CHRISTOPHER W. KATZENBACH
(SBN 108006)
Email: ckatzenbach@kkcounsel.com
KATZENBACH LAW OFFICES
912 Lootens Place, 2nd Floor
San Rafael, CA 94901
Telephone: (415) 834-1778
Fax: (415) 834-1842

Attorneys for Plaintiffs AMERICAN AIRLINES FLOW-THRU PILOTS COALITION, GREGORY R. CORDES, DRU MARQUARDT, DOUG POULTON, STEPHAN ROBSON, and PHILIP VALENTE III on behalf of themselves and all others similarly situated

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

AMERICAN AIRLINES FLOW-THRU PILOTS COALITION, GREGORY R. CORDES, DRU MARQUARDT, DOUG POULTON, STEPHAN ROBSON , and PHILIP VALENTE III, on behalf of themselves and all others similarly situated, Plaintiffs, vs. ALLIED PILOTS ASSOCIATION and AMERICAN AIRLINES, INC., Defendants.	Case No.: 3:15-cv-03125 RS **MEMORANDUM IN OPPOSITION TO MOTION OF ALLIED PILOTS ASSOCIATION FOR RECONSIDERATION OF DENIAL OF SUMMARY JUDGMENT** Courtroom 3, 17th Floor Judge Richard Seeborg

TABLE OF CONTENTS

INTRODUCTION 1
ARGUMENT 1
I. APA'S NEGOTIATION OF A DISCRIMINATORY AGREEMENT HARMING THE FTPs SATISFIES NORMAL RULES OF CAUSATION. 1
A. APA's Breach Of Duty In Negotiating Letter G Resulted In Excluding FTPs From "Make-Up" LOS Credits Other Pilots Received For The Time Jobs At American Were Unavailable Because of 9/11. 1
B. *Ackly* and *Acri* Do Not Involve Breach Of Duty In Negotiating Discriminatory Contract Terms. 4
II. EVEN IF THE CAUSATION RULE OF *ACRI*/*ACKLEY* APPLIED, THERE ARE TRIABLE FACTUAL ISSUES WHETHER AMERICAN WOULD HAVE AGREED TO GIVE LOS CREDITS TO FTPs 7
A. American Has Previously Agreed To "Make-Up" LOS Credits For Lost Work Because Of 9/11. 7
B. When APA Has Advocated To Expand Benefits For Other Pilot Groups, American Has Agreed To Do So. 10
C. APA's Evidence Does Not Support Its Contention That American Would Not Have Agreed To Give LOS Credits To FTPs. 11
III. APA IS WRONG IN CONTENDING THAT THE COURT MISAPPLIED THE LAW IN *ACRI/ACKLEY* 13
CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Ackley v. Western Conf. of Teamsters, 958 F.2d 1463 (9th Cir. 1992) ..... passim
Addington v. US Airline Pilots Association, 791 F.3d 967 (9th Cir. 2015) 10
Ass'n of Flight Attendants v. Horizon Air Indus., 976 F.2d 541 (9th Cir. 1992) 13
Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 265-266 (1946) 4, 14
Bishop v. Air Line Pilots Ass'n, Int'l, 159 L.R.R.M. 2005, 1998 WL 474076 (N.D. Cal. Aug. 4, 1998), *aff'd mem.*, 211 F.3d. 1272 (9th Cir. 2000) 5
Brotherhood of Locomotive Firemen and Enginemen v. Mitchell, 190 F.2d 308 (5th Cir. 1951) ... 3
CSX Transp., Inc. v. Marqua., 980 F.2d 359, 364-365 (6th Cir. 1992). 13
Goclowski v. Penn Cent. Transp. Co., 571 F.2d 747 (3rd Cir. 1977) 6
Int'l Bhd. of Elec. Workers v. Foust, 442 U.S. 42 (1979) 3, 14
Marlin-Rockwell Corp. v. NLRB, 116 F.2d 586 (2d Cir. 1941) 9

