbitrary or taken in bad faith"); *Barton Brands*, 529 F.2d at 799 (prohibiting discrimination "on bad faith grounds"); *Truck Drivers*, 379 F.2d at 142 (faulting union for "renounc[ing] any good faith effort to reconcile" employee interests); *Ramey*, 378 F.3d at 276-77 (union has obligation to "exercise its discretion with complete good faith and honesty") (quoting *Vaca*, 386 U.S. at 177); *Teamsters Local Union No. 42*, 825 F.2d at 611(same). In these cases, the distinction matters little. "Bad faith" and "discrimination" become two different labels for the same theory of liability. None of the applicable cases trouble over this issue of nomenclature, and perhaps rightly so. *Cf. Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 798 (2d Cir. 1974) (rejecting, pre-*O'Neill*, the strict compartmentalization of fair representation claims and holding that varied labels only serve to emphasize the range of a union's broad discretion). *But see Rakestraw*, 989 F.2d at 945-48 & n.2 (Ripple, J., dissenting from denial of rehearing *en banc*) (criticizing panel decision for abandoning the tripartite "arbitrary, discriminatory, or in bad faith" standard, which *O'Neill* reaffirmed, in favor of a "crabbed interpretation of the duty of fair representation"). It may be that "bad faith" and "discrimination" merge into a single concept that describes the ills at work in this case. *See Bernard*, 873 F.2d at 216 (prohibiting bad-faith disparate treatment of workers); *Williams v. Pac. Maritime Ass'n*, 617 F.2d 1321, 1330 (9th Cir. 1980) (same); *Ramey*, 378 F.3d at 277 (same). The terminological difference does not affect its proof or defense.

USAPA also objected that Plaintiffs never pled discrimination, that Plaintiffs waived the discrimination instruction on multiple occasions, and that Plaintiffs objected

to it in the drafting phase before finally accepting that term in the final instructions.[14] [Doc. # 482, at 1898.] All of these contentions lack merit. The First Amended Complaint did not mention "discrimination" as a basis for liability because it pled more generally that USAPA acted "arbitrarily, for improper purpose, and/or in bad faith." [Doc. # 86 at 22.] This pleading encompasses the theoretical vestibule of unlawful discrimination, which is a type of "improper purpose." The November 20, 2008 order denying USAPA's motion to dismiss repeatedly referred to discrimination as an operative theory of liability. [Doc. # 84, at 8, 10-13, 18-19.] Plaintiffs have confined their liability case to the facts pled, and their unofficial objections to the discrimination instruction did not comport with applicable law. It is sophistic at best for USAPA to claim surprise here. It was USAPA who first requested, over Plaintiffs' unofficial objection, an instruction on discrimination. [Doc. # 348, at 86-87.]

B. Subject Matter Jurisdiction and Ripeness

Jurisdiction being a prerequisite to all remedies, the Court reaffirms its prior holdings on subject matter jurisdiction and ripeness. Adjudicating this case does not intrude upon the jurisdiction of the System Board of Adjustment or the National Mediation Board. [*E.g.* doc. ## 84, at 17-22; 104; 250 at 2; 288 at 3.] Although the Railway Labor Act generally requires exhaustion in breach-of-CBA suits against an employer, there is no statutory or contractual exhaustion requirement in this fair representation suit. The fact that a CBA—the Transition Agreement—and its interpretation form part of the fabric of the fair representation claim does not preclude jurisdiction. Neither the System Board of Adjustment nor the National Mediation Board

[14] The referenced objections of Plaintiffs took place during open dialogues about jury instructions and were not Plaintiffs' formal objections. As the Court advised the parties, "for purposes of the rules of civil procedure, the only objections to jury instructions that will count for making the record will be the ones you make at the end. The dialogue that we have in the process are not objections. They are not sufficient. I don't treat them as such. And everyone will have a chance at the end to make their record. But that's not how I see the purpose of the dialogues we have up until then." [Doc. # 390, at 37.]

