

1 EDGAR N. JAMES*
STEVEN K. HOFFMAN*
2 DANIEL M. ROSENTHAL*
James & Hoffman, P.C.
3 1130 Connecticut Avenue, N.W., Suite 950
Washington, D.C. 20036
4 Telephone: (202) 496-0500
Facsimile: (202) 496-0555
5 ejames@jamhoff.com
skhoffman@jamhoff.com
6 dmrosenthal@jamhoff.com

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

12 Attorneys for Defendant
Allied Pilots Association

13 *Admitted pro hac vice
14

15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

18 AMERICAN AIRLINES FLOW-THRU)
19 PILOTS COALITION, *et al.*,)

20 Plaintiffs,)

21 v.)

22 ALLIED PILOTS ASSOCIATION, *et al.*,)

23 Defendants.)

Case No. 3:15-cv-03125-RS

**DEFENDANT ALLIED PILOTS
ASSOCIATION'S NOTICE OF MOTION
AND MOTION FOR SUMMARY
JUDGMENT OR, IN THE ALTERNATIVE,
FOR PARTIAL SUMMARY JUDGMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Fed. R. Civ. P. 56

Date: April 21, 2016

Time: 1:30 p.m.

Courtroom: 3 - 17th Floor

Judge: Hon. Richard Seeborg

TABLE OF CONTENTS

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

TABLE OF AUTHORITIES.....iii

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR,
IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENTvi

MEMORANDUM OF POINTS AND AUTHORITIES..... 1

 INTRODUCTION AND ISSUES PRESENTED 1

 FACTUAL BACKGROUND2

 1. The Flow-Through Agreement2

 2. Pilots’ “length of service” at American.....3

 3. Implementation of the Flow-Through Agreement, and
 the events of 2001.....4

 4. American’s merger with USAir.....5

 ARGUMENT6

 I. Summary Judgment Standard.....6

 II. Count I of Plaintiffs’ Complaint is almost entirely untimely and
 relates to periods during which APA owed Plaintiffs no duty of
 fair representation.....6

 A. Count I is untimely7

 (1) The granting of length of service credit for other
 pilot groups.....8

 (2) Plaintiffs’ other claims of discrimination in favor
 of former TWA pilots.....9

 (3) Plaintiffs’ letters to APA9

 B. Count I relates to conduct undertaken when APA did not
 owe a duty to Plaintiffs..... 10

 III. APA is entitled to summary judgment on the portion of Count I
 relating to the 2015 CBA..... 12

 A. No reasonable jury could conclude that APA acted
 discriminatorily by negotiating Letter G. 13

 B. No reasonable jury could conclude that APA acted arbitrarily
 or in bad faith by negotiating Letter G. 16

 C. No reasonable jury could conclude that, had APA proposed
 the different agreement that Plaintiffs prefer, American
 would have acceded to that demand. 17

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

- IV. Count II of Plaintiffs’ Complaint is moot insofar as it arises from the withdrawn Stipulation and Proposal, and is unripe insofar as it arises from AAPSIC’s current position in the SLI arbitration. 17

 - A. The withdrawal of the Stipulation and Proposal moots the first portion of Count II. 18
 - B. The second portion of Count II is not ripe. 20

- V. Even if the remainder of Count II were ripe, no reasonable jury could conclude that the Association acted arbitrarily, discriminatorily, or in bad faith in the SLI arbitration. 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Ackley v. Western Conf. of Teamsters,
958 F.2d 1463 (9th Cir. 1992) 13, 17

Addington v. US Airline Pilots Ass’n,
791 F.3d 967 (9th Cir. 2015) 22, 23

Addington v. US Airline Pilots Ass’n,
606 F.3d 1174 (9th Cir. 2010) *passim*

Aetna Life Ins. Co. v. Haworth,
300 U.S. 227 (1937) 20

Air Line Pilots Ass’n, Int’l v. O’Neill,
499 U.S. 65 (1991) 12, 16

Allen v. CSX Transp., Inc.,
325 F.3d 768 (6th Cir. 2003) 10, 11

Am. Cas. Co. v. Baker,
22 F.3d 880 (9th Cir. 1994) 18

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 6

Arizonans for Official English v. Arizona,
520 U.S. 43 (1997) 18

Beck v. United Food & Commercial Workers Union, Local 99,
506 F.3d 874 (9th Cir. 2007) 12, 13, 17

Bensel v. Allied Pilots Ass’n,
387 F. 3d 298 (3d Cir. 2004) 10

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) 13, 17

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 6

Christiansen v. APV Crepaco, Inc.,
178 F.3d 910 (7th Cir. 1999) 10, 12

Elwell v. Air Line Pilots Ass’n Int’l,
65 F. Supp. 3d 1103, 1110 (D. Colo. 2014) 14

Findley v. Jones Motor Freight, Div. Allegheny Corp.,
639 F.2d 953 (3d Cir. 1981) 24

1 *Flight Attendants in Reunion v. American Airlines, Inc.*,
 ___ F.3d ___, 2016 WL 611970 (2d Cir. Feb. 16, 2016)..... 16, 25

2

3 *Grand Canyon Trust v. United States Bureau of Reclamation*,
 691 F.3d 1008 (9th Cir. 2012)..... 18, 19

4 *Groesch v. City of Springfield, Ill.*,
 635 F.3d 1020 (7th Cir. 2011)..... 8

5

6 *Gvozdenovic v. United Air Lines, Inc.*,
 933 F.2d 1100 (2d Cir. 1991)..... 7

7 *Landry v. Air Line Pilots Ass’n Int’l*,
 901 F.2d 404 (5th Cir. 1990)..... 7

8

9 *Lea v. Republic Airlines, Inc.*,
 903 F.2d 624 (9th Cir. 1990)..... 7

10 *Ledbetter v. Goodyear Tire & Rubber Co.*,
 550 U.S. 618 (2007) 8

11

12 *Lewis v. Continental Bank Corp.*,
 494 U.S. 472 (1990) 18, 19

13 *Lujan v. Defenders of Wildlife*,
 504 U.S. 555 (1992) 18

14

15 *McNamara-Blad v. Ass’n of Prof’l Flight Attendants*,
 275 F.3d 1165 (9th Cir. 2002)..... 10, 11, 12, 16

16 *Merritt v. Int’l Ass’n of Machinists*,
 2008 WL 5784439 (E.D. Mich. Sept. 22, 2008) 17

17

18 *Mills v. Green*,
 159 U.S. 651 (1895) 18

19 *Montevago v. U.S. Airways, Inc.*,
 2009 WL 4908845 (D. Md. Dec. 11, 2009) 24

20

21 *Native Village of Noatak v. Blatchford*,
 38 F.3d 1505 (9th Cir. 1994)..... 20

22 *North Carolina v. Rice*,
 404 U.S. 244 (1971) 18

23

24 *Patterson v. Int’l Bhd. of Teamsters, Local 959*,
 121 F.3d 1345 (9th Cir. 1997)..... 24, 25

25 *Pearson v. Massachusetts Bay Transp. Auth.*,
 723 F.3d 36 (1st Cir. 2013) 14

26

27 *Peterson v. Kennedy*,
 771 F.2d 1244 (9th Cir. 1985)..... 24, 25

28

1 *Pouncil v. Tilton*,
 2 704 F. 3d 568 (9th Cir. 2012) 8

3 *Preiser v. Newkirk*,
 4 422 U.S. 395 (1975) 20

5 *San Lazaro Ass’n v. Connell*,
 6 286 F.3d 1088 (9th Cir. 2002) 18

7 *Simo v. Union of Needletrades, Indus. & Textile Employees, Sw. Dist. Council*,
 8 322 F.3d 602 (9th Cir. 2003) 12, 16

9 *Smith v. United Airlines, Inc.*,
 10 2014 WL 4181978 (N.D. Cal. Aug. 22, 2014) 10

11 *Spellacy v. Airline Pilots Ass’n – Int’l*,
 12 156 F.3d 120 (2d Cir. 1998) 17

13 *Spenlau v. CSX Transp., Inc.*,
 14 279 F. 3d 1313 (11th Cir. 2002) 10, 11

15 *Stone v. Writer’s Guild West, Inc.*,
 16 101 F.3d 1312 (9th Cir. 1996) 7, 10

17 *United Air Lines, Inc. v. Evans*,
 18 431 U.S. 553 (1977) 8

19 **United States Constitution**

20 Article III, § 2 18

21 **Federal Statutes**

22 28 U.S.C. § 2201(a) 20

23 29 U.S.C. §151 *et seq.* 7

24 45 U.S.C. § 151, *et seq.* 7

25 **Federal Rules**

26 Fed. R. Civ. P. 9(b) 17

27 Fed. R. Civ. P. 56(a) 6

28 Fed. R. Civ. P. 56(e) 6

1 **NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR,**
2 **IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT**

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

4 PLEASE TAKE NOTICE THAT at 1:30 p.m. on April 21, 2016, or as soon thereafter as the
5 matter may be heard, in Courtroom 3 on the 17th floor of the United States District Court for the
6 Northern District of California at 450 Golden Gate Avenue, San Francisco, California, 94102,
7 Defendant Allied Pilots Association (“APA” or the “Association”) will and hereby does move this
8 Court for an order granting summary judgment or, in the alternative, partial summary judgment, in its
9 favor and against Plaintiffs pursuant to Federal Rule of Civil Procedure 56 and Northern District of
10 California Civil Local Rules 7-2, 7-4, and 56.