Merk v. Jewel Food Div. of Jewel Cos., 945 F.2d 889 (7th Cir. 1991) 6
Mt. Healthy City Sch. Dist. Bd. of Edu. v. Doyle, 429 U.S. 274 (1977). 3
Nashville C. St. L. R. v. Railway Employees Dept. A.F.L., 93 F.2d 340 (6th Cir. 1937) cert. denied 303 U.S. 649 9
Peters v. Burlington Northern R. Co., 931 F.2d 534 (9th Cir. 1990) 13
Ramey v. Dist. 141 Int'l Ass'n of Machinests & Aerospace Workers, 378 F.3d. 269 (2nd Cir. 2004). 14
Richardson v. Texas & N.O. R. Co., 242 F.2d 230 (5th Cir. 1957) 2
Staub v. Protor Hosp., 562 U.S. 411, 131 S.Ct. 1186 (2011) 2
Steele v. Louisville & N. R. Co., 323 U.S. 192 (1944) 3, 14
U.S. v. 194 Quaker Farms Rd., 85 F.3d 985 (2nd Cir. 1996) 15
U.S. v. Continental Ins. Co., 776 F.2d 962 (11th Cir. 1985) 15
Willaim Dal Porto & Sons, Inc. v. Agricultural Labor Relations Bd., 191 Cal.App.3d 1195 (1987). 4

Rules

Local Rule 7-9(c) 1

Treatises

Restatement (Second) of Torts § 431 (1965) 2, 14

INTRODUCTION

The Allied Pilots Association (APA) attempted a preemptive strike by moving for summary judgment early in this case. APA made its arguments, including all the arguments it makes in its motion for reconsideration regarding causation. See APA Mem. In Support at pp. 13-16, 17; APA Reply Mem. pp. 13-14. The parties devoted almost an hour to oral argument discussing the issues, including causation. The Court explicitly addressed the issue of causation in its decision. Order, p. 7:7-10.

It is therefore unbelievable for APA to assert that the Court's decision "constitutes a 'manifest failure by the Court *to consider* material facts or dispositive legal arguments which were presented to the Court' before the Order issued, as required for reconsideration under Civil Local Rule 7-9(b)(3)." APA Motion For Leave To File Motion For Partial Reconsideration, Etc. ("APA MFR"), p. 1:23-25 (emphasis added). The Court repeatedly and explicitly considered the causation issue. APA's motion plainly violates Local Rule 7-9(c):

> No motion for leave to file a motion for reconsideration may repeat any oral or written argument made by the applying party in support of or in opposition to the interlocutory order which the party now seeks to have reconsidered. Any party who violates this restriction shall be subject to appropriate sanctions.

APA's motion does not even acknowledge that Local Rule 7-9(c) exists. APA's motion should be sanctioned as an abuse on the Court and on Plaintiffs.

ARGUMENT

I. APA'S NEGOTIATION OF A DISCRIMINATORY AGREEMENT HARMING THE FTPs SATISFIES NORMAL RULES OF CAUSATION.

A. APA's Breach Of Duty In Negotiating Letter G Resulted In Excluding FTPs From "Make-Up" LOS Credits Other Pilots Received For The Time Jobs At American Were Unavailable Because of 9/11.

This case involves discrimination by APA in negotiating LOS credits for all other pilot groups and excluding FTPs from that benefit. The causal connection in discrimination cases is a straightforward question of proximate cause that is shown by the fact of the discriminatory

agreement itself. APA negotiated and interpreted Letter G in a way that excluded FTPs from the two years of extra LOS credits that made up for time pilots could not work at American because of the aftermath of 9/11. As a result FTPs did not get the Letter G credits. This is a straightforward causal connection between APA's actions (excluding FTPs from Letter G)[1] and damages (FTPs did not get the LOS credits). That satisfies all normal rules of causation.

In *Staub v. Protor Hosp.*, 562 U.S. 411, 131 S.Ct. 1186, 1192 (2011), the Court explained this long-standing rule of causation as requiring only "some direct relation" between the conduct and the resulting injury:

> Proximate cause requires only "some direct relation between the injury asserted and the injurious conduct alleged," and excludes only those "link[s] that [are] too remote, purely contingent, or indirect." [Citation and footnote omitted.]

In more commonly used terms, APA's conduct is causally related if it is a "substantial factor in bringing about the harm". *Restatement (Second) of Torts* § 431 (1965).

Where discrimination is effected through an employer-union agreement like Letter G, causation is clear. The contract is the cause of the discrimination. *Richardson v. Texas & N.O. R. Co.*, 242 F.2d 230, 235-236 (5th Cir. 1957). In *Richardson* the railroad and the union had entered into agreements, in violation of the union's duty of fair representation, that discriminated against African-American employees "to the prejudice of their seniority rights" and "with consequent loss . . . of income and retirement benefits." *Id.* at 231. In imposing liability on both the union and the employer, the Fifth Circuit reasoned: "It takes two parties to reach an agreement, and both have a legal obligation to not make or enforce an agreement or discriminatory employment practice which they either know, or should know, is unlawful." *Id.* at 236. Because the discriminatory contract results in the discrimination, unions are liable for damages for negotiating discriminatory contracts in breach of their duty of fair representation

[1] Because APA failed to respond to any of the FTPs letters on LOS credits, or explain any problems with negotiating LOS for the FTPs, a jury would be entitled to conclude that APA's actions were deliberate and intended to ensure that FTPs did not get LOS credits.

even if the employer is not. *Brotherhood of Locomotive Firemen and Enginemen v. Mitchell*, 190 F.2d 308, 311, 313 (5th Cir. 1951).

