EDGAR N. JAMES*
STEVEN K. HOFFMAN*
DANIEL M. ROSENTHAL*
James & Hoffman, P.C.
1130 Connecticut Avenue, N.W., Suite 950
Washington, D.C. 20036
Telephone: (202) 496-0500
Facsimile: (202) 496-0555
ejames@jamhoff.com
skhoffman@jamhoff.com
dmrosenthal@jamhoff.com

JEFFREY B. DEMAIN (SBN 126715)
JONATHAN WEISSGLASS (SBN 185008)
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, California 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064
jdemain@altshulerberzon.com
jweissglass@altshulerberzon.com

Attorneys for Defendant
Allied Pilots Association

Admitted pro hac vice

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

AMERICAN AIRLINES FLOW-THRU PILOTS COALITION, *et al.*, Plaintiffs, v. ALLIED PILOTS ASSOCIATION, *et al.*, Defendants.	Case No. 3:15-cv-03125-RS **DEFENDANT ALLIED PILOTS ASSOCIATION'S MOTION FOR LEAVE TO FILE MOTION FOR PARTIAL RECONSIDERATION OF SUMMARY JUDGMENT ORDER; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** N.D. Cal. Civil Local Rule 7-9 Date: N/A Time: N/A Courtroom: N/A Judge: Hon. Richard Seeborg

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MOTION FOR LEAVE TO FILE MOTION FOR PARTIAL RECONSIDERATION OF SUMMARY JUDGMENT ORDER

TO ALL PARTIES AND THEIR ATTORNEY(S) OF RECORD:

Pursuant to Northern District of California Civil Local Rule 7-9, Defendant Allied Pilots Association ("APA" or the "Association") hereby moves this Court for leave to file a motion for partial reconsideration of the Order re Motions for Summary Judgment and Class Certification that the Court issued on June 16, 2016 ("Order"), Docket No. 67, limited to the Court's disposition of the "causation" element of the "Letter G" claim for breach of the duty of fair representation. Pursuant to Civil Local Rule 7-9(d), the Association has not noticed a hearing date for the instant motion.

By the instant motion, the Association respectfully seeks an order permitting it to file a motion for reconsideration with regard to the above-referenced Order, as discussed in the following Memorandum of Points and Authorities. This Motion is based on the Memorandum of Points and Authorities and all of the Court's pleadings and papers on file in this matter, including but not limited to the summary judgment record.

Dated: June 24, 2016.

Respectfully submitted,

EDGAR N. JAMES
STEVEN K. HOFFMAN
DANIEL M. ROSENTHAL
James & Hoffman, P.C.

JEFFREY B. DEMAIN
JONATHAN WEISSGLASS
Altshuler Berzon LLP

By: */s/ Jeffrey B. Demain*
Jeffrey B. Demain

Attorneys for Defendant Allied Pilots Association

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION AND SUMMARY OF MOTION

On June 16, 2016, the Court issued its Order re Motions for Summary Judgment and Class Certification ("Order"), Docket No. 67, granting, with one exception, the summary judgment motion filed by Defendant Allied Pilots Association ("APA" or the "Association") as to Plaintiffs' Second Amended Complaint. The sole exception to the Court's grant of summary judgment permitted Plaintiffs to continue pursuing the allegation in their First Claim for Relief that the Association violated its duty of fair representation ("DFR") in negotiating "Letter G," a portion of the 2015 collective bargaining agreement between the Association and American Airlines, Inc. ("American"). Order at 6:1 – 7:10. Although the Association argued that Plaintiffs had failed to provide sufficient evidence as to several of the elements of their Letter G claim to get to a jury on that claim, the sole basis for the instant motion relates to only one of those elements: causation.