1 possesses the statutory power to address or remedy a fair representation claim of this
2 nature. 45 U.S.C. §§ 184 (granting System Board of Adjustment jurisdiction over
3 "disputes between an employee or group of employees and a carrier or carriers by air
4 growing out of grievances, or out of the interpretation or application of agreements
5 concerning rates of pay, rules, or working conditions"); 45 U.S.C. §§ 152 Ninth, 155, 183
6 (granting National Mediation Board jurisdiction over election disputes and disputes
7 "between an employee or a group of employees and a carrier or carriers" regarding
8 contract negotiation and other issues).

9 The Court also maintains its prior conclusion that this case is ripe for adjudication.
10 USAPA has challenged this point repeatedly, most recently on motion for judgment as a
11 matter of law. [Doc. # 445.] At the beginning of the case, the Court held that the claims
12 were ripe because, according to the allegations, it was enough to allege that USAPA has
13 breached its duty by deliberately delaying the single collective bargaining agreement,
14 thereby causing injury to the West Pilots in the form of ongoing furloughs and other
15 detriments. [*See* Doc. # 84:12-13.] During discovery, Plaintiffs retreated from any notion
16 of deliberate delay on the part of USAPA. As has already been held, this change in the
17 factual predicate presents no ripeness problem. [Doc. ## 449; 482 at 1755-56.]

18 **1. Ripeness Doctrine**

19 Two factors govern the inquiry into whether a case is ripe: "the fitness of the
20 issues for judicial decision," and "the hardship to the parties of withholding court
21 consideration." *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433
22 F.3d 1199, 1211-12 (9th Cir. 2006). Both factors favor jurisdiction here.

23 The issues fit for decision are these: Whether USAPA adopted and presented its
24 seniority proposal without any legitimate union objective, solely to benefit East Pilots at
25 the expense of West Pilots, and if so whether the West Pilots are entitled to damages and
26 an injunction therefor. *See id.* at 1212 (noting that ripeness hinges on "the precise legal
27 question to be answered"). The jury answered the first question in the affirmative. A
28 ruling on relief need not wait for further facts to eventuate themselves. Plaintiffs' case

does not rest upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Cardenas v. Anzai*, 311 F.3d 929, 934 (9th Cir. 2002) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). USAPA concedes that it will never bargain for implementation of the Nicolau Award. [Doc. # 574 at 1047.] It is constitutionally hostile to doing so. The Airline has accepted the Nicolau Award, expressing no opposition to it, and the union has failed to show any legitimate reason (or plausible future reason) for abandoning it. Liability flows from the process and aims of USAPA's seniority position. The outcome of negotiations is irrelevant. Without an injunction, USAPA's seniority position inevitably impairs the collective bargaining process.

For this same reason, denying judicial review would work a substantial hardship upon the parties, including the Airline. The prospect of a single new CBA holds significant economic consequences for all US Airways pilots, whose wages, working conditions, furloughs, and demotions are on the line. In addition to depriving West Pilots of legitimate representation, USAPA's bargaining position leaves the Airline to decide between a lack of a single CBA and an unlawful single CBA.

2. Remedial Concerns

The practicalities of the remedy also support ripeness. As discussed further on, effective relief is available in the form of an injunction requiring USAPA to negotiate for the implementation of the Nicolau Award, which the Airline has already accepted. Even if a CBA were in place, relief could only set aside that agreement and restore the union's proper negotiating position—it could not impose a permanent new CBA term. *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 107-09 (1970) (forbidding NLRB from prescribing terms of CBA); *Hyatt Mgmt. Corp. of N.Y. v. NLRB*, 817 F.2d 140, 143 (D.C. Cir. 1987) (noting that the rule also applies to the courts); *see also Bernard v. Air Line Pilots Ass'n, Int'l*, 873 F.2d 213, 215, 217-18 (9th Cir. 1989) (affirming injunction that set aside "tainted" agreement, established a temporary seniority system, and required union adherence to ALPA merger policy as a new seniority bargaining position). To

withhold relief until the conclusion of corrupted negotiations would accomplish nothing but delay—a hardship to all parties.