In *Steele v. Louisville & N. R. Co.*, 323 U.S. 192 (1944), the Supreme Court likewise focused on the illegality of the contract that resulted from the union's breach of duty: "No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making. … It is the federal statute which condemns as unlawful the Brotherhood's conduct. 'The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted.' [Citations omitted.]" *Id.* at 203-204. The Supreme Court concluded: "the duty which the statute imposes on a union representative of a craft to represent the interests of all its members stands on no different footing and that the statute contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty." *Id.* at 207. In *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42 (1979), the Supreme Court restated the rule of *Steele* that that "the relief in each case should be fashioned to make the injured employee whole." *Id.* 442 U.S. at 49

In short, where the harm results from a contract negotiated in violation of the duty of fair representation, causation is governed by the normal rules of causation. The normal rules impose liability and damages if APA's breach of its duty of fair representation was a "substantial factor" in the negotiation of the discriminatory contract that brought about the harm to the FTPs.

Applying normal causation rules does not preclude APA from showing that American would not have agreed to give LOS credits to FTPs. APA can show that, notwithstanding its breach of duty, American would not have given the Letter G LOS credits to FTPs. See *Mt. Healthy City Sch. Dist. Bd. of Edu. v. Doyle*, 429 U.S. 274, 286-289 (1977). However, the risk of uncertainty is on APA, whose breach of duty resulted in FTPs not obtaining the LOS credits

other pilot groups received under Letter G. This is the approach long-approved in federal law. In *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265-266 (1946), the Court explained:[2]

> The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery" for a proven invasion of the plaintiff's rights. [Citation omitted.]

This is the approach California courts have used in failure-to-bargain cases arising under the Agricultural Labor Relations Act. See *Willaim Dal Porto & Sons, Inc. v. Agricultural Labor Relations Bd.*, 191 Cal.App.3d 1195, 1207-1210 (1987).[3]

B. *Ackly* and *Acri* Do Not Involve Breach Of Duty In Negotiating Discriminatory Contract Terms.

Ackley v. Western Conf. of Teamsters, 958 F.2d 1463, 1472 (9th Cir. 1992), *Acri v. Int'l Ass'n of Machinists*, 781 F.2d 1393, 1397 (9th Cir. 1986) and the other cases APA relies upon, do not involve discriminatory contract provisions negotiated by the union in breach of its duty. Neither case involved a breach of duty in negotiating a contract or discriminatory contract terms.

Rather, these cases involved misrepresentations or misconduct in connection with ratification votes. In *Acri*, the question was whether an employer would limit a cap on severance pay in the old contract that limited the severance to the amount in the severance fund. The employer refused to agree to pay more, but the union said it had and the contract was ratified and a strike ended. *Id.* 781 F.2d at 1395. The fair representation case was premised on the union' misrepresentation of the agreement. *Id.* at 1397. When the issue was raised in summary judgment, "plaintiffs' counsel conceded that plaintiffs could not establish that American Can

---

[2] *Acri v. Int'l Ass'n of Machinists*, 781 F.2d 1393 (9th Cir. 1986) noted this rule (*id.* at 1398 fn.2) but rejected it because the court felt that this could not overcome the issue of causation presented in *Acri*. As we discuss below, in *Acri* there was no claim that the contract contained discriminatory terms or had been negotiated in violation of the duty of fair representation.

[3] Judge Reinhardt's concurrence in *Acri v. Int'l Ass'n of Machinists*, 781 F.2d 1393, 1399 (9th Cir. 1986 noted with approval the make-whole remedy for bad-faith bargaining used under the California Agricultural Labor Relations Act. As he noted in his concurrence, bad-faith bargaining is an entirely different situation than speculating what would have happened if a strike had continued.

would have given in to their demand to remove the severance pay limit even if the strike had continued." *Id*. at 1397.