11 The Association seeks summary judgment on the grounds that: (1) most of Count I of
12 Plaintiffs’ Second Amended Complaint (“Complaint”) for breach of the duty of fair representation is
13 time-barred because it is based on events occurring more six months prior to the filing of the lawsuit;
14 (2) most of Count I also fails because, at the time of the incidents alleged, the Association owed no
15 duty of fair representation to the Plaintiffs or the members of the class they purport to represent who
16 were affected by the challenged actions; (3) the remainder of Count I fails because no reasonable jury
17 could conclude that the Association acted arbitrarily, discriminatorily, or in bad faith, or that there is a
18 causal connection between APA’s alleged breach of the duty of fair representation and Plaintiffs’
19 alleged harm; (4) Count II of the Complaint fails because some of the allegations on which it is
20 predicated are moot and the remainder are unripe; and (5) even if the remainder of Count II were ripe,
21 no reasonable jury could conclude that the Association acted arbitrarily, discriminatorily, or in bad
22 faith in the arbitration at issue. The Association therefore respectfully requests that the Court issue an
23 order granting summary judgment to the Association or, in the alternative, granting partial summary
24 judgment to the Association on as many of the foregoing issues as the Court finds warranted.

25 This Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of
26 Points and Authorities; the supporting evidence cited in the Memorandum (including but not limited to
27 the Declarations of David C. Brown, Thomas Duncan, Arthur McDaniels, and Jeffrey B. Demain, and
28

1 the Compendium of Exhibits, filed herewith); any reply papers that the Association may file; all of the
2 Court’s pleadings and papers on file in this matter; and upon such further evidence and argument as
3 may be presented at or before the hearing of this motion.

4 Dated: March 17, 2016.

Respectfully submitted,

5
6 EDGAR N. JAMES
STEVEN K. HOFFMAN
DANIEL M. ROSENTHAL
7 James & Hoffman, P.C.

8 JEFFREY B. DEMAINE
JONATHAN WEISSGLASS
9 Altshuler Berzon LLP

10
11 By: /s/ Jeffrey B. Demain
Jeffrey B. Demain

12 Attorneys for Defendant Allied Pilots Association
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES**INTRODUCTION AND ISSUES PRESENTED**

1
2
3 Defendant Allied Pilots Association (“APA” or the “Association”) serves as the collective
4 bargaining representative for pilots at American Airlines (“American”), a group that includes
5 Plaintiffs. Before coming to American, Plaintiffs worked at another airline, American Eagle (“Eagle”).
6 Eagle is owned by American’s parent company, but is a wholly separate airline whose pilots are
7 represented by a different union, the Air Line Pilots Association (“ALPA”).¹ Plaintiffs press two
8 claims for breach of APA’s duty to fairly represent them, but each claim fails as a matter of law.

9 Plaintiffs’ first claim relates to rules in the collective bargaining agreement between APA and
10 American (“CBA”) that have been settled for many years, since long before the applicable limitations
11 period. They assert in Count I of their Second Amended Complaint (“Complaint”), Docket No. 38, that
12 they have been treated unfairly with respect to one of their terms of employment, their credited “length
13 of service,” which affects their rate of pay. But it is undisputed that the rules governing Plaintiffs’
14 length of service were set in 1997. Although they allege that APA has failed to modify those settled
15 rules, and has treated other pilot groups more favorably in the past two decades, those allegations
16 cannot revive a long-dead claim. Moreover, those decisions occurred at a time when APA owed no
17 duty of fair representation to the affected Eagle pilots, who were not yet employed by American and
18 were represented by ALPA, not APA. As to the sole arguably timely claim in Count I, regarding a
19 provision in the most recent CBA, no reasonable jury could conclude that APA violated its duty of fair
20 representation by negotiating that provision or that any such violation caused any injury.

21 Count II asserts that Plaintiffs were treated unfairly in the ongoing process to integrate the
22 seniority lists of American and US Airways (“USAir”) following the airlines’ merger. Much of Count
23 II is moot because it challenges a seniority integration proposal and a stipulation that have been
24 formally and irrevocably withdrawn. The remainder of Count II will not become ripe, if ever, until the
25
26

27
28 ¹ Eagle has recently been renamed Envoy Air, but we use its historical name here.

1 seniority integration process concludes. In any event, Count II fails on its merits because no reasonable
2 jury could conclude that APA acted arbitrarily, discriminatorily, or in bad faith.

3 FACTUAL BACKGROUND

4 **1. The Flow-Through Agreement**

5 Plaintiffs are current employees of American, represented by APA, who previously worked for
6 an entirely separate airline, Eagle. *See* Second Amended Complaint (“Complaint”), Dkt. No. 38, ¶¶ 4-
7 5. Eagle’s pilots were not represented by APA during the period relevant to this case, but rather have
8 been represented at all relevant times by ALPA. Declaration of Arthur McDaniels, filed herewith,
9 ¶¶ 14-16. The events giving rise to this case begin with an agreement between four parties—American,
10 Eagle, APA, ALPA—popularly referred to as the “Flow-Through Agreement.” McDaniels Decl. ¶ 17
11 & Exh. 1. The Flow-Through Agreement was executed on May 5, 1997, and expired by its terms on
12 May 1, 2008. Complaint ¶ 6; McDaniels Decl. ¶¶ 18-19. The named Plaintiffs and the putative class
13 came to American from Eagle under the terms of the Flow-Through Agreement. Complaint ¶¶ 6, 10.

14 The pilot groups at American and Eagle each received a distinct benefit from the Flow-Through
15 Agreement. The Eagle pilots, represented by ALPA, gained an avenue to positions at American, which
16 were higher-paying and more prestigious than those at Eagle. McDaniels Decl. ¶ 21. Specifically, the
17 agreement promised one out of every two “new hire positions” at American to Eagle pilots. *Id.* & Exh.
18 1 ¶ III(A). We refer to pilots who came to American via the Flow-Through Agreement as “Flow-
19 Through Pilots.” The American pilots, represented by APA, gained the right to positions at Eagle in
20 the event that they were furloughed from American. McDaniels Decl. ¶ 23 & Exh. 1 ¶ IV.

21 Because the hiring of Eagle pilots at American could disrupt Eagle’s operations, the Flow-
22 Through Agreement allowed Eagle to maintain pilots in their positions at Eagle for 18 months to two
23 years, even if the pilots became entitled to a position at American during that period. McDaniels Decl.
24 ¶ 25 & Exh. 1 ¶ III(E). Once at American, pilots held back under this provision would still receive
25 seniority numbers on the American Airlines seniority list as if they had started at American when they
26 first became entitled to a position there. McDaniels Decl. ¶ 26 & Exh. 1 ¶ III(B).

27 To illustrate, we provide the following simplified hypothetical:
28

1 On January 1, 1999, Eagle pilot John Johnson starts flying as a captain at
 2 Eagle. In autumn, American decides that, on November 5, 1999, it will
 3 bring on 40 pilots. American is required to offer half of those slots to
 4 eligible pilots at Eagle. Because Johnson is one of the 20 most senior
 5 Eagle pilots who have not yet been offered a position at American, he is
 6 entitled to one of those 20 positions. However, Eagle exercises its
 7 authority to hold Johnson in his position until July 1, 2000, eighteen
 months after Johnson became a captain at Eagle. The next time American
 hires new pilots after July 1, 2000, Johnson is one of those pilots. Once at
 American, Johnson receives a seniority number on American's seniority
 list as if he had been hired at American on November 5, 1999, the date he
 became entitled to a position at American, i.e., he is senior to pilots hired
 at American after November 5, 1999.