In its summary judgment motion, the Association argued that Plaintiffs had no evidence of causation on which a reasonable jury could find in their favor, i.e., no evidence that if the Association had proposed in the negotiations for Letter G to extend length of service ("LOS") credit to Plaintiffs and the similarly-situated Flow-Through Pilots ("FTPs"), American would have acceded to that proposal. The Court concluded, however, that "although plaintiffs may face an uphill battle to show American would have agreed to extend LOS credit to them had the Union pursued it, they have made an adequate showing to prevent summary judgment against them for lack of causation." Order at 7:7-10. The Order did not specify, describe, or analyze the evidence on which the Court relied for that conclusion. By its present motion, the Association respectfully requests that this Court grant leave to file a motion for reconsideration of that aspect of the Order, on the ground that the Court's conclusion is unsupported by any evidence in the summary judgment record and therefore 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).

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ARGUMENT

I. The Requirements of Civil Local Rule 7-9.

Civil Local Rule 7-9 ("Rule 7-9") requires litigants who wish the Court to reconsider an interlocutory order to first file a motion requesting leave to file a motion for reconsideration. *See* Rule 7-9(a). In making such a motion, "[t]he moving party must specifically show reasonable diligence in bringing the motion," and must also show the existence of one of three circumstances, including "(3) A manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before such interlocutory order." Rule 7-9(b). Here, the Association relies on that third circumstance.

II. The Association Has Exercised Reasonable Diligence in Bringing the Instant Motion.

The Court's Order issued on June 16, 2016. Counsel for the Association reviewed the Order, reviewed the summary judgment record, consulted the local rules, engaged in discussions among themselves and their client representatives regarding the appropriate response, and researched and drafted the instant motion. The motion is being filed on June 24, 2016, eight days (and only six court days) after the Order issued. The Association respectfully submits that this constitutes "reasonable diligence" by any standard.

III. The Association Respectfully Submits that the Court Manifestly Failed to Consider the Material Facts in the Summary Judgment Record, Which Provide No Basis for a Conclusion that Plaintiffs Satisfied Their Burden of Establishing a Triable Issue of Material Fact as to the Causation Element of Their "Letter G" Claim for Breach of the Duty of Fair Representation.

The Association respectfully asks the Court to take a second look at the undisputed facts in the summary judgment record regarding the causation issue. The Association respectfully submits that, when one focuses on those facts, distinct from the remainder of the admittedly substantial summary judgment record (within which they might otherwise be overlooked), there is no evidence on which a reasonable jury could find that Plaintiffs had fulfilled their burden of proof on the causation issue. We review that evidence here.

The record evidence as to the negotiation and legal effect of Letter G is undisputed. Letter G restored up to two years of LOS credit for pilots who had been furloughed from American. *See*

Second Amended Complaint ("Complaint"), Docket No. 38, at ¶¶ 52(e), 75(b)(ii); APA SJ Exh. 2, Docket No. 49-2, at 44. Letter G was intended to remedy the harm suffered by pilots who had been furloughed by American – i.e., forced out of their jobs. *See* Declaration of David C. Brown in Support of APA's Motion for Summary Judgment ("Brown Decl."), Docket No. 45, at ¶ 20. Plaintiffs and the other FTPs, however, were never furloughed, either by American or their employer, American Eagle ("Eagle"). Declaration of Arthur McDaniels in Support of APA's Motion for Summary Judgment ("McDaniels Decl."), Docket No. 48, at ¶ 44; Declaration of Thomas Duncan in Support of APA's Motion for Summary Judgment ("Duncan Decl."), Docket No. 47, at ¶ 17. For that reason, they are not eligible for LOS credit under Letter G. *See* Complaint at ¶ 52(e)(i). Plaintiffs allege that APA violated its DFR by not instead negotiating an agreement that would have extended similar LOS credit to them for the time they spent at Eagle waiting to "flow up" to American, notwithstanding that they were not furloughed or otherwise unemployed during that period. *See* Complaint at ¶¶ 52(e), 75(b)(ii).[1]

As discussed further below, the well-established law in the Ninth Circuit requires plaintiffs who sue their union for breach of the DFR in negotiating a collective bargaining agreement to prove, *inter alia*, the existence of a causal connection between the alleged breach and their claimed injury. *See, e.g., 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); *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). Specifically, the causation element requires plaintiffs to prove that if the union had advanced the negotiating proposal they favored, "the company would have acceded to the union's demands." *Ackley*, 958 F.2d at 1472; *Bishop*, 1998 WL at *18.