3. Limitations Cases

Cases from the limitations context confirm that the claim is ripe. Claims are ripe, at the latest, when the statute of limitations begins to run. *See, e.g.*, *Norco Const., Inc. v. King County*, 801 F.2d 1143, 1146 (9th Cir. 1986); *Hensley v. City of Columbus*, 557 F.3d 693, 696 (6th Cir. 2009). The statute of limitations runs on fair representation claims from the time that the asserted injury becomes "fixed and reasonably certain." *Archer v. Airline Pilots Ass'n Int'l*, 609 F.2d 934, 937 (9th Cir. 1979). The West Pilots' asserted injury was "fixed and reasonably certain" as of the time that USAPA presented its seniority proposal to the Airline for improper purposes, abdicating its responsibility to negotiate on behalf of both groups impartially and in good faith.

Ramey undergirds this conclusion. *Ramey* held that a union's unequivocal announcement of an intent to breach its duty would only give rise to a ripe claim in limited circumstances. 378 F.3d 269, 278-79 & n.4 (2d Cir. 2004). However, a claim does accrue when the union acts on that intention by presenting its seniority proposal to the company, before the conclusion of a CBA. *Id.* at 279-80. Though the facts of *Ramey* and this case are not identical, the analytical framework is apt.

> The duty of fair representation owed by a union to its members is similar to a contractual duty, and the union's announcement of its intent to advocate against its members' interests may be compared to a party's anticipatory repudiation of a contractual duty. In some anticipatory repudiation cases the aggrieved party may sue immediately after the repudiation is announced. However, the statute of limitations ordinarily does not begin to run, and the cause of action does not accrue, until the date of the actual breach; that is, until the date on which performance is due. . . . Applying this principle to the case at bar, the cause of action accrued on the date on which performance was due, namely the date on which [the union] advocated a position on the seniority issue to USAir.

Id. USAPA points out that at the time that the *Ramey* plaintiffs happened to sue, the union had already reached agreement with the airline on seniority integration. This

contention misses the point. The above language makes clear that the *Ramey* plaintiffs' claim accrued prior to the execution of the agreement. The same circumstances are present here. USAPA has made plain its intent never to bargain for the Nicolau Award, and it has advocated its date-of-hire seniority proposal to the company.

4. Other Authority

USAPA has cited no precedential authority for dismissing a fair representation claim on ripeness grounds. Indeed, USAPA has cited no federal appellate authority discussing ripeness in the labor context. Perhaps such cases are scarce because the typical inquiry in a fair representation suit is whether a union's past action violated its duty of fair representation—a question ripe by definition. Such was the inquiry in this case, and so it does not raise paradigmatic ripeness concerns of record development or temporal standing. Plaintiffs sought and obtained an adjudication of past and present union action.

USAPA has repeatedly suggested that only the "final product of the bargaining process" is subject to fair representation claims, citing *Air Line Pilots Association v. O'Neill*, 499 U.S. 65, 78 (1991). [*E.g.*, doc. # 36 at 13.] This phrase, carefully plucked from its context, is too slender a reed to support such an elephantine proposition. *O'Neill*'s statement that "the final product of the bargaining process may constitute evidence of a breach of duty" was not directed at ripeness, but rather at the "arbitrariness" standard of reviewing union actions. Reuniting the phrase with the rest of the quoted sentence makes its meaning clear: "[T]he final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a 'wide range of reasonableness,' that it is wholly 'irrational' or 'arbitrary.'" *Id.* (citation omitted).

O'Neill did not concern the accrual of fair representation claims. It simply held that the union's duty of fair representation, including the arbitrary–discriminatory–bad faith framework, "applies to all union activity, including contract negotiation." *Id.* at 67; *see also Glover v. St. Louis-S.F. Ry. Co.*, 393 U.S. 324, 329 (1969). Nothing in *O'Neill*

prevents the imposition of liability for negotiating activities prior to the conclusion of a CBA. Rather, the case suggests that the liability may arise sooner because the agreement is only considered as "evidence" of a breach rather than the breach itself. *O'Neill*'s application of the duty of fair representation to "contract negotiation" underscores this conclusion. 499 U.S. at 67.

It may be the rare case where a redressable fair representation claim accrues in the midst of labor negotiations, which are usually dynamic and uncertain, but it happened here. In USAPA's hands, the Nicolau Award's time of death has passed; only the time of the funeral is uncertain. The Transition Agreement resolved the union's internal seniority conflict by way of the Nicolau Award, which USAPA wholly abandons solely to benefit one group of pilots over another. Indeed, this particular breach of the duty implicates both negotiation and administration of collective bargaining agreements. *See id.* at 77 (doubting that "that a bright line could be drawn between contract administration and contract negotiation" in every case).