8 McDaniels Decl. ¶ 28.

9 **2. Pilots' "length of service" at American**

10 The Flow-Through Agreement determined certain terms of employment for Flow-Through
 11 Pilots once they reached American. For example, at American, a pilot's pay is determined in part by
 12 the pilot's "length of service," to which Plaintiffs also refer as "classification seniority." *Id.* ¶ 11;
 13 Complaint ¶ 16. Length of service for pay purposes is distinct under the CBA from a pilot's
 14 "occupational seniority," which is used when pilots bid on the aircraft and routes they would like to
 15 fly. Complaint ¶ 16.² Ordinarily, length of service is counted from the date that a pilot enters the
 16 American Airlines payroll, excluding any time that the pilot spent on furlough. McDaniels Decl. ¶ 13.
 17 Under the Flow-Through Agreement, this general rule applies to the Flow-Through Pilots: their length
 18 of service begins when they enter the American Airlines payroll—not when they entered the Eagle
 19 payroll or when they became entitled to a position at American. *Id.* ¶¶ 29, 33 & Exh. 1 ¶ III(C).

20 This general rule has several exceptions. First, pilots coming to American via a merger with
 21 another airline have been awarded length of service starting when they were hired at their original
 22 airline. McDaniels Decl. ¶ 34. This approach dates to American's merger with Air California in 1987,
 23

24
 25 ² At American, pilots' length of service affects their pay as well as other benefits, and the CBA
 26 includes different definitions of length of service depending on its particular application. Because these
 27 distinctions are not material to Plaintiffs' claim, we assume for purposes of simplicity that any
 reference to "length of service" or "classification seniority" refers to length of service for pay purposes
 as described in this paragraph. We also assume that any reference to "occupational seniority" refers to
 pilots' seniority for bidding and furlough purposes.

1 and includes every merger since, including the 2001 merger with Trans World Airlines (“TWA”) and
2 the 2013 merger with USAir. *Id.*; Declaration of David C. Brown, filed herewith, ¶ 13. Second, APA
3 and American recently agreed to restore some length of service credit to pilots who had returned to
4 American from furlough, deviating from the ordinary rule that time on furlough does not count towards
5 length of service. Brown Decl. ¶¶ 16-21 & Exh. 2. Included in the CBA effective January 30, 2015,
6 this agreement (known as “Letter G”) provided up to two years of length of service credit to those
7 pilots. Brown Decl. ¶¶ 16, 20-21; Exh. 2 at 44. Plaintiffs and the putative class were not covered by
8 these exceptions because they did not come to American via merger, and had not been furloughed.
9 McDaniels Decl. ¶¶ 16, 44.

10 **3. Implementation of the Flow-Through Agreement, and the events of 2001**

11 By September 11, 2001, more than 100 Eagle pilots had started work at American under the
12 Flow-Through Agreement, while another several hundred had become entitled to positions but were
13 being held back at Eagle. Complaint ¶¶ 36-37. The economic effects of the terrorist attacks led
14 American to stop hiring and to furlough a massive number of pilots. McDaniels Decl. ¶¶ 41-42.
15 American furloughed nearly 3,000 pilots, and did not begin recalling those pilots until 2007. *Id.* ¶ 42.

16 The terrorist attacks coincided with the merger of TWA into American. *Id.* ¶ 37. American
17 purchased TWA’s assets in April 2001, placing them into a new entity known as TWA LLC, with the
18 intention that the employees of TWA LLC would eventually become employed by American. *Id.* An
19 agreement known as “Supplement CC” determined how the former TWA pilots would be integrated
20 into the American pilot seniority list. McDaniels Decl. ¶ 38 & Exh. 16. Under Supplement CC, more
21 than 1,000 former TWA pilots (to whom Plaintiffs refer as the “TWA-LLC Staples,” Complaint ¶ 40)
22 were placed at the end of the then-existing American seniority list—junior to all of the Flow-Through
23 Pilots then flying for American and to all of the Eagle pilots who had become entitled to positions at
24 American but were being held back at Eagle. McDaniels Decl. ¶ 44; Complaint ¶ 40. Meanwhile, the
25 post-September 11 furloughs at American proceeded on a seniority basis under the CBA. McDaniels
26 Decl. ¶ 42. American did not furlough any of the Flow-Through Pilots then working for American,
27 who were senior to many of the former TWA pilots under Supplement CC. *Id.* ¶ 44.

1 The Flow-Through Agreement included a frequently-used arbitration mechanism for resolving
 2 disputes. *Id.* ¶¶ 30, 47. Some of the disputes related to how the Flow-Through Agreement should
 3 operate in light of the post-September 11 furloughs and the TWA acquisition. *See id.* ¶¶ 49-55. The last
 4 arbitration award under the Flow-Through Agreement was issued on April 9, 2010, and none of the
 5 awards is currently under challenge or subject to challenge at this late date. *Id.* ¶ 56.

6 **4. American’s merger with USAir**

7 In 2013, American merged with USAir, necessitating the integration of American’s pilot
 8 seniority list with the two seniority lists in place at USAir. Complaint ¶ 58; Brown Decl. ¶¶ 5-9;
 9 Declaration of Thomas Duncan, filed herewith, ¶ 20.³ These three seniority lists will be integrated
 10 through a binding arbitration process known as the seniority list integration (“SLI”) arbitration, which
 11 is currently ongoing. Duncan Decl. ¶¶ 25-26 & Exh. 18. APA is not a party to the seniority integration
 12 process; rather, each of the three pilot groups has authority to present a proposal to an arbitration panel,
 13 through a pilot committee and counsel selected by each pilot group. Duncan Decl. ¶ 26 & Exh. 18.
 14 Count II attacks actions of the committee representing pre-merger American pilots, known as the
 15 American Airlines Pilots Seniority Integration Committee or “AAPSIC.” *See* Complaint ¶¶ 83-89;
 16 Duncan Decl. ¶ 5. Plaintiffs incorrectly attribute AAPSIC’s actions to APA itself; in fact, APA is
 17 bound through an agreement with the participants not to interfere with any of the committees,
 18 including AAPSIC. Duncan Decl. ¶¶ 26-27 & Exh. 18 at ¶ 8(a).

19 Plaintiffs allege that APA (actually, AAPSIC) entered into a stipulation in the seniority
 20 integration arbitration that pilots’ prior service at regional affiliated airlines of American and USAir,
 21 including Eagle, will not be considered in integrating the seniority lists (“Stipulation”). Complaint
 22 ¶ 61. But on August 27, 2015, one of the merger committees representing the former USAir pilots
 23 withdrew from the Stipulation, thereby abrogating it. Duncan Decl., ¶¶ 37-39 & Exh. 30. The parties
 24 later agreed on a new set of stipulations that do not contain the challenged Stipulation. Duncan
 25

26 ³ US Airways had two pilot seniority lists due to an earlier merger of US Airways and America
 27 West, after which the pilot groups of those two airlines were unable to agree on an integrated list.
 28 Duncan Decl. ¶¶ 21-23.

1 Decl. ¶¶ 37, 39; *compare* Exh. 27 at 1, ¶ 4 (challenged Stipulation), *with* Exh. 28 (September 19, 2015
2 stipulations) & Exh. 29 (January 15, 2016 stipulations).

3 Plaintiffs also complain about a proposal for integrating the seniority lists presented by
4 AAPSIC on June 19, 2015 (“Proposal”), though they again misattribute the Proposal to APA.
5 Complaint ¶ 63. Like the Stipulation, the Proposal has been withdrawn for reasons unrelated to this
6 case. Duncan Decl. ¶¶ 29-33 & Exh. 51; Complaint ¶¶ 67, 69 (admitting Proposal was withdrawn and
7 replaced). On September 19, 2015, AAPSIC submitted an entirely different proposal containing none
8 of the features of the original proposal on which Count II is predicated. Duncan Decl. ¶¶ 35, 40-43, 51-
9 61; *compare* Exh. 19 at 1, ¶ 4 (challenged Proposal), *with* Exh. 24 (September 19, 2015 AAPSIC
10 proposal); *see also* Complaint ¶ 69. Nowhere in the Complaint do Plaintiffs object to any aspect of the
11 September 19, 2015 proposal. Indeed, they have informed AAPSIC by letter that they “agree on
12 [AAPSIC’s] approach.” Duncan Decl. ¶¶ 43, 71 & Exh. 41.