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[1] For the purposes of the present motion, the Association does not ask the Court to revisit its ruling that "[w]hile the distinction between those pilots who had been 'furloughed' and those who had not may ultimately be accepted by a trier of fact as an appropriate one for the Union to have made, that conclusion is not subject to determination as a matter of law." Order at 7:5-7. We note that a factfinder's ability to question the appropriateness of the furloughed/non-furloughed distinction sheds no light on whether APA's bargaining partner, American, would have actually agreed to treat furloughed and non-furloughed pilots as similarly situated. As shown below, there is absolutely no record evidence that American would have done so.

The summary judgment record is undisputed as to this evidence. Plaintiffs introduced no direct evidence that American "would have acceded to [a] demand[]" for additional LOS credit for the FTPs, none of whom had been furloughed. And the only record evidence indirectly relating to the causation issue consists of evidence of the following facts, which, if anything, support the contrary conclusion that American would *not* have acceded to such a demand.

(1) In the Flow-Through Agreement, negotiated in 1997 by American, Eagle, APA (as the exclusive collective bargaining representative of the American pilots), and the Air Line Pilots Association ("ALPA") (as the exclusive collective bargaining representative of the Eagle pilots), both carriers and pilot groups (including the Plaintiffs and the subsequent FTPs, represented by ALPA) agreed that Eagle pilots who "flowed up" to American would *not* receive LOS credit for the time they flew for Eagle. APA SJ Exh. 1 (Docket No. 49-1) at ¶ III.C ("A CJ Captain's … length of service for pay purposes … will be based on the date such pilot is entered on the AA payroll."). This undisputed fact cannot reasonably support a finding that American would have acceded to an APA demand for additional LOS credit for the FTPs. And although the Association does not bear the burden to disprove causation, this undisputed fact supports an inference that American was not willing to provide FTPs with LOS credit for the time they flew for Eagle; if it had been willing, it could and would have done so in the Flow-Through Agreement, the very agreement that regulated the terms on which they would "flow up" to American.[2]

(2) American has agreed to extend additional LOS credit to pilots who were furloughed, both under Letter G and in other similar situations involving furloughs. S*ee* APA SJ Exhs. 2 (Docket No. 49-2) at 44, 45 (Docket No. 49-45), & 46 (Docket No. 49-46). It is undisputed that these agreements were in accord with industry practice regarding length of service for furloughed pilots. *See* Brown Decl. ¶ 19. As noted above, however, Plaintiffs and the other FTPs were *never* furloughed, either by

[2] It is undisputed that the FTPs were represented in the negotiation of the Flow-Through Agreement by ALPA, not by APA. *See* McDaniels Decl. at ¶¶ 15-17. Plaintiffs do not assert that ALPA was hostile to the FTPs. Thus, American's failure to provide the FTPs with LOS credit for their time at Eagle in the 1997 Flow-Through Agreement cannot be attributed to a failure by APA to request such credit.

American or Eagle. McDaniels Decl., Docket No. 48, at ¶ 44; Duncan Decl., Docket No. 47, at ¶ 17. That American has granted LOS credit to pilots who were furloughed, consistent with industry practice, cannot reasonably support a finding that American would have acceded to an APA demand for additional LOS credit for the FTPs, who were not furloughed.[3] And again, although it is not the Association's burden to disprove causation, this undisputed fact, taken together with the fact that American denied LOS credit to the Eagle pilots in the Flow-Through Agreement and with Plaintiffs' allegations that American has exhibited hostility toward the FTPs by denying them benefits it has granted to other pilot groups, *see infra* at 8:5-28 & n.4, instead supports a finding that American would *not* have acceded to an APA demand for additional LOS credit for the FTPs.