Another district court, considering a suit by a different set of pilots against USAPA, has accepted USAPA's ripeness argument. *See Breeger v. USAPA*, No. 08-CV-490, 2009 WL 1328902, 2009 U.S. Dist. LEXIS 40489 (W.D.N.C. May 12, 2009). In *Breeger*, certain East Pilots brought a fair representation suit against USAPA, alleging that USAPA failed to meet a constitutional obligation to reshuffle East Pilot seniority positions established by prior mergers. The district court adopted a Magistrate Judge's Report and Recommendation, dismissing the case in reliance on *O'Neill* as well as a selection of unpublished federal decisions and state cases. The Report states, "The parties have not cited, and the undersigned is unaware of, any published federal authority addressing whether a union's conduct may give rise to a ripe [fair representation] claim prior to the conclusion of negotiations with the employer." It does not address the context of *O'Neill*'s "final product of the bargaining process" language. It makes no mention of *Ramey*, which was not presented to the court in any brief. The holding of *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, cited in the Report, does not

preclude suit before a CBA was in place; that case recognized a fair representation claim arising out of a union's failure to reach agreement with the employer, noting that fair representation suits may challenge both CBAs and "the negotiations leading to them." 756 F.2d 1262, 1273 (7th Cir. 1985). Nor is *Federal Express Corp. v.Air Line Pilots Association* applicable here; that case denied declaratory judgment standing in the midst of labor negotiations because there was no "reasonable apprehension of litigation." 67 F.3d 961, 964 (D.C. Cir. 1995). Although the Report does not specifically discuss hardships or the fitness of the issues for judicial decision, the dismissal for lack of ripeness may have reflected the shapelessness of the plaintiffs' theory. The *Breeger* plaintiffs sued to challenge the union's working date-of-hire seniority proposal under a broadly worded constitutional commitment to date-of-hire-seniority, with little more than conclusory allegations of bad faith and discrimination. *See Air Wisconsin*, 909 F.2d at 215-19 (rejecting a similar challenge on the merits).

Nor does the reasoning of *Brooks v. Air Line Pilots Association, International* compel dismissal. __ F. Supp. 2d __, 2009 WL 1883108, 2009 U.S. Dist. LEXIS 55210 (D.D.C. June 30, 2009). In that case, a fair representation claim was dismissed on ripeness grounds because it challenged the position a union took in an administrative grievance proceeding. The outcome of the grievance proceeding, and therefore the harm to the pilots, was entirely contingent and discrete. Conversely, the West Pilots' harm here is not "fear that [USAPA] may succeed with its advocacy," *Brooks*, 2009 WL 1883108, at *3, 2009 U.S. Dist. LEXIS 55210, at *9. It is the present, concrete loss of fair representation, a loss that is certain to continue, which will invalidate or preclude any single collective bargaining agreement with the Airline.

Like *Breeger*, *Brooks* does not address *Ramey*. This Court need not say whether, under the foregoing analysis, factual distinctions would require a different result in *Breeger* or *Brooks*. To the extent any general statements in those cases conflict with the

above reasoning, the Court respectfully departs from their analysis in the specific circumstances of this case.[15]

C. Declaratory and Injunctive Relief

Plaintiffs seek three forms of relief at this stage: (1) A declaration that the Airline and its pilots, as represented by USAPA, are contractually bound to incorporate the Nicolau Award; (2) an order directing USAPA "with equal West Pilot representation" to negotiate a complete single CBA that incorporates the Nicolau Award, and then to present that CBA for a single ratification vote by all USAPA members; (3) an order enjoining USAPA and East Pilots, until the single CBA is in effect, from filing grievances that would impair the company from implementing the Nicolau Award.[16] At this stage, only the second request, in modified form, will be granted.