13 ARGUMENT

14 **I. Summary Judgment Standard**

15 The Court should grant summary judgment if “there is no genuine dispute as to any material
16 fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A dispute is
17 “genuine” if “the evidence is such that a reasonable jury could return a verdict for the non-moving
18 party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party bears the initial
19 burden of identifying the portions of the pleadings and evidence that demonstrate the absence of a
20 triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 325 (1986). If the moving
21 party meets this initial burden, the burden then shifts to the non-moving party to demonstrate “specific
22 facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324.

23 **II. Count I of Plaintiffs’ Complaint is almost entirely untimely and relates to periods 24 during which APA owed Plaintiffs no duty of fair representation.**

25 Plaintiffs’ Count I accuses APA of violating the duty of fair representation through “Agreement
26 to Discriminatory [length of service] Provisions.” Complaint at 25:13 (heading). As shown below, this
27 claim fails as a matter of law because the referenced length of service agreements occurred more than
28 six months before Plaintiffs filed their initial complaint on July 6, 2015. *See* Docket No. 1. Moreover,

1 when APA and American made the referenced agreements, the Eagle pilots affected by those
 2 agreements had not yet come to American and were still flying for Eagle, so APA did not owe them
 3 any duty. The sole arguable exception to these points is Plaintiffs' claim regarding Letter G, which is
 4 addressed in a separate section below.

5 A. Count I is untimely.

6 A six-month statute of limitations applies to Plaintiffs' claim that APA breached its duty of fair
 7 representation. *See, e.g., Lea v. Republic Airlines, Inc.*, 903 F.2d 624, 633–34 (9th Cir. 1990); *accord*
 8 *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1106 (2d Cir. 1991); *Landry v. Air Line Pilots*
 9 *Ass'n Int'l*, 901 F.2d 404, 411-12 (5th Cir. 1990).⁴ The six-month period "begins ... when a plaintiff
 10 'knew, or should have known, of the defendant's wrongdoing,'" *Stone v. Writer's Guild West, Inc.*,
 11 101 F.3d 1312, 1314 (9th Cir. 1996) (internal quotation marks omitted), that is, "'when the [plaintiff]
 12 discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the
 13 alleged violation,'" *id.* (internal quotation marks omitted). Where the claim is premised on a CBA, it
 14 accrues and the statute of limitations begins running, at the latest, when the agreement takes effect. *See*
 15 *Addington v. US Airline Pilots Ass'n* ("*Addington I*"), 606 F.3d 1174, 1181–83 (9th Cir. 2010).

16 Here, these principles lead to judgment for APA on nearly all of Plaintiffs' Count I, which
 17 relates to their length of service credit at American. Complaint ¶¶ 72-82. The allegedly discriminatory
 18 system for determining Plaintiffs' length of service was created in 1997, when the Flow-Through
 19 Agreement was executed, and has not been changed since. Specifically, Paragraph III(C) of that
 20 Agreement states that an Eagle pilot's "length of service for pay purposes ... will be based on the date
 21 such pilot is entered on the [American] payroll." Exh. 1 ¶ III(C).⁵ This rule has been in place for almost
 22

23
 24 ⁴ The six-month statute of limitations applies to duty of fair representation claims under both
 25 the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.*, which governs unions in the railroad and
 26 airline industry, and the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.*, which
 27 governs other private sector unions. *See Landry*, 901 F.2d at 411. This section utilizes precedent under
 28 both the RLA and NLRA.

⁵ In addition to defining Plaintiffs' length of service for pay purposes, the Flow-Through Agreement also defines their length of service for pension and vacation benefits, as well as their seniority. *Id.*

1 20 years without change. *See* McDaniels Decl. ¶33. Plaintiffs’ suit is therefore far too late. *See*
 2 *Addington I*, 606 F.3d at 1181–83. As shown below, although Plaintiffs attempt to peg Count I to more
 3 recent events, they cannot do so, and those events occurred outside the limitations period in any event.

4 (1) The granting of length of service credit for other pilot groups.

5 The Complaint alleges that APA did not negotiate for Flow-Through Pilots to receive credit for
 6 time at Eagle, but negotiated for other pilot groups to get credit “for service at other airlines, including
 7 TWA, TWA LLC, US Airways, Reno Air, AirCal, and Mid-Atlantic Airways.” Complaint ¶ 52(d). All
 8 of these airlines were merged into American. McDaniels Decl. ¶ 34.⁶ Eagle, in contrast, has never
 9 merged into American but continues to operate as a separate airline. McDaniels Decl. ¶ 16.⁷

10 Plaintiffs’ claim of unequal treatment accrued when the Flow-Through Agreement was
 11 executed in 1997. At that time, American already had a policy of allowing pilots coming to American
 12 via a merger to retain length of service accrued prior the merger, unlike pilots from Eagle under the
 13 Flow-Through Agreement. McDaniel Decl. ¶¶ 33-34. Indeed, American had applied that policy in the
 14 AirCal and Reno Air mergers referenced in Plaintiffs’ Complaint. *See id.* ¶ 34; Complaint ¶ 52(d).

15 American’s consistent application of that policy after 1997 in the TWA and USAir mergers
 16 does not revive Plaintiffs’ claim. In *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), the plaintiff
 17 claimed that her seniority at United was adversely affected by a discriminatory employment policy. *Id.*
 18 at 554-56. The Supreme Court found the claim untimely because, although the policy had a
 19 “continuing impact on her pay and fringe benefits,” it was established outside the limitations period.
 20 *Id.* at 558. Here, too, the policy was established too far in the past for Plaintiffs to pursue a claim.⁸

22 ⁶ The former Mid-Atlantic pilots are a subset of the US Airways pilots, and thus also came to
 American in December 2013. *See* Duncan Decl. ¶ 24.

23 ⁷ This distinction means that even if Plaintiffs’ Count I were timely, no reasonable jury could
 24 find that APA violated its duty of fair representation. *See infra* at 12-13 (describing high standard for
 duty of fair representation claims).

25 ⁸ *United Air Lines v. Evans* was superseded by the Lilly Ledbetter Act, with regard to Title VII
 26 claims. *See Groesch v. City of Springfield, Ill.*, 635 F.3d 1020, 1028 (7th Cir. 2011). However, because
 Congress has passed no such law applying to duty of fair representation claims, *Evans* still applies. *See*
 27 *Pouncil v. Tilton*, 704 F. 3d 568, 580 (9th Cir. 2012) (relying on *Ledbetter v. Goodyear Tire & Rubber*
Co., 550 U.S. 618 (2007), in explaining principles of timeliness notwithstanding that *Ledbetter* had
 28 been superseded by the Ledbetter Act with regard to Title VII claims).

1 In any event, even if each of these mergers generated a new claim, the most recent claim arose
 2 in December 2013, when American and USAir merged, and the former USAir pilots became employed
 3 by American. Brown Decl. ¶¶ 7-11. At that time, American began paying the former USAir pilots
 4 under the system Plaintiffs complain of, i.e. including time at USAir in calculating their length of
 5 service. Brown Decl. ¶¶ 7-13.⁹ Thus, the challenged policy was most recently applied approximately
 6 18 months before Plaintiffs filed their lawsuit, far outside the limitations period.

7 (2) Plaintiffs' other claims of discrimination in favor of former TWA pilots

8 Plaintiffs also allege that APA has favored the former TWA pilots over the Flow-Through
 9 Pilots in three other ways. First, they complain that former TWA pilots were given access to jobs at
 10 Eagle, displacing some Eagle pilots from their positions. *See* Complaint ¶¶ 46-48. But the Complaint
 11 itself dates this event to 2003. *See id.* ¶ 46. Second, Plaintiffs observe that American and APA did not
 12 treat former TWA pilots as new hires triggering obligations under the Flow-Through Agreement,
 13 leading to a series of arbitrations. The Complaint alleges that APA and American made this agreement
 14 in June 2007, *see* Complaint ¶¶ 52(b)-(c), 53, and that those arbitrations were concluded in 2010, *id.*
 15 ¶¶ 52(b)(i), 54. Third, APA allegedly contended that when the Flow-Through Agreement expired in
 16 May 2008, the Flow-Through Pilots not yet at American should forfeit their "placeholder" numbers on
 17 the American seniority list. *See* Complaint ¶ 52(c). This claim accrued, at the very latest, on June 30,
 18 2008, the date of the arbitration decision resolving that dispute. McDaniels Decl. ¶ 55 & Exh. 14.