In *Ackley*, the issue was again a misrepresentation—or failure to disclose—in a ratification vote. *Ackley*, supra, 958 F.2d at 1468, 1472. The Court stated that it was applying the *Acri* in the context of a misrepresentation case. *Id.* at 1472. [4] In that context, the Ninth Circuit held that there was "no evidence whatsoever that Matlack would have been disposed to agree to more generous terms had the union rejected the proposed 1988-1991 agreement a third time." *Id.*, 958 F.2d at 1473.[5]

Acri and *Ackley* are easily distinguished on their facts as this case is not a misrepresentation case involving a ratification vote. But the grounds for rejecting the causation rule of *Acri* and *Ackley* in this case goes deeper. *Acri* and *Ackley* did not involve breach of the duty of fair representation in collective bargaining. The contracts in *Acri* and *Ackley* that were ratified did not contained terms that were negotiated in breach of the union's duty. *Acri* and *Ackley* did not involve situations where the employer either participated in the union's breach of duty or was the means through which the union accomplished illegal discrimination. To the contrary, both *Acri* and *Ackley* rested their reasoning on the principle that courts should respect the outcome of good-faith collective bargaining. See *Ackley*, supra, 958 F.2d at 1472-1473; *Acri*, supra, 781 F.2d at 1399-1400 (concurring opinion of Judge Reinhardt).

A rule of causation based on respecting the outcome of good-faith bargaining does not support applying the same causation rule to contracts that are the product of bad-faith bargaining or that result from a union's breach of its duty of fair representation.

---

[4] *Ackley* stated at 1472: "However, to prevail in a misrepresentation case - and thus in a nondisclosure case - plaintiffs must demonstrate 'a causal relationship between the alleged misrepresentations and their injury.' *Id.* [*Acri*, 781 F.2d at1379]. They must show that (1) absent the misrepresentations, the outcome of the ratification vote would have been different; *and* that (2) had it been different, the company would have acceded to the union's demands. *Id*."

[5] *Bishop v. Air Line Pilots Ass'n, Int'l*, 159 L.R.R.M. 2005, 1998 WL 474076 *16 (N.D. Cal. Aug. 4, 1998), *aff'd mem.*, 211 F.3d. 1272 (9th Cir. 2000) also involved a ratification vote.

Confirming this distinction, Judge Reinhardt, in his concurrence in *Arci*, noted that bad-faith bargaining presented an entirely different situation. In that situation, Judge Reinhardt noted that a damage remedy is appropriate. Judge Reinhardt stated (*id.* at 1399):

> Determining what would have happened had a strike continued is far different from determining what would have occurred had a matter been submitted to arbitration, or even what the result of good faith bargaining might have been. * * * A make-whole remedy in a failure-to-bargain case is arrived at by determining what other comparable employers in the area have agreed to do following good-faith bargaining. (*See Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349 [1352-53] (9th Cir. 1986), for description of the specific method used under California Agricultural Labor Relations Act.)

Judge Reinhardt's approval of a make-whole remedy for a failure-to-bargain case supports a make-whole remedy in this case as well, where the negotiation of Letter G's terms was a product of APA's breach of its fair representation duty. To the extent that APA asserts that Letter G makes a bona fide distinction between "furloughed" pilots and FTPs, the Court has already concluded that that is a triable issue of fact and APA does not seek to revisit that issue in its motion. APA MFR p. 3 fn. 1.

Simply put, while a contract term negotiated in violation of a union's breach of duty is unenforceable and illegal, the contracts ratified in *Acri* and *Ackley* were entirely lawful, their terms were completely unaffected by any alleged breach of the union's duty and there was no claim that the employer knew of any violation of the union's duty in connection with the ratification votes. [6] In that context, the *Acri*/*Ackley* causation rule understandably applies because the contract that was negotiated is independent of the union's beach of duty in conduction the ratification vote. However, nothing in *Acri* and *Ackley* supports applying that

[6] A different situation would have been presented had the employer in *Acri* or *Ackley* known of the union's misrepresentations. Compare: *Goclowski v. Penn Cent. Transp. Co.*, 571 F.2d 747, 759-760 (3rd Cir. 1977) (contract would be invalid if employer knew of illegal ratification process); *Merk v. Jewel Food Div. of Jewel Cos.*, 945 F.2d 889, 896 (7th Cir. 1991) ('Failure to ratify under circumstances where an employer is aware both of the ratification requirement and of the failure to comply with it may invalidate an employer's claims under the unratified agreement.").

rule to cases involving discriminatory contract terms negotiated in violation of APA's breach of duty and intended to discriminate against FTPs.

II. EVEN IF THE CAUSATION RULE OF *ACRI/ACKLEY* APPLIED, THERE ARE TRIABLE FACTUAL ISSUES WHETHER AMERICAN WOULD HAVE AGREED TO GIVE LOS CREDITS TO FTPs.