1. Declaratory Relief

No declaratory relief will be granted. The First Amended Complaint contains no specific prayer for declaratory relief, only a general request for "other relief that the Court deems necessary and proper." [Doc. # 86.] *See Kam-Ko Bio-Pharm Trading Co. Ltd-Australasia v. Mayne Pharma (USA) Inc.*, 560 F.3d 935, 943 (9th Cir. 2009) (stating that declaratory relief must be pled like any other form of relief). Moreover, because a permanent injunction will issue, it is unclear what additional effect a declaration would

[15] Other limitations cases USAPA cites offer little guidance because they concern grievance proceedings, *Barlow v. Am. Nat'l Can Co.*, 173 F.3d 640, 643-45 (8th Cir. 1999), the adequacy of pension plan change notices, *Mitchota v. Anheuser-Busch, Inc.*, 755 F.2d 330 (3d Cir. 1985), or other claims founded on the execution of a collective bargaining agreement or subsequent events, without discussion of prior culpable acts. *Bensel v. Allied Pilots Ass'n*, 387 F.3d 298 (3d Cir. 2004); *Hagerman v. United Transp. Union*, 281 F.3d 1189, 1197-98 (10th Cir. 2002); *Ratkosky v. United Transp. Union*, 843 F.2d 869, 873 (6th Cir. 1988); *United Indep. Flight Officers*, 756 F.2d at 1273.

[16] Plaintiffs originally sought relief directing the Airline to begin using the Nicolau Award for promotions and furloughs by a date certain, even if a new CBA has not been finalized. Plaintiffs withdrew this request during bench trial proceedings. [Doc. # 485, at 58.] For this reason, the bench trial testimony of Plaintiffs' witness Brian Stockdell regarding Airline logistics is not considered and does not affect the analysis. *See supra* n. 3.

have respecting the union's breach of its duty. "Where more effective relief can be obtained by other proceedings, and consequently a declaratory judgment would not serve a useful purpose, the courts are justified in refusing a declaration." *Allis-Chalmers Corp. v. Arnold*, 619 F.2d 44, 46 (9th Cir. 1980) (quoting *Zenie Bros. v. Miskend*, 10 F. Supp. 779, 782 (S.D.N.Y. 1937) and citing Borchard, *Declaratory Judgments* 302, 303 (2d ed. 1941)); 6A *Moore's Federal Practice* ¶ 57.08(3) (2d ed. 1979)). Plaintiffs' first requested form of relief will not be granted.

2. Availability and Propriety of Injunctive Relief

The Supreme Court has expressly allowed injunctive relief in fair representation suits. *Vaca*, 386 U.S. at 195. The appropriateness of such relief varies with the facts of each case, but the Court possesses the power to enjoin the union. *Id.*

USAPA objects that an order directing the union to negotiate for the implementation of the Nicolau Award would violate an age-old rule against the governmental imposition of collective bargaining results, chiefly citing *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 108-09 (1970), and *O'Neill*, 499 U.S. at 74. This rule is inapplicable. The remedy in question will do no such thing. In fact, USAPA relies upon doctrine that undermines its own position. *O'Neill* holds that despite *H. K. Porter Co.* and related authority, courts may review substantive contract terms in fair representation suits. 499 U.S. at 75-77. *Hyatt Management* holds that although the NLRB cannot compel acceptance of new bargaining terms, it is nonetheless "authorized to order the offending party to execute and honor" an existing agreement that it had repudiated. 817 F.2d at 142; *accord Fisk Univ.*, 237 NLRB 1164, 1171-72 (1978); *Raven Indus., Inc.*, 209 NLRB 335, 335, 337-38 (1974); *cf. also Amalgamated Clothing & Textile Workers Union*, 246 NLRB 747, 748 n.4 (1979) (NLRB will not compel union to sign company settlement proposal where union had not agreed to that proposal because doing so would

1 potentially "forc[e] the parties to rewrite the contract in contravention of" *H. K. Porter*).[17]

2 Like the NLRB, a court can compel a union to follow self-imposed,
3 nondiscriminatory rules where a failure to do so breaches the duty of fair representation.
4 In *Bernard*, the Ninth Circuit endorsed a preliminary injunction akin to the permanent
5 injunction sought here. 873 F.2d at 217. Invalidating an agreement that contained
6 discriminatory seniority provisions, the district court found that "a new agreement would
7 have to be executed." *Id.* The injunction required ALPA to follow its own negotiation,
8 mediation, and arbitration process in adopting a bargaining position on seniority rights.
9 *Id.* at 215, 217; *see also Beardsly v. Chicago & N. W. Transp. Co.*, 850 F.2d 1255, 1271
10 (8th Cir. 1988) (cited by USAPA) (remanding with instructions to vacate an unlawful
11 agreement and order the union to negotiate "in line with the [procedural] requirements set
12 forth" in a previous agreement). In *Bernard*, as here, an injunction enforces the duty of
13 fair representation by negating an improper bargaining position. A future arbitration was
14 mandated in *Bernard*; here, the arbitration already took place, and the Airline accepted
15 the result. This difference in timing does not affect the Court's ability to enforce the
16 union's duty.