19 (3) Plaintiffs' letters to APA

20 Plaintiffs also allege that they have "requested that APA take action to seek to rectify or
 21 remedy the disparities in ... [length of service] credit," but "APA did not respond to these letters or
 22 provide plaintiffs any explanation or justification for the disparities." Complaint ¶ 57; *see also* ¶ 75(c).

25 ⁹ Plaintiffs have not alleged that they were unable to find out about the rules for pay of US
 26 Airways pilots until after January 6, 2015. Any such claim would be implausible because the rules
 27 were widely known at American and APA, and were not confidential or secret. Brown Decl. ¶ 13.
 28 Similarly, CBAs between American and APA are made available to all American pilots by APA and
 are published as public documents by the National Mediation Board. McDaniels Decl. ¶ 58.

1 This claim is untimely for two reasons. First, a plaintiff cannot revive a time-barred claim
 2 merely by requesting that a union take action to alter or remedy conduct that occurred more than six
 3 months previous. Rather, “[o]nce the union’s decision became final ... its subsequent inactivity did not
 4 amount to a new violation.” *Christiansen v. APV Crepaco, Inc.*, 178 F.3d 910, 916 (7th Cir. 1999). A
 5 contrary rule would render the statute of limitations illusory. Indeed, even if Plaintiffs had sent letters
 6 to APA within the limitations period, such action would not toll the statute of limitations, let alone
 7 restart it entirely. *See Smith v. United Airlines, Inc.*, 2014 WL 4181978, at *3 (N.D. Cal. Aug. 22,
 8 2014) (only utilization of mandatory grievance procedures tolls the statute of limitations); *Stone*, 101
 9 F.3d at 1315 (same). Second, even if Plaintiffs’ letters could somehow restart the limitations clock, the
 10 Complaint admits that the first such letter was sent in May 2013, and the most recent in December
 11 2014, Complaint ¶ 57—both more than six months before they filed suit.

12 B. Count I relates to conduct undertaken when APA did not owe a duty to Plaintiffs.

13 There is another reason why APA should receive judgment on most of Count I: the challenged
 14 actions occurred when the affected Flow-Through Pilots had not yet begun flying for American and
 15 therefore were not represented or owed any duty by APA. Plaintiffs are simply wrong to assert that
 16 APA’s duty to these pilots arose before they started work at American. *See* Complaint ¶ 73.

17 Under the Railway Labor Act, “[a] union’s duty of fair representation ... does not extend to
 18 persons who are not employees in the bargaining unit.” *McNamara-Blad v. Ass’n of Prof’l Flight*
 19 *Attendants*, 275 F.3d 1165, 1169-70 (9th Cir. 2002) (quoting *Karo v. San Diego Symphony Orchestra*
 20 *Ass’n*, 762 F. 2d 819, 821 (9th Cir. 1985)). Moreover, “it is *actual* inclusion in the bargaining unit—
 21 not ‘impending’ inclusion—that triggers attachment of the duty of fair representation.” *Bensel v. Allied*
 22 *Pilots Ass’n*, 387 F. 3d 298, 314 (3d Cir. 2004). Individuals who have seniority rights to a position—
 23 but who have not actually started working in that position—are not part of the bargaining unit and are
 24 not owed a duty of fair representation. *Spennau v. CSX Transp., Inc.*, 279 F. 3d 1313, 1315 (11th Cir.
 25 2002); *Allen v. CSX Transp., Inc.*, 325 F.3d 768, 772-74 (6th Cir. 2003).¹⁰

26
 27 ¹⁰ Plaintiffs’ situation is directly analogous to that of the plaintiffs in *Spennau*, in which
 28 locomotive engineers at a railroad had seniority rights to a different position, trainman, at the same
 (Footnote continued)

1 Here, until any Eagle pilot *actually began work at American*, the pilot was not part of APA's
 2 bargaining unit and was not owed a duty by APA. *See, e.g., Spenlau*, 279 F.3d at 1315. Until that time,
 3 Plaintiffs were working at Eagle under the exclusive representation of ALPA, *see* McDaniel Decl.
 4 ¶¶ 15-16, and therefore could not have been represented by APA. *See McNamara-Blad*, 275 F.3d at
 5 1171.¹¹ Indeed, APA was barred by the duty of fair representation from advancing the Eagle pilots'
 6 interests at the expense of the pilots in its bargaining unit. *McNamara-Blad*, 275 F.3d at 1173.

7 Nearly all of the allegations of Count I relate to actions APA took before the affected Flow-
 8 Through Pilots began work at American: (1) the length of service rules for Flow-Through Pilots were
 9 determined by the Flow-Through Agreement, which was negotiated in 1997, before any Eagle pilot
 10 came to American under that agreement; (2) when APA allegedly negotiated to allow former TWA
 11 pilots to “flow down” and take positions at Eagle in 2003, Complaint ¶¶ 47-48, any pilots displaced
 12 thereby would have been employees at Eagle, not represented by APA; (3) when APA allegedly
 13 advocated for former TWA pilots not to be treated as new hires in or before June 2007, Complaint
 14 ¶ 52(b)-(c), the pilots affected were those at Eagle who were not able to obtain positions at American
 15 in the 1:2 ratio under the Flow-Through Agreement; and (4) when APA allegedly took the position that
 16 American seniority numbers for Eagle pilots who had not yet come to American should be forfeited
 17 upon the expiration of the Flow-Through Agreement in May 2008, Complaint ¶ 52(c), the pilots
 18 affected were those who had not yet started at American.¹²

19 _____
 20 railroad. *Id.* at 1314-15. The defendant union represented the trainmen, and negotiated an agreement
 21 that provided benefits only to trainmen in “active ... service,” thereby excluding the plaintiffs. *Id.* at
 22 1314. The Eleventh Circuit rejected plaintiffs’ duty of fair representation claim because, despite their
 23 seniority rights, the engineers “were not of the same class of employees as trainmen,” and thus were
 24 not owed a duty of fair representation by the union. *Id.* at 1315. *Accord Allen*, 325 F.3d at 773
 25 (rejecting a duty of fair representation claim on similar facts).

26 ¹¹ Thus, for example, in arbitrations conducted under the Flow-Through Agreement, ALPA
 27 represented all Eagle pilots, even those pilots who had already received seniority numbers at
 28 American. McDaniels Decl. ¶ 57.

¹² To be sure, APA did owe a duty of fair representation to the former Eagle pilots who
 “flowed up” and actually began working at American, as of the date on which each such pilot started
 work for American. But APA did not breach that duty, either because those pilots were not yet
 working for American when the challenged action occurred (Item 1 above in the text), or could not
 have been adversely affected thereby because the action would have affected only pilots still employed
 at Eagle (Items 2-4 above in the text).

1 Plaintiffs cannot revive these claims by arguing that APA should have reversed the challenged
 2 actions or taken remedial measures once the affected pilots began work at American. The Ninth Circuit
 3 has explained that “a union’s duty of fair representation to new employees is not implicated where a
 4 union implements a position that it adopted before the new employees became members in the union’s
 5 statutory bargaining unit,” even when that implementation occurs *after* the new employees enter the
 6 bargaining unit. *McNamara-Blad*, 275 F.3d at 1173; *see also Christiansen*, 178 F.3d at 916.

7 **III. APA is entitled to summary judgment on the portion of Count I relating to the**
 8 **2015 CBA.**

9 Only one final portion of Count I relates to a period during which APA did represent Plaintiffs,
 10 and is arguably timely.¹³ Specifically, Plaintiffs complain about Letter G, an agreement that restored
 11 up to two years length of service credit for pilots who had been furloughed from American. *See*
 12 Complaint ¶¶ 52(e), 75(b)(ii); Exh. 2. Letter G was intended to remedy the harm suffered by pilots who
 13 had been furloughed by American—i.e., forced out of their jobs. Plaintiffs’ claim fails because no
 14 reasonable factfinder could conclude that APA breached its duty of fair representation by negotiating
 15 Letter G or that APA’s negotiating conduct caused Plaintiffs’ claimed injury of lower compensation.