A. American Has Previously Agreed To "Make-Up" LOS Credits For Lost Work Because Of 9/11.

Unlike in *Acri*/*Ackley*, in this case there is no uncertainty as to American's willingness to agree to LOS credits to make up for lost work resulting from 9/11. American agreed to LOS credits in Letter G expressly because of 9/11. American agreed to LOS credits at least twice before (Letter CC and Letter CC(2)). APA Exhs. 45, 46 and Pltf. Exh. 17; Brown Decl. ¶ 18. Likewise, LOS credits are commonly negotiated in the industry. Brown Decl. ¶ 19; see also McDaniels Decl. ¶ 34.

While APA argues that this "make-up" agreement is only for "furloughed" pilots (APA MFR pp. 2-3), this Court has already determined that the purported distinction between furloughed and non-furloughed pilots is a jury issue. APA MOR p. 3 fn. 1. To the extent that that APA is asserting this distinction as a basis to argue American would never have agreed to give LOS credits to FTPs, the issue is still a factual dispute. In its argument, APA still fails to show how a distinction between "furloughed" and "non-furloughed" pilots in Letter G is such a compelling distinction that a jury could not possibly find that the FTPs would not have received the Letter G LOS benefit if APA had fairly represented the FTPs and advocated their interests in getting a "make-up" credit for the time the FTPs had to stay at Eagle because of the reduction in pilot jobs at American from 9/11. Letter G was negotiated as a "make-up" for lost time at American because of 9/11. Brown Decl. ¶ 20. The FTPs loss of years of service was as equally attributable to 9/11 as the loss of service at American that Letter G made up for other pilots.

APA asserts that the LOS credits were to remedy the harm for pilots who had been "forced out of their jobs" (APA MFR p. 3:2-3). This does not meaningfully distinguish FTPs from the other pilots who received LOS benefits. The evidence is that the basic purposes of

Letter G was to make up for the effects of 9/11 in delaying movement to American and the resulting loss of years of service for pay purposes (Brown Decl. ¶ 20), not to compensate for job loss or unemployment. Other facts show that LOS credits are for 9/11 "make-up," not job loss.

1. LOS credits have been given in situations where pilots were not forced out of their jobs. LOS credits, for example, have been given for past service in airlines acquired by American. McDaniels Decl. ¶ 34. APA offers no explanation how such pilots deserve LOS credits under a "forced out of their job" standard.

2. Letter G itself applied to pilots who were *not* forced out of their jobs. Letter G applies to Stand in Stead pilots: "Furlough Stand in Stead pilots shall receive LOS credit for the time spent on furlough prior to their first offer of recall." APA Exh. 2, p. 44 [Letter G, paragraph no. 2]. A "Stand in Stead" pilot is a pilot that *voluntarily* takes the place of a junior pilot who would have been furloughed otherwise. See APA Exh. 2, p. 14, Section 2-6, Paragraph PP. [7] While 9/11 may have triggered job losses that allowed a "Stand in Stead" pilot to voluntarily give up their job, the were not forced out of their jobs and did not have any involuntary loss of work. Giving LOS credits to "Stand in Stead" pilots is explicable only as part of a general "make up" for loss of years of service for pay credit at American because of 9/11..

3. Letter G LOS credits were given to the TWA Staplees who were not "furloughed" pilots in any sense, but simply pilots who had an expectation of a job at American when jobs became available but who—like the FTPs—had those expectations shattered by 9/11.

a. TWA pilots had only the expectation of jobs at American when new jobs became available. That was no different than the FTPs expectation of jobs at American. The TWA pilots were transferred to TWA-LLC "with the intention that they would eventually be transferred to American." Duncan Decl. ¶ 9. Just like the FTPs, after 9/11

[7] A "Stand in Stead" pilots is further defined in Letter TT of the contract, that states: "In recognition that there exists within the AA pilot seniority list some pilots that would preference or proffer the opportunity to move from an active pilot to a furloughed pilot, the Company and the Association agree to establish a Furlough Stand in Stead Provision effective on December 20, 2003." While Letter TT is not part of the excerpts of the contracts that are part of the summary judgment record, Plaintiffs make this foregoing as an offer of proof to rebut APA's contention in its MFR. A copy of Letter TT is attached to the offer of proof.