(3) Finally, American has declined to extend additional LOS credit even to pilots who *were* furloughed, where it does not consider those pilots to have been employed by American or one of its merger partners. This latter evidence concerns a group of pilots who flew for MidAtlantic Airways ("MidAtlantic"). MidAtlantic was a division of US Airways created in 2003, when that airline and ALPA (then the collective bargaining representative of its pilots) agreed that the airline would create a new operation to fly regional jets, which could be flown by pilots furloughed from US Airways. Duncan, Docket No. 47, at ¶ 24 & APA SJ Exh. 17, Docket 49-17. MidAtlantic was initially intended to operate as a wholly-owned subsidiary of US Airways, but it ultimately was formed as a division within US Airways and operated on the US Airways operating certificate issued by the Federal Aviation Administration. Duncan Decl. at ¶ 24 & APA SJ Exh. 17 at 3. Following the merger between American and US Airways, APA requested American to extend LOS credit under Letter G to a group of pilots who were hired directly by the MidAtlantic division, rather than by US Airways, and were subsequently furloughed by MidAtlantic. (American had already granted LOS credit under Letter G to another group of pilots who had originally been hired directly by US Airways, were furloughed by US Airways, flew for MidAtlantic during their furlough, and finally returned to US

[3] Although Plaintiffs argue that certain former TWA pilots were forced out of their jobs before ever flying for American, it is clear that these pilots were indeed furloughed, whether by American or its merger partner (TWA or TWA-LLC).

Airways after being recalled from their furlough from US Airways.) *See* Reply Declaration of Neil Roghair in Support of APA's Motion for Summary Judgment ("Roghair Reply Decl."), Docket No. 58, at ¶¶ 6-8. American refused APA's request, asserting that the members of the group of MidAtlantic furloughees who were the subject of that request "were never furloughed from US Airways Mainline service and therefore are not entitled to the Length of Service Adjustment." *Id*. at ¶ 8 & APA SJ Exh. 53, Docket No. 60-2.

That American has granted LOS credit to pilots who were furloughed from US Airways, but not to pilots who were furloughed from Mid-Atlantic, cannot reasonably support a finding that American would have acceded to an APA demand for additional LOS credit for the FTPs, who were never furloughed from either American or Eagle. To the contrary, it supports the opposite conclusion that American would *not* have so acceded. Plaintiffs' theory of their Letter G claim is that they were effectively furloughed by having to wait at Eagle for several years until job opportunities at American opened up, enabling them to flow up to American. Even putting aside the consideration that remaining employed at Eagle during that interim period does not constitute a furlough, the line that American drew in the situation of the pilots who were directly hired by and then furloughed from MidAtlantic demonstrates clearly that American will *not* grant LOS credit even to pilots who have been furloughed unless they were hired by and subsequently furloughed from a *mainline* carrier (e.g., American or US Airways), not if they were hired by and subsequently furloughed from a related, but non-mainline, carrier (e.g., Eagle or MidAtlantic). If American would not give LOS credit under Letter G to the furloughed MidAtlantic direct hires, it certainly would not have agreed to do so for the FTPs, who were directly hired by Eagle rather than by American, since MidAtlantic was at least "closer" to the relevant mainline carrier (operating as a division of, and under the same operating certificate as, US Airways) than was Eagle (which is a corporation independent from American, operating under its own certificate).

The foregoing constitutes *all* of the record evidence relating to the causation issue and, as just discussed, none of it could provide a sufficient basis for a reasonable jury to find that Plaintiffs had satisfied their burden of proving that American would have acceded to an APA demand for additional LOS credit for the time the FTPs spent at Eagle. At most, it shows that American has agreed to

provide additional LOS credit to pilots who were hired directly by and subsequently furloughed from mainline carriers – circumstances indisputably not shared by the FTPs.