16 In assessing claims for breach of a union’s duty, courts take a “highly deferential” approach,
 17 “recognizing the wide latitude that [unions] need for the effective performance of their ...
 18 responsibilities.” *Air Line Pilots Ass’n, Int’l v. O’Neill*, 499 U.S. 65, 78 (1991) (hereinafter “*O’Neill*”).
 19 To prevail on the “breach” element of the claim, a plaintiff must show that the union acted arbitrarily,
 20 discriminatorily, or in bad faith. *Id.* at 67. A union’s conduct is arbitrary “only if ... the union’s
 21 behavior is so far outside a wide range of reasonableness as to be irrational.” *Id.* (internal quotations
 22 omitted). A union’s conduct is discriminatory only if “substantial evidence” demonstrates that the
 23 conduct is “intentional, severe, and unrelated to legitimate union objectives,” *Beck v. United Food &*
 24 *Commercial Workers Union, Local 99*, 506 F.3d 874, 880 (9th Cir. 2007) (internal quotations omitted),
 25 and that it arises from “prejudice or animus,” *Simo v. Union of Needletrades, Indus. & Textile*

26 _____
 27 ¹³ APA preserves all arguments regarding the timeliness of Plaintiffs’ claim regarding the 2015
 28 CBA, but does not argue in this motion that the claim is untimely.

1 *Employees, Sw. Dist. Council*, 322 F.3d 602, 618 (9th Cir. 2003) (internal quotations omitted). To
 2 show bad faith, plaintiffs must provide “substantial evidence of fraud, deceitful action, or dishonest
 3 conduct.” *Beck*, 506 F.3d at 880.

4 Additionally, plaintiffs must be able to demonstrate a causal connection between the alleged
 5 breach and their claimed injury. *See, e.g., Ackley v. Western Conf. of Teamsters*, 958 F.2d 1463, 1472
 6 (9th Cir. 1992); *Bishop v. Air Line Pilots Ass’n, Int’l*, 159 L.R.R.M 2005, 1998 WL 474076 *16 (N.D.
 7 Cal. Aug. 4, 1998), *aff’d mem.*, 211 F.3d. 1272 (9th Cir. 2000). Where, as here, the alleged breach
 8 concerns the union’s conduct in collective bargaining, the causation element requires a plaintiff to
 9 prove that if the union had advanced the negotiating proposal favored by the plaintiff, “the company
 10 would have acceded to the union’s demands.” *Ackley*, 958 F.2d at 1472; *Bishop*, 1998 WL at *18.¹⁴

11 A. No reasonable jury could conclude that APA acted discriminatorily by negotiating
 12 Letter G.

13 The Complaint suggests that APA acted discriminatorily in negotiating Letter G because the
 14 agreement benefited furlougees but not the Flow-Through Pilots. Complaint ¶ 75(e). But Plaintiffs
 15 cannot prove two required elements of a discrimination claim. First, Plaintiffs cannot show that APA’s
 16 conduct was “unrelated to legitimate union objectives.” *Beck*, 506 F.3d at 880 (internal quotations
 17 omitted). Letter G provides a benefit to a group of pilots who have suffered a specific harm—being
 18 furloughed—that neither Plaintiffs nor the members of the putative class suffered. Duncan Decl. ¶ 17
 19 (no Flow-Through Pilots were furloughed at Eagle); McDaniels Decl. ¶ 44 (no Flow-Through Pilots
 20 were furloughed at American). The mitigation of that harm is a legitimate union objective.¹⁵

21 _____
 22 ¹⁴ Although Plaintiffs’ burden on this point is heavy, that is simply the consequence of
 23 substantive federal labor policy. As the Ninth Circuit has explained, the duty of fair representation
 24 “test for causality” in the bargaining context “is difficult to satisfy, and rightly so,” given the wide
 25 range of reasonableness accorded to the union’s bargaining conduct; “[o]therwise . . . the bargaining
 26 process would be under constant siege in the courts.” *Ackley*, 958 F.2d at 1472. “Both union members
 27 and employers have a strong interest” in “the long-term stability of labor-management contracts,” and
 28 “both benefit from the rule that labor-management contracts will not be lightly set aside.” *Id.* at 1473.
 Rather than the courts, “the proper vehicle . . . for addressing members’ complaints regarding the
 adequacy of union representation during the bargaining process” is “the union’s internal election and
 rulemaking processes” *Id.* at 1472.

¹⁵ It is important to appreciate that Plaintiffs do not and cannot allege that they were excluded
 from the benefit negotiated in Letter G. Letter G applies to them and they would be eligible to receive
 (Footnote continued)

1 Two undisputed facts support the commonsense conclusion that Letter G served a legitimate
 2 union interest rather than reflecting prejudice against Flow-Through Pilots. First, several of
 3 American’s peer airlines provide length of service credit to pilots on furlough, Brown Decl. ¶ 19,
 4 demonstrating that APA had a legitimate interest in negotiating a similar benefit for its own pilots. *See*
 5 *Elwell v. Air Line Pilots Ass’n Int’l*, 65 F. Supp. 3d 1103, 1110 (D. Colo. 2014) (rejecting duty of fair
 6 representation claim where union modeled its position after a contract at another airline). Second, APA
 7 has an established pattern throughout its history—extending nearly twenty years before it negotiated
 8 Letter G—of negotiating for pilots to receive length of service credit lost on furlough. Brown Decl.
 9 ¶18. Thus, Letter G served APA’s legitimate interest in consistency with prior positions, and was not
 10 motivated by animus towards Plaintiffs or the Flow-Through Agreement. *Cf. Pearson v. Massachusetts*
 11 *Bay Transp. Auth.*, 723 F.3d 36, 42 (1st Cir. 2013) (“Causation moves forward, not backwards”).

12 Nor can Plaintiffs show that the situation of Flow-Through Pilots was so similar to that of the
 13 furloughees that APA lacked a legitimate reason to differentiate between them. To reiterate, none of
 14 the Flow-Through Pilots were ever furloughed, either from Eagle or from American. Duncan Decl.
 15 ¶ 17; McDaniels Decl. ¶ 44. Plaintiffs nevertheless suggest that both groups suffered an equivalent
 16 harm, i.e., both were injured by the “lack of work at [American] after September 11, 2001,”
 17 presumably because this “lack of work” both led to furloughs and delayed Eagle pilots’ ascension to
 18 American. *See* Complaint ¶ 75(e). But such an argument could not be accepted by any reasonable jury
 19 because the harms suffered by furloughees and Flow-Through Pilots were clearly distinct. Eagle pilots
 20 whose ascension to American was delayed (even for several years) continued to be employed at Eagle
 21 while waiting to “flow up” to American, and thus continued to work and receive their paychecks. *See*

22
 23 _____
 24 additional length of service credit if they had been furloughed from American, which they were not.
 25 Their claim is instead that APA should have negotiated an *altogether different* benefit: additional
 26 length of service credit for all pilots who were working either for American or for another airline
 27 owned by American’s parent corporation during the post-September 11 furlough, regardless of whether
 28 or not those pilots incurred any injury from the furlough. Merely articulating Plaintiffs’ claim reveals
 how different their situation is from that of the furloughees, as well as how insubstantial their claim is
 in light of the great deference that is accorded under the duty of fair representation to a union’s ability
 to formulate its bargaining goals and priorities.

1 Duncan Decl. ¶ 19.¹⁶ In sharp contrast, American pilots forced out of their jobs via furlough suffered
 2 disruptions to their careers and lifestyles not experienced by those who merely remained at Eagle—
 3 they had to look for new jobs, adjust to new workplaces, and possibly experience periods of
 4 unemployment or the need to relocate their families. *See* Duncan Decl. ¶¶ 14-15.