17 This remedial authority gives due regard for freedom of contract. The requested
18 relief does not purport to thrust on the union new or previously unagreed-upon terms. It
19 merely restores the union to the fulfillment of its duty. *O'Neill*, 499 U.S. at 74. *Bernard*
20 did not examine the source of the district court's authority to order such relief, but

21 ---

22 [17] USAPA quotes *Hyatt Management*'s additional statement that "neither the courts nor the Board can change or nullify substantive contractual provisions." 817 F.2d at 143.
23 *Hyatt Management* relies in turn upon *Pacemaker Yacht Co. v. NLRB*, which contains a more
24 complete and persuasive statement of the rule: "Absent a contractual provision in irreconcilable conflict with federal labor policy, neither courts nor the Board may modify or
25 nullify substantive contractual provisions." 663 F.2d 455, 460 (3d Cir. 1981). Though the
26 Court is not asked to invalidate any contractual provision at this time, a provision that discriminates in violation of the duty of fair representation may be "in irreconcilable conflict
27 with federal labor policy" and therefore subject to judicial invalidation. *See Bernard*, 873 F.2d at 217 (affirming injunction that "set aside" an agreement "tainted" by a breach of the
28 duty of fair representation).

Vaca leaves that authority subject to circumstances. No lesser remedy would be adequate. The complex intangibles of seniority rights, which affect a wide array of working conditions, defy expression in purely monetary terms. To the extent that the duty of fair representation limits union action, enforcement must follow.

USAPA correctly asserts that the Court is generally without power to enjoin individuals who are not parties to the litigation. Fed. R. Civ. P. 65(d) (providing for injunctive powers against parties and their "officers, agents, servants, employees, and attorneys, and . . . other persons who are in active concert or participation with [them]"); *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1287 (9th Cir. 2009). The East Pilots as a class and the Airline are not agents of the union. No injunction or declaration will issue that is directly enforceable against all East Pilots or the Airline without affording them a full and fair opportunity to be heard. To the extent Plaintiffs seek such relief, their third request is rejected on this basis. However, this rule would not necessarily apply to an injunction against the union that affects employee rights. *See Butler v. Local Union 823, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 514 F.2d 442, 455 (1975) (holding that such an injunction, in appropriate circumstances, does not require joinder of individual employees because it merely enforces an existing legal restraint on the union), *overruled on other grounds by Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 45 n.6 (1979) (punitive damages)*, and United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981) (statute of limitations).

3. Scope & Nature of Injunctive Relief

USAPA will be ordered to negotiate in good faith for the implementation of the Nicolau Award, defending that award in negotiations and presenting it with the single new CBA to the pilots for ratification vote. This remedy was requested by Plaintiffs and pled in the First Amended Complaint. It promises to address the problem at hand without limiting the negotiation of independent employment terms. Implicitly, it also precludes the union from acting to undermine the Nicolau Award through collateral provisions in