Since they could not point to any record evidence on the causation issue, Plaintiffs offered nothing but speculation that American *might* have acceded to such a demand, arguing only that "it seems implausible that American would agree to give LOS credit to thousands of new employees from TWA and US Airways (Letter G applies to both groups) and not to the far smaller group of FTPs," Pls' Memo. in Opp. to APA MSJ, Docket No. 54, at 20:22-23, and that "[t]he fact that American has repeatedly ceded to APA demands for LOS credits for other and larger employee groups would allow a jury to conclude, in this case, that APA's failure to present the issue to American caused FTPs not to receive these LOS benefits," *id*. at 20:26 – 21:2. As we have discussed above, the evidence Plaintiffs cite that American has granted LOS credit to larger pilot groups in situations in which those pilots were *furloughed* from *mainline* carriers, does not make it "implausible" that American would decline to give such credit to the smaller group of FTPs who were never furloughed, given American's consistent practice (in conformity with industry practice) of distinguishing between the groups. Indeed, Plaintiff Gregory Cordes admitted that the pre-Letter G grants of LOS credits to furloughed pilots are irrelevant to the issues surrounding the FTP's situation under Letter G: "APA has noted prior occasions where it had negotiated LO[S] credits for pay purposes for 'furloughed' pilots. The situations where these letters were negotiated were vastly different [from the Letter G situation]." Declaration of Gregory Cordes in Opposition to APA's Motion for Summary Judgment ("Cordes Decl."), Docket No. 56, at ¶ 45.

Even if a factfinder were to accept Plaintiffs' assertion that the FTPs were effectively furloughed at Eagle, the case of the pilots directly hired by and then furloughed from MidAtlantic – to whom American denied LOS credit under Letter G – precludes the inference that Plaintiffs seek to draw. Indeed, the situation of those MidAtlantic pilots demonstrates that any inference would have to be directly to the contrary: since American refused to grant LOS credit under Letter G to the smaller group of MidAtlantic direct hire-furloughees, who number some 60 pilots (Roghair Reply Decl. at ¶ 9), on the ground that they were not furloughed from a mainline carrier, it certainly would have refused on the same basis to do so for the FTPs, who number several hundred pilots (Complaint at ¶ 11), even if

they were deemed to have been effectively furloughed, because they were directly hired by Eagle, not American. There is simply no record evidence that could support a jury finding, either direct or inferential, that American would have acceded to an APA demand that the FTPs be granted additional LOS credit for their time at Eagle.

Finally, the unsupported assertion that American might have acceded to an APA demand for additional LOS credit for FTPs is further undermined by Plaintiffs' own allegations that American is hostile to them and has exhibited that hostility on numerous occasions by denying them benefits it has granted to other pilot groups. Thus, the Complaint, which constitutes admissions of a party opponent if used against Plaintiffs, alleges that American "regularly and repeatedly acted against the interests of the FTPs as to their terms and conditions of employment at A[merican]," and "acted to advance the interests of other pilot groups as to the terms and conditions of employment at A[merican] for these other pilot groups over the interests of the FTPs, contrary to the interests of the FTPs and without taking account of the interests of the FTPs." Complaint at ¶ 51; *see also id.* at ¶¶ 78-80.[4]

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[4] Specifically, Plaintiffs allege that American engaged in the following conduct hostile to the interests of the FTPs:

(a) "[A]greed to give TWA-LLC pilots, including the TWA-LLC Staplees, the right to flow-down to American Eagle and displace FTPs still flying at American Eagle." Complaint at ¶ 52(a).

(b) "[A]greed . . . to have TWA-LLC Staplees, who were below FTPs on the AAL pilot seniority list, placed into new-hire classes beginning in June 2007 ahead of the FTPs." Complaint at ¶ 52(b); *see also* Cordes Decl., Docket No. 56, at ¶ 17.

(c) Disregarded an arbitration award by "continu[ing] to hire TWA-LLC Staplees for new-hire positions at AAL ahead or and in preference to FTPs." Complaint at ¶ 52(b)(3); *see also* Cordes Decl. at ¶¶ 18-20.