most of the TWA pilots were unable to transfer and were let go from TWA-LLC before getting a job at American. *Id.* at ¶ 14; McDaniels Decl. ¶¶ 42, 43 ("1243 of [the 1291 TWA pilots] were furloughed while still at TWA LLC"). Many TWA pilots, however, were able to flow-down and work at Eagle during most of their furlough awaiting a call to American (Duncan Decl. ¶¶ 4, 14), just like the FTPs were waiting for American jobs to become available while they flew at Eagle.

b. The TWA Staplees were not "furloughed" pilots. Under the definition of "furlough" in the APA/American contract, any contention that TWA Staplees were "furloughed" at all is inconsistent with the contract language that requires a pilot to be released from active duty flying for American to be within the definition of "furlough." Declaration of Gregory R. Cordes In Opposition to APA Motion for Summary Judgment ("Cordes Decl.") ¶ 42.

c. A "furlough" contemplates a return to work for the *same employer* as a continuation of the existing employment relationship. *Nashville C. St. L. R. v. Railway Employees Dept. A.F.L.*, 93 F.2d 340, 342-343 (6th Cir. 1937) cert. denied 303 U.S. 649. In other words, it is re-employment to the old employment that is critical. *Marlin-Rockwell Corp. v. NLRB*, 116 F.2d 586, 588 (2d Cir. 1941) ("In our opinion the mutual expectation of re-employment justified the Board in treating the employee relationship of the laidoff men as continuing." The TWA Staplees were furloughed from TWA-LLC, not American. Duncan Decl. ¶14; McDaniels Decl. ¶¶ 42, 43. The TWA Staplees had no expectation of re-employment with TWA-LLC when they were "furloughed" from TWA-LLC because their employer—TWA-LLC—no longer existed. They were not going to return to their old employer and resume their former employment relationship; they would be going to a new employer under new employment conditions. Their expectations, like the expectations of the FTPs, were simply to get jobs at American when the jobs became available.

d. Arbitrator LaRocco held that the TWA-LLC Staplees were the equivalent of "new hire" pilots "identical to a large pool of successful applicants (for employment)," not "furloughed" pilots who are returning to their old jobs. Cordes Decl. ¶ 19. Arbitrator LaRocco's decision pre-dated Letter G and was binding on both APA and American.[8] In treating TWA Staplees as "furloughed" pilots, APA (once again) acted contrary to Arbitrator LaRocco's explicit rulings and his arbitration award.

4. The effect of a furlough on LOS is that a pilot at American suffers an income set-back for periods when they cannot work at American because they will not accrue years of service for pay purposes when they were not working at American. McDaniels Decl. ¶¶ 11, 12, 13; Brown Decl. ¶ 17. Letter G was intended to restore some of that loss because of the effects of 9/11 on jobs at American. Brown Dec. ¶¶ 20, 21. As to this loss, both the FTPs and the TWA Staplees were similarly situated. They both lost expected jobs at American because of 9/11. If it made sense to give Letter G credits to the TWA Staplees, it would have made equal sense to give these credits to FTPs to make up for lost years and lost service credits they also expected to earn but for 9/11.

B. When APA Has Advocated To Expand Benefits For Other Pilot Groups, American Has Agreed To Do So.

If APA had supported Letter G credits for the FTPs, there is a reasonable basis to believe they would have received the LOS credits. The FTPs raised this issue multiple times with APA prior to the negotiations with American to demonstrate how LOS credits applied to their situation. Plaintiffs Exhibits 11, 12, 13, 14. APA did not respond to these letters to assert that the FTPs' reasoning or the positions they were asserting were unjustified or unreasonable. APA never asserted that American would not agree to give LOS credit to FTPs even if APA argued for it.

[8] As the Ninth Circuit held in *Addington v. US Airline Pilots Association*, 791 F.3d 967, 989-990 (9th Cir. 2015), a union's efforts "to free [one employee group] from the consequences of the arbitration to which they were bound" was "blatantly discriminatory" and "outside the 'wide range of reasonableness'" afforded unions.

The evidence shows that APA's support for a benefit is a powerful factor in obtaining American's agreement to provide it. For example:

(a) APA's support for LOS credits for pilots coming to American from merger with other airlines apparently resulted in these pilots obtaining this benefit. McDaniels Decl. ¶ 34.

(b) APA's support for giving Letter G credits to TWA Staplees and "Stand in Stead" pilots resulted in these pilots getting the LOS credits.

(c) APA's support resulted in expanding flow-down under the Flow-Through Agreement to include the TWA Staplees, even though American had initially excluded from flow-down (APA Exh. 10 (LaRocca Arbitration award on merits in FLO-0903) at pp. 9-10, 16-17).