1 the agreement, and from failing to negotiate toward a single CBA that includes the
2 Nicolau Award.
3 This injunction and order also illuminates USAPA's untoward objectives,
4 informing the Airline and union members what the union is not permitted to do. To date,
5 the Airline has accepted the Nicolau Award and taken no bargaining position against it.
6 The injunction to follow protects the Airline in that course. The West Pilots' original
7 claims against the Airline for breaching the Transition Agreement were dismissed for lack
8 of subject matter jurisdiction for failing to state any facts that suggested the Airline was
9 acting in concert with USAPA toward improper seniority objectives. The Airline's
10 incentive to avoid needless liability places another healthy constraint on USAPA's
11 bargaining.
12 USAPA will also be required to negotiate for the implementation of the Nicolau
13 Award as part of any single CBA, unmodified by additional conditions and restrictions
14 USAPA would place upon it. USAPA claims that it has the right to impose new
15 conditions and restrictions, invoking the historical fact that ALPA exerted pressure on the
16 West MEC to accept some form of "mitigation" of the Nicolau List. This very fact
17 undercuts USAPA's request. ALPA exerted pressure because it did not hold unilateral
18 power to deprive the West MEC and the West Pilots of the arbitrated outcome. The West
19 Pilots remain entitled to a union that will not abrogate the Nicolau Award without a
20 legitimate purpose. Any waiver of that right must be "consensual." [Ex. ## 1034 at 1;
21 1092; 1094.] A jury and this Court have found the union to be motivated by wrongful
22 objectives, and abundant evidence supports that finding. It would indulge those
23 objectives to allow USAPA to alter the Nicolau Award, and it would bestow upon
24 USAPA an unlawful power that ALPA neither possessed nor asserted.[18]
25

26 [18] USAPA also argues that the First Amended Complaint sought implementation of
27 the "Nicolau List" rather than the "Nicolau Award," and so it left open the union's power to change the Nicolau Award's conditions and restrictions. The Court does not comb the First
28 Amended Complaint so finely, nor does the prayer for relief so tightly restrict the powers of

Similarly, USAPA will be forbidden from negotiating separate CBAs for the two pilot groups, as it argues the Transition Agreement and the Railway Labor Act would have permitted it to do.[19] Separate negotiations would invite highly probable wrongdoing, which would evade effective judicial remedy and burden the Plaintiffs with more ruinous litigation expense. The evidence shows not only USAPA's wrongful motives but also willingness to conceal those motives and to bring about its seniority objectives by subterfuge. Prior to trial, USAPA negotiated only toward a single CBA for both pilot groups. It was only when the verdict was returned that USAPA announced to the Court its intent to seek separate agreements. [Doc. # 485, at 58, 78-81.] When asked at oral argument several weeks later who held the right to ratify any separate CBA, USAPA could provide no answer. USAPA should not have the opportunity to strike disparate contract terms for the two pilot groups, making up by indirection for the failure to meet East Pilot seniority ambitions.

USAPA could state no legitimate union reason for pursuing separate agreements. It asserted only that the Court's order would deprive the union of self-help remedies associated exclusively with those agreements. This is not so. The National Mediation Board certified both pilot groups as a single craft, that is, a single bargaining unit, in January 2008. *US Airline Pilots Association*, 35 N.M.B. 65, 78 (2008). The parties do not dispute that the West Pilots' CBA is currently amendable, and the East CBA becomes so very soon. At that point, USAPA would be free to invoke Section 6 procedures for

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equity. ALPA Merger Policy provides that the union shall defend the "opinion and award." [MP pt. 1.H.5.b.]

[19] Cases cited by USAPA merely hold that it is generally not forbidden to negotiate separate agreements for different groups in a bargaining unit; they do not address the remedial concerns of this case. *See Ass'n of Flight Attendants v. United Airlines*, 71 F.3d 915, 919 (D.C. Cir. 1995) (noting that the National Mediation Board discourages separate bargaining agreements for different groups of employees within the same bargaining unit); *Ass'n of Flight Attendants v. USAir, Inc.*, 24 F.3d 1432, 1437 (D.C. Cir. 1994); *Bishop v. Air Line Pilots Ass'n, Int'l*, No. 98-359, 1998 WL 474076, at *9, 1998 U.S. Dist. LEXIS 11948, at *27 (N.D. Cal. 2005); *Grand Trunk W. R.R.*, 19 N.M.B. 226, 232 n.1 (1992).

1 both CBAs, including the National Mediation Board's mediation/arbitration process and
2 possible self-help, in order to negotiate a single CBA that would alter wages and working
3 conditions for the entire bargaining unit. Nothing in the Transition Agreement or the
4 Railway Labor Act provides otherwise. Section V of the Transition Agreement specifies
5 that no rights under the Railway Labor Act are waived, and it provides for additional
6 private mediation regardless of what contracts are amendable. The injunctive remedy
7 poses no harm to the Airline, which has at all times sought the operational integration that
8 a single CBA would bring. If these conditions were to change, either party could seek
9 focused relief from the permanent injunction.