(d) Entered into a corrupt, off-the-record agreement with an arbitrator and other parties (including APA and Plaintiffs' exclusive collective bargaining representative at Eagle, ALPA) to have the arbitrator issue as his award a secret agreement between the parties that denied the FTPs a reasonable remedy for their grievance and impaired their contractual rights. Complaint at ¶¶ 54-56; Declaration of Gavin MacKenzie in Opposition to APA's Motion for Summary Judgment, Docket No. 55-2, at ¶¶ 12-28.

IV. The Association Respectfully Submits that the Court also Manifestly Failed to Consider Dispositive Legal Arguments Presented in the Summary Judgment Briefing.

The Association respectfully suggests that the Court manifestly failed to consider that the Ninth Circuit deliberately imposed on DFR plaintiffs who seek to challenge a collective bargaining agreement a burden of proof that it expressly recognized would be extremely difficult to satisfy, and that it did so to effectuate the federal labor policy in favor of encouraging collective bargaining and protecting the stability of collective bargaining agreements. This Court also failed to rigorously apply the summary judgment standard as articulated by the Supreme Court, which requires plaintiffs opposing summary judgment to point to specific facts in the record that create a genuine dispute of fact requiring trial, not merely to evidence that is only colorable or not significantly probative. The Association respectfully submits that application of these governing legal standards to the undisputed facts in the summary judgment record, as set forth above, should result in reconsideration of the Court's denial of summary judgment on the "Letter G" claim.

In its decisions in *Ackley* and *Acri*, the Ninth Circuit articulated the "causation" test set forth above, i.e., that plaintiffs who sue their union for breach of the DFR in negotiating a collective bargaining agreement have the burden of proving, *inter alia*, the existence of a causal connection between the alleged breach and their claimed injury, specifically, that if the union had advanced the negotiating proposal they favored, "the company would have acceded to the union's demands." *Ackley*, 958 F.2d at 1472; *accord Acri*, 781 F.2d at 1397. In *Ackley*, the Ninth Circuit expressly recognized that this placed a heavy burden on DFR plaintiffs, 958 F.2d at 1472, but reasoned that this was necessary to effectuate federal labor policy: "Congress created the collective bargaining system in order to promote the peaceful and orderly, yet collective, resolution of industrial disputes and, ultimately, to ensure the long-term stability of labor-management contracts. . . . Both union members and employers have a strong interest in that result. Accordingly, both benefit from the rule that labor-management contracts will not be lightly set aside." *Id*. at 1472-73 (citation omitted). The Ninth Circuit also explained that this does not leave plaintiffs without recourse, even if they cannot satisfy their heavy burden of proof as to causation, since "the union's internal election and rulemaking

processes are the proper vehicle, at least initially, for addressing members' complaints regarding the adequacy of union representation during the bargaining process." *Id*. at 1472.

In evaluating on summary judgment whether DFR plaintiffs have met their heavy burden, the Court must take into account the summary judgment standard. Under that standard, once a moving defendant has made a *prima facie* showing of the absence of a genuine issue of material fact, a non-moving plaintiff must "designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(c)). In so doing, the non-moving plaintiff "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Indeed, "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (citations omitted).

In the present case, application of these legal standards to the undisputed facts should result in granting the Association's summary judgment motion on Plaintiffs' "Letter G" claim. As discussed above, Plaintiffs failed to introduce any evidence, or point to any evidence otherwise in the record, on which a reasonable jury could rely to find that American would have acceded to an APA proposal to grant the FTPs additional LOS credit at the time of the negotiation of Letter G. Rather, the evidence suggests that American would *not* have so acceded. But even if the evidence did not lean in that direction, and instead failed to support either inference, summary judgment should have been granted against Plaintiffs on the causation issue. Under the authorities discussed above, such a "tie" does not go to the Plaintiffs, who bear the burden of proof on the causation issue, but to the Association. Here, Plaintiffs did not even reach the level of showing "some metaphysical doubt as to the material facts" regarding causation, *Matsushita*, 475 U.S. at 586; nor did they present evidence that was "merely colorable" or "not significantly probative," *Anderson*, 477 U.S. at 249. Rather, they presented *no* evidence of causation and pointed to none in the record sufficient for a jury to conclude that American would have acceded to an APA proposal to grant the FTPs additional LOS credit.[5]