(d) APA successfully got American to give the TWA Staplees preference in hiring—even after Arbitrator LaRocco's decision in 2007 finding that they were not entitled to preference ahead of the FTPs and even though that would predictably result in financial liability to American for breach of the Agreement.

(e) APA successfully induced American and other parties to create a fake arbitration award to conceal a settlement that benefitted the TWA Staplees by increasing their ability to move to American ahead of the FTPs. See Declaration of Gavin Mackenzie In Opposition to APA Motion for Summary Judgment ("Mackenzie Decl.") Decl. ¶¶ 17-19, 21-22.

The situation with the Mid-Atlantic Airways (MDA) pilots does not show otherwise. See APA MOR pp. 5-6. As we discuss in the next section, this is a *post hoc* justification that does not show what would have happened when Letter G was negotiated.

C. APA's Evidence Does Not Support Its Contention That American Would Not Have Agreed To Give LOS Credits To FTPs.

APA's arguments do not show that the Court erred in its conclusion that the question of whether APA would have agreed to LOS credits for the FTPs is a factual dispute for a jury.

1. The exclusion of Eagle service from length of service for pay in the Flow-Through Agreement (APA MFR p. 4) was negotiated in 1997, before 9/11 happened. APA and American also agreed in their collective bargaining agreement to exclude all furlough time from LOS for pay purposes. McDaniels Decl. ¶¶ 11, 12, 13; Brown Decl. ¶ 17.

APA and American *revised* the contractual rule as to furloughs in negotiating Letter G to give two-years of LOS credits for pilots who had been on furlough and were therefore *not entitled* to LOS for pay under the existing contract terms. Since American was willing to renegotiate LOS credits for other pilots notwithstanding the existing contract terms, the terms of the Flow-Through Agreement—which had expired in 2008—does not establish American would have been unwilling to modify this rule as well, even if an expired contract is considered the same as an existing agreement. The fact that American was willing to modify *existing* contract terms for non-accrual of service credit while on furlough shows that American is willing to modify contractual restrictions if APA proposes and advocates changes.

2. APA argues that the practice of negotiating retroactive LOS credits for "furloughed" pilots means that American would not have agreed to Letter G LOS credits for the FTPs even if APA had raised the issue. APA MFR pp. 4-5. As discussed above, Letter G is not limited to "furloughed" pilots. Rather, the facts would support a jury finding that Letter G was a general "make-up" because of the loss of anticipated work at American because of 9/11.

3. APA's argument as to MidAltantic (MDA) pilots (APA MOR pp. 5-6) is a post-hoc justification at best. There is no evidence that the MDA pilots' situation came up in the Letter G negotiations or that American turned them down at the time Letter G was being negotiated. The evidence is that APA became aware of the MDA situation afterwards, nevertheless believed that the MDA pilots were included in the Letter G benefit as "furloughed" pilots and advocated for them. APA Exh. 53 at p. 4. American's denial of LOS to MDA pilots occurred after this case was filed and while American was still a defendant against whom damages were being sought. This post-hoc evidence cannot show what would have occurred

had APA not breached its duty when Letter G was negotiated. *Peters v. Burlington Northern R. Co*., 931 F.2d 534, 540 (9th Cir. 1990).

4. APA contends that the Complaint alleges American's "hostility" to the FTPs. APA MFR p. 8. What the Complaint alleges in the cited paragraphs is that American joined in APA's discrimination, not that APA was independently hostile to the FTPs even absent APA's hostility. The allegations are: APA and American have "acted against the interests of the FTPs" and "to advance the interests of other pilot groups" (SAC ¶ 51); that American "has joined with APA in discriminating against FTPs (SAC ¶ 78); that American has "under taken a pattern of discrimination and collusion with APA (SAC ¶ 79); and American has "colluded with APA and participated in, enabled and agreed to engage in discrimination against the FTPs (SAC ¶ 80). Under these allegations, if APA stops discriminating and breaching its duty, there would be no reason to think that American would not cease colluding with APA to harm FTPs. If American decided to persist in discriminating against the FTPs in bargaining out of hostility to them, the FTPs would have a remedy under the Railway Labor Act in a private right of action in federal court for American's failure to bargain in good faith, as well as an appropriate remedy for that violation. *Ass'n of Flight Attendants v. Horizon Air Indus*., 976 F.2d 541, 543 (9th Cir. 1992); *CSX Transp., Inc. v. Marqua.*, 980 F.2d 359, 364-365, 367-368 (6th Cir. 1992).