5 In addition, the harm Plaintiffs allege they suffered, i.e. stagnation of their careers at Eagle, was
 6 incurred before they began work at American, and thus before APA owed them any duty of fair
 7 representation. *See supra* at 10-12. APA therefore had a legitimate basis for distinguishing between the
 8 two types of harm, one suffered on APA’s watch by employees within APA’s bargaining unit, and the
 9 other suffered by pilots who, at the time they incurred the harm, had not yet joined the APA bargaining
 10 unit.¹⁷ Finally, Plaintiffs’ alleged harm of career stagnation, though unlike the harm suffered by
 11 furloughees, is quite similar to the harm experienced by a different group of pilots: those at American
 12 after 9/11 who avoided furlough but nevertheless lost opportunities for career advancement as
 13 American cut its capacity and slashed employee pay. Letter G treats Plaintiffs exactly like this group;
 14 neither is eligible for additional length of service credit because neither experienced furlough.¹⁸

15 Even if Plaintiffs could prove that APA lacked a legitimate reason for negotiating Letter G
 16 (which they cannot), they would still have to show that Letter G was motivated by animus towards the
 17

18 ¹⁶ Plaintiffs allege that some Eagle pilots were displaced from their positions at Eagle by
 19 furloughed American pilots. Complaint ¶ 48. But the reassignment of a pilot to another pilot position
 20 within the same airline is much less disruptive than a layoff. In any event, Plaintiffs have not alleged
 21 that the named Plaintiffs, or any member of the putative class, were among those displaced. At most,
 22 only seven future Flow-Through Pilots could have been displaced at Eagle by an American furlougee,
 23 given their seniority at Eagle and the number of furloughees who “flowed down” to Eagle. Duncan
 24 Decl. ¶ 19.

25 ¹⁷ Although Plaintiffs assert that the TWA LLC pilots “did not perform work for [American]”
 26 before being furloughed, Complaint ¶ 42, the undisputed facts demonstrate that TWA LLC was
 27 recognized by the National Mediation Board as part of a single airline operation with American. *See*
 28 Duncan Decl. ¶ 10. Eagle pilots, by contrast, are represented by a different union, ALPA, because
 Eagle is not recognized as part of American’s operation.

¹⁸ Plaintiffs are also not similarly situated to two specific subsets of pilots discussed in the
 Complaint—former TWA pilots who received credit under Letter G and former MidAtlantic pilots for
 whom APA has advocated for Letter G credit, Complaint ¶¶ 52(e)(i), (iv)—because, unlike Plaintiffs
 and the putative class, both groups were actually furloughed. *See* McDaniels Decl. ¶¶ 41-44; Duncan
 Decl. ¶¶ 13-17, 24, 46.

1 Flow-Through Pilots. *Simo*, 322 F.3d at 618. Plaintiffs’ Complaint attempts to do so by asserting a list
 2 of examples of alleged mistreatment they have suffered at the hands of APA. As shown above,
 3 however, APA did not represent the affected Eagle pilots when these events occurred. *See supra* at 10-
 4 12. Far from demonstrating animus towards Flow-Through Pilots, these events simply illustrate APA’s
 5 vigorous advocacy for the pilots it actually did represent. *See McNamara-Blad*, 275 F.3d at 1173; *see*
 6 *also Flight Attendants in Reunion v. American Airlines, Inc.*, ___ F.3d ___, 2016 WL 611970 *5 (2d
 7 Cir. Feb. 16, 2016) (holding that hostile union conduct occurring prior to the time the union owed
 8 plaintiffs a duty of fair representation cannot evidence union’s present animus toward them). For the
 9 same reason, Plaintiffs gain nothing through their assertion that APA was hostile to them because it
 10 “did not desire pilots employed at American Eagle to have any rights to flow-up to [American], but
 11 desired only to secure the right for [American] pilots to flow-down to American Eagle.” Complaint ¶
 12 76. To the extent APA had any such desire, it would have reflected only APA’s entirely appropriate
 13 advocacy in favor of the pilots it represented at the time—i.e., American pilots who might need to flow
 14 down. Plaintiffs cannot infer an illegitimate animus from conduct not only consistent with but
 15 mandated by the duty of fair representation. *See McNamara-Blad*, 275 F.3d at 1173.¹⁹

16 B. No reasonable jury could conclude that APA acted arbitrarily or in bad faith by
 17 negotiating Letter G.

18 Plaintiffs also cannot establish any other basis for liability under the duty of fair representation.
 19 First, for the same reasons discussed above, Plaintiffs cannot show that APA acted arbitrarily. Because
 20 Letter G served the legitimate union interest of remedying the distinct harm suffered by furlougees,
 21 APA’s negotiation of that agreement, rather than the entirely different agreement Plaintiffs prefer, was
 22 well within the “wide range of reasonableness” accorded to union bargaining activity. *O’Neill*, 499

23
 24 ¹⁹ Plaintiffs also cannot show animus merely by noting that they are less numerous than other
 25 groups of pilots. *See* Complaint at ¶ 76. If that sufficed to show animus, then any minority employee
 26 group adversely affected by union action would automatically be able to succeed on a duty of fair
 27 representation claim. Finally, Plaintiffs have no evidence at all to support the notion that APA harbors
 28 animus towards the Flow-Through Pilots because in 1995—20 years ago—the Eagle pilots voted to be
 represented by ALPA rather than APA. *See id.* at ¶ 77. Even if APA’s leaders in 1995 were upset about
 that decision (of which there is absolutely no evidence), Plaintiffs can present no evidence that they
 still hold positions in APA’s leadership.

1 U.S. at 78. Second, Plaintiffs cannot establish bad faith because they do not and cannot allege that
 2 APA engaged in “fraud, deceitful action, or dishonest conduct,” *Beck*, 506 F.3d at 880, and have not
 3 “state[d] with particularity the circumstances constituting fraud,” as required by Fed. R. Civ. P. 9(b).

4 C. No reasonable jury could conclude that, had APA proposed the different agreement that
 5 Plaintiffs prefer, American would have acceded to that demand.

6 To prove causation, Plaintiffs must establish that if, instead of proposing the Letter G length of
 7 service credit for furloughed pilots, APA had proposed the agreement that Plaintiffs prefer—additional
 8 length of service credit for all pilots who were working either for American or for another airline
 9 owned by American’s parent corporation during the post-September 11 furlough, regardless of whether
 10 or not those pilots incurred any injury from the furlough—“the company would have acceded to [that]
 11 demand[.]” *Ackley*, 958 F.2d at 1472.²⁰ This they cannot do, as they have no such evidence.

12 **IV. Count II of Plaintiffs’ Complaint is moot insofar as it arises from the withdrawn
 13 Stipulation and Proposal, and is unripe insofar as it arises from AAPSIC’s current
 14 position in the SLI arbitration.**

15 Count II focuses on the ongoing SLI arbitration to integrate the American pilot seniority list
 16 with the two seniority lists in place at USAir. The first portion of Count II focuses on the now-
 17 withdrawn Stipulation and Proposal, whereas the second portion focuses on AAPSIC’s current
 18 arbitration position. Complaint ¶¶ 61-71, 86. The first portion is moot because both the Stipulation and
 19 the Proposal were withdrawn before either could have any effect on Plaintiffs’ rights, i.e., before the
 20 SLI arbitration even commenced on the merits, and were replaced with new stipulations and a new
 21 proposal whose terms are not challenged by Plaintiffs. The second portion is not ripe because Plaintiffs
 22 have not incurred any injury from AAPSIC’s current arbitration position and, under Ninth Circuit
 23 precedent, no such claim can be pursued until the arbitration award has issued.

24 ²⁰ Although *Ackley* applied the causation rule in the context of a claim that union officers
 25 misinformed union members as to the terms of a proposed collective bargaining agreement prior to a
 26 ratification vote, other decisions make clear that it applies to any claim for violation of the duty of fair
 27 representation arising from the union’s bargaining conduct. *See, e.g., Spellacy v. Airline Pilots Ass’n –*
 28 *Int’l*, 156 F.3d 120, 124-25, 130 (2d Cir. 1998); *Merritt v. Int’l Ass’n of Machinists*, 2008 WL 5784439
 *14 (E.D. Mich. Sept. 22, 2008); *Bishop*, 1998 WL 474076 at *16-*17 (rejecting argument that *Ackley*
 causation test is limited to the context of misrepresentations prior to contract ratification votes).