[5] Plaintiffs cannot claim any unfairness from the application of these legal principles, as they chose to forego their opportunity to gather evidence to attempt to meet their burden, including by conducting relevant discovery of American.

In prior cases applying the causation test, both the Ninth Circuit and the Northern District of California have held DFR plaintiffs to their burden of proof on the causation issue and have granted summary judgment on their claims not only where they conceded they were unable to satisfy their burden, but also where there was no evidence either way as to whether the employer would have acceded to the plaintiffs' favored bargaining proposal. In *Acri*, summary judgment was granted and subsequently affirmed where the plaintiffs conceded that they could not show that the employer would have acceded to their demands. *Acri*, 781 F.2d at 1398. But in *Ackley*, the Ninth Circuit noted the absence of any such concession (in contrast to *Acri*), yet nonetheless affirmed the district court's grant of summary judgment on the causation issue where the plaintiffs "proffered no evidence whatsoever that [the employer] would have been disposed to agree to more generous terms had the union rejected the proposed 1988-1991 agreement a third time," finding that they had thereby "failed completely to satisfy the second prong of the *Acri* test." *Ackley*, 958 F.2d at 1473. And in *Bishop*, 1998 WL 474076, the Northern District of California, subsequently affirmed by the Ninth Circuit, granted summary judgment to the union defendant notwithstanding that the plaintiffs did introduce *some* evidence on the causation issue. There, that issue involved whether, if the union members voted down a tentative agreement ("TA") covering four separate bargaining units, the employer would have been willing to continue bargaining for such an agreement (which the plaintiffs preferred) or would instead have insisted on bargaining for four separate agreements, one for each bargaining unit. In opposition to summary judgment, the plaintiffs introduced evidence that the employer's president in fact preferred a single agreement covering all four bargaining units, but the district court found even that evidence "insufficient to raise a genuine issue of fact with respect to whether [the employer's] management would have acceded to the union's demand to continue bargaining for a single agreement if the amended TA had been rejected." *Id.* at *18.

Plaintiffs have done no more to carry their burden of proof in the present case than did the plaintiffs in *Ackley*, and indeed less than the plaintiffs in *Bishop*, against whom summary judgment was granted. The Association merely requests that, in light of its acknowledgment that Plaintiffs "face an uphill battle to show that American would have agreed to extend LOS credit to them had the Union pursued it," Order at 7:7-9, this Court take a second look at the evidence in the summary judgment

record, applying the governing legal standards discussed above, to determine whether Plaintiffs have satisfied their burden of "designat[ing] specific facts showing that there is a genuine issue for trial" as to the causation issue. *Celotex*, 477 U.S. at 324.

CONCLUSION

For the foregoing reasons, the Association respectfully requests this Court to grant leave to file a motion for reconsideration and set a briefing schedule thereon. To facilitate a prompt resolution of that motion, the Association will waive the filing of an additional opening brief and will instead rely on the arguments presented above as its opening brief on the motion for reconsideration, leaving for scheduling only dates for an opposition brief, a reply brief, and a hearing.

Dated: June 24, 2016.

Respectfully submitted,

EDGAR N. JAMES
STEVEN K. HOFFMAN
DANIEL M. ROSENTHAL
James & Hoffman, P.C.

JEFFREY B. DEMAIN
JONATHAN WEISSGLASS
Altshuler Berzon LLP

By: */s/ Jeffrey B. Demain*
Jeffrey B. Demain

Attorneys for Defendant Allied Pilots Association