III. APA IS WRONG IN CONTENDING THAT THE COURT MISAPPLIED THE LAW IN *ACRI/ACKLEY* .

APA errs in asserting the court misapplied the law by not applying *Acri* and *Ackley*. APA MFR pp. 9- 12. As shown, the *Acri/Ackley* rules do not apply to the causation involved in this case because Letter G was negotiated in violation of APA's duty of fair representation.

Contrary to APA's argument (APA MFR p. 9), *Acri/Ackley* did not create a special rule for all cases involving the duty of fair representation in the negotiation of contracts. *Acri/Ackley* involved the opposite situation—where the contract terms that were negotiated were entirely *unaffected* by any union breach of duty. Judge Reinhardt's concurrence in *Acri* makes this point

expressly—as he was careful to distinguish the situation in *Acri* from cases involving contracts resulting from bad-faith bargaining.

Applying the *Acri/Ackley* rule as a general rule applicable to cases involving contracts negotiated in breach of the duty of fair representation would represent a change in long-standing legal standards applicable to fair representation cases. If that were a general requirement, the plaintiff would have to show that the employer in Louisiana in 1950 would have agreed to equal treatment of African-Americans had the union not demanded discrimination. A plaintiff would have to show that the employer would have agreed to better seniority provisions even after proving that the union negotiated adverse seniority provisions to retaliate against a disfavored group. See *Ramey v. Dist. 141 Int'l Ass'n of Machinests & Aerospace Workers*, 378 F.3d. 269, 277 (2nd Cir. 2004). APA cites no case has applied the *Acri/Ackley* rule to situations involving a breach of duty in negotiating contract terms. The simple reason that there are no such cases is that the *Acri/Ackley* rule simply does not apply in that circumstance.

To the extent that APA is arguing that the court should adopt the *Acri/Ackley* rule as a general standard in fair representation cases, that argument is foreclosed by Supreme Court precedent. "[T]he statute contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty." *Steele v. Louisville & N. R. Co.*, supra, 323 U.S. at 207. The policy is to provide an effective judicial remedy for a breach of a union's duty. *Id.* at 203-204. This means that "the relief in each case should be fashioned to make the injured employee whole." *Int'l Bhd. of Elec. Workers v. Foust*, supra, 442 U.S. at 49. The "usual judicial remedies" include the usual rule of causation, where conduct is causally related if it is a "substantial factor in bringing about the harm" (*Restatement (Second) of Torts* § 431 (1965)) and the burden is on the wrongdoer to show that misconduct caused no harm (*Bigelow v. RKO Radio Pictures, Inc.*, supra, 327 U.S. at 265-266).

APA's argument to apply the *Acri/Ackley* rule outside of the context in which it was developed achieves nothing more that setting up a roadblock to make-whole remedies for a union's breach of duty. It serves only to give unions an additional protection from the

consequences of a breach of their duty and to insulate unions from the consequences of their misconduct. It will only encourage unions to act in bad faith in negotiating contacts because of the difficulty of proof the rule would create. It frustrates the policy of the law to make employees whole for a union's breach of the duty of fair representation.

Moreover, the evidence and information relevant to what happened, or would have happened, in bargaining is in the union's possession. Here in particular, the FTPs were kept in the dark because APA would not respond to their letters. Cordes Decl. ¶¶ 24-30. Where one party has vastly superior access to the evidence on an issue, the law generally puts the burden of proof on that party. *U.S. v. 194 Quaker Farms Rd.*, 85 F.3d 985, 990 (2nd Cir. 1996) ("Burden-shifting where one party has superior access to evidence on a particular issue is a common feature of our law."); *U.S. v. Continental Ins. Co.*, 776 F.2d 962, 964 (11th Cir. 1985) (following "common law guide that the party in the best position to present the requisite evidence should bear the burden of proof"). Applying the *Acri/Ackley* to all fair representation cases involving bargaining beyond the specific context of *Acri/Ackley* is contrary to this rule allocating burdens of proof. Again, this only to insulates unions from the consequences of their acts and undermines the policy to provide make-whole relief for breach of the duty of fair representation.

CONCLUSION

For the forgoing reasons, APA's motion for reconsideration should be denied. The Court should consider sanctions under Local Rule 7-9(c) to compensate Plaintiffs for the costs incurred in opposing APA's motion that simply rehashes its prior arguments.

Dated: July 11, 2016.

KATZENBACH LAW OFFICES

By s/ Christopher W. Katzenbach
Christopher W. Katzenbach
Attorneys for Plaintiffs AMERICAN AIRLINES FLOW-THRU PILOTS COALITION, Et Al.