10 The public interest favors this remedy as well. Separate labor agreements would
11 materially deprive US Airways of the business benefits, now four years delayed, of a
12 merger and combined operations, for no apparent reason but to enable continued unlawful
13 discrimination within the union. To shut this door is part of the minimum necessary to
14 end the game. The pilots must choose between the status quo and a single new CBA that
15 incorporates the Nicolau Award with whatever improvements in wages and working
16 conditions USAPA can negotiate for the East Pilots and the West Pilots alike.

17 The injunction will not address speculative examples of malfeasance. It will not
18 restrain USAPA's grievance machinery in order to thwart a hypothetical East Pilot plot to
19 obstruct negotiations by filing seniority grievances. There is no evidence of any threat of
20 a bad-faith grievance campaign. If it happens in the future, it may be the proper subject
21 of enforcement or modification of the permanent injunction. The Court will expressly
22 retain jurisdiction to modify, extend, or vacate relief, which should be adequate to meet
23 any unforeseen events.

24 The injunction will not subject any new CBA to a majority vote of the West Pilots
25 (as Plaintiffs pled) or to a majority vote of each separate pilot group (as USAPA requests
26 as a fall-back). Both requests lack legal grounding. The USAPA constitution requires
27 ratification of any new CBA by a majority vote of the entire membership. The allegations
28 and proof contain nothing to suggest that USAPA's representational structure amounts to

1 a breach of its duty; USAPA indicates that the West Pilots have been and always will be
2 free to join the union. To grant either of the suggested remedies would, without
3 justification, countermand the election and certification of USAPA as collective
4 bargaining representative. Plaintiffs' proposal goes even farther because it would grant
5 one group of pilots (the West Pilots) a unique power to veto a new proposed CBA for any
6 reason, not just a cure for the violation of a legal right. Plaintiffs' request that USAPA be
7 enjoined to negotiate "with equal West Pilot representation" is too vague to be understood
8 and will not form part of relief.

9 The Court also rejects USAPA's bold request that the injunction dissolve upon a
10 failed vote to ratify a new CBA containing the Nicolau Award. The duty of fair
11 representation requires USAPA and any successor union to bargain for the
12 implementation of the Nicolau Award. To limit relief as requested would enable the
13 easiest of evasions of this duty. As already explained, the abusive wishes of the majority
14 do not become legitimate simply because they are asserted in a ratification vote. A failed
15 ratification vote gives the union no new power to accommodate a discriminatory majority.

16 **IV. ORDER**

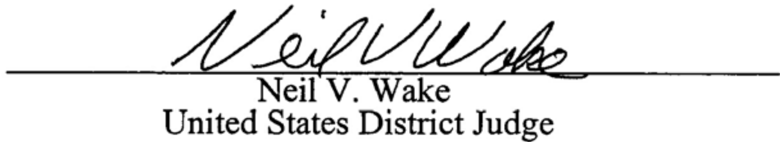
17 The jury has found USAPA liable to Plaintiffs and the represented class. Damage
18 proceedings remain for the six named Plaintiffs, except for the claims for general refund
19 of union dues and fees, which have been denied as a matter of law. All claims in No. CV
20 08-1728 PHX-NVW have been adjudicated in favor of the Defendants. It is appropriate
21 now to enter a permanent injunction and a final and enforceable judgment on all claims
22 except Plaintiffs' unadjudicated individual damage claims. The Court does so by a
23 separate Partial Judgment and Permanent Injunction filed herewith. The Court expressly
24 finds no just reason for delay in entry of that judgment and expressly directs that it be
25 entered immediately.

26 IT IS THEREFORE ORDERED that Plaintiffs' Motion for Directed Verdict [doc.
27 # 446] is denied as moot.
28

IT IS FURTHER ORDERED that Defendant USAPA's Renewed Motion for Judgment as a Matter of Law [doc. # 567] and Motion for a New Trial [doc. # 590] are denied.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Supplement the Record [doc. ## 580, 582] is denied for the reasons stated in open court on the record.

DATED this 17th day of July 2009.



Neil V. Wake
United States District Judge