1 A. The withdrawal of the Stipulation and Proposal moots the first portion of Count II.

2 Article III of the Constitution limits the jurisdiction of all federal courts to actual “Cases” and
3 “Controversies.” U.S. Const. art. III, § 2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992).
4 “To qualify as a case fit for federal-court adjudication, ‘an actual controversy must be extant at all
5 stages of review, not merely at the time the complaint is filed.’” *Arizonans for Official English v.*
6 *Arizona*, 520 U.S. 43, 67 (1997); accord *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). If
7 a claim is moot, it *must* be dismissed; “[m]ootness is a jurisdictional question because the [federal
8 courts are] not empowered to decide moot questions or abstract propositions” *North Carolina v.*
9 *Rice*, 404 U.S. 244, 246 (1971) (internal quotations omitted).

10 An “actual controversy” ceases to exist, and the underlying claim predicated upon it is moot, if
11 it becomes “impossible for th[e] court, if it should decide the [claim] in favor of the plaintiff, to grant
12 him any effectual relief whatever.” *Mills v. Green*, 159 U.S. 651, 653 (1895). In *Mills*, the Supreme
13 Court held that a lawsuit in which the plaintiff challenged the denial of his right to vote in a one-time
14 election became moot when that election was held. *Id.* at 657-58. More recently, the Ninth Circuit has
15 held that a “case becomes moot when interim relief or events have deprived the court of the ability to
16 redress [a] party’s injuries.” *Am. Cas. Co. v. Baker*, 22 F.3d 880, 896 (9th Cir. 1994) (internal
17 quotation marks omitted); accord *San Lazaro Ass’n v. Connell*, 286 F.3d 1088, 1095 (9th Cir. 2002).

18 Because the factual circumstances on which the first portion of Count II is predicated—the
19 existence of a particular Stipulation and Proposal—no longer exist, no judicial decision on those issues
20 could have any effect on the parties’ dispute. Any decision by this Court would constitute an “advisory
21 opinion[.]” “decid[ing] moot questions or abstract propositions” in contravention of Article III and of
22 longstanding judicial practices. *Rice*, 404 U.S. at 246. “[F]ederal courts are without power to decide
23 questions that cannot affect the rights of litigants in the case before them.” *Id.*

24 This principle is illustrated by *Grand Canyon Trust v. United States Bureau of Reclamation*,
25 691 F.3d 1008, 1014 (9th Cir. 2012). There, an environmental group brought suit and challenged, *inter*
26 *alia*, the sufficiency of a 2008 Biological Opinion (“BiOp”) issued by one of the defendants, the U.S.
27 Fish and Wildlife Service (“FWS”). As the litigation proceeded in the district court, the FWS issued a
28

1 new 2009 BiOp, *id.* at 1015, and after the notice of appeal had been filed, issued a new 2011 BiOp, *id.*
 2 at 1016. Just as the new stipulations and new AAPSIC proposal replaced the challenged Stipulation
 3 and Proposal in the present case, each succeeding BiOp in *Grand Canyon Trust* supplanted the prior
 4 BiOp. For that reason, the Ninth Circuit found that the plaintiff’s claims regarding the earlier BiOps
 5 were mooted by the issuance of the 2011 BiOp. *Id.* at 1016-17, holding that “the issuance of a
 6 superseding BiOp moots issues on appeal relating to the preceding BiOp,” *id.* at 1017.

7 Plaintiffs cannot make any credible argument that the challenged Stipulation and Proposal
 8 caused them any cognizable harm during the short period of time (less than three months for the
 9 Stipulation and only eleven days for the Proposal) that they were in effect. Nor do Plaintiffs allege that
 10 they suffered any such harm, but instead allege only that they will suffer harm in the future: that they
 11 “will suffer *future* damages, including reduced employment opportunities, wages and benefits,” and
 12 “will have their positions on the AAL pilot seniority list adversely affected” Complaint ¶ 88
 13 (emphasis added); *see also* Exh. 50 (Plaintiffs’ Initial Disclosures), at 6:13-15 (“Damages arising from
 14 loss of seniority position arising from the SLI process are not included as that process has not
 15 concluded.”). But those allegations cannot be based on the withdrawn Stipulation and Proposal, which
 16 were withdrawn before arbitration proceedings on the merits began, but only on a prediction as to the
 17 effect on the eventual seniority integration arbitration decision of AAPSIC’s *current* position (i.e., the
 18 remaining portion of Count II).²¹ Nor do Plaintiffs seek any non-monetary relief that can reasonably be
 19 predicated on the withdrawn Stipulation and Proposal, but only on AAPSIC’s current position. *See*
 20 Complaint ¶ 89.²²

23 ²¹ To be sure, Plaintiffs also allege that they “have accrued and continue to accrue the costs of
 24 attorneys’ fees incurred in establishing the breaches of duty by APA and attempting to mitigate the
 25 harms caused by APA’s breach of duty.” Complaint ¶ 88. But the Supreme Court has held that an
 outstanding claim for attorneys’ fees “is, of course, insufficient to create an Article III case or
 controversy where none exists on the merits of the underlying claim.” *Lewis*, 494 U.S. at 480.

26 ²² In any event, Plaintiffs’ request for “an injunction to make up any monetary loss” from the
 27 alleged breach of duty in the SLI arbitration, *id.*, is not a proper request for injunctive relief at all, but
 rather a request for money damages in disguise, which is moot for the same reasons we have discussed
 above with regard to Plaintiffs’ undisguised damages claim.

1 Finally, Plaintiffs’ request for declaratory relief that APA has breached its duty with regard to
2 the SLI process, *id.*, to the extent it is even based on the Stipulation and Proposal, cannot provide
3 Article III jurisdiction where the actual controversy between the parties as to those issues has ceased to
4 exist. *See, e.g., Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40 (1937) (explaining that the
5 Declaratory Judgment Act “is operative only in respect to controversies which are such in the
6 constitutional sense,” and that “the operation of the Declaratory Judgment Act is procedural only”); *see*
7 *also Preiser v. Newkirk*, 422 U.S. 395, 401-02 (1975) (case became moot notwithstanding claim for
8 declaratory relief); *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1514 (9th Cir. 1994) (“The
9 district court . . . may grant declaratory relief only when there is an actual case or controversy; a
10 declaratory judgment may not be used to secure judicial determination of moot questions.”); 28 U.S.C.
11 § 2201(a) (requiring an “actual controversy” for the issuance of a declaratory judgment).

12 B. The second portion of Count II is not ripe.

13 The second portion of Count II is predicated on AAPSIC’s current position in the SLI
14 arbitration, specifically its strategic decisions as to what positions to advance, what evidence to
15 introduce in the arbitration, and what portions of its arbitration strategy to disclose to Plaintiffs before
16 it is implemented. *See* Complaint ¶¶ 69-71. Under Ninth Circuit law, no fair representation claim
17 arising from the SLI arbitration can ripen until Plaintiffs incur actual injury, which happens only if and
18 when the arbitrators issue an award that disadvantages them in some cognizable way.

19 In *Addington I*, the Ninth Circuit held a duty of fair representation claim unripe because it
20 challenged the position taken by a union in an ongoing seniority integration process following an
21 airline merger, which had not yet produced a final seniority list. 606 F.3d at 1177. “To determine
22 whether a case is ripe, [the court] considers two factors: the fitness of the issues for judicial decision,
23 and the hardship to the parties of withholding court consideration.” *Id.* at 1179 (internal quotations
24 omitted). “A question is fit for decision when it can be decided without considering contingent future
25 events that may or may not occur as anticipated, or indeed may not occur at all.” *Id.* (internal
26 quotations omitted). Applying these factors, the court found the challenge before it to be unripe.

1 First, the court determined that “this case presents contingencies that could prevent effectuation
 2 of [the union’s seniority integration] proposal and the accompanying injury,” *id.* at 1179, specifically
 3 as to what seniority integration proposal would be adopted, *id.* at 1179-80. As such, the harm from the
 4 challenged proposal was too speculative for the claim to be ripe. *Id.* at 1180. Similarly, AAPSIC’s
 5 current arbitration proposal is subject to contingencies that render any challenge thereto premature—
 6 namely that the arbitrators will select between proposals from three different committees, or adopt
 7 parts of multiple proposals, or create a list not based on any of the proposals. “Because these
 8 contingencies make the claim speculative, the issues are not yet fit for judicial decision.” *Id.*

9 Second, the *Addington I* court “conclude[d] that withholding judicial consideration does not
 10 work a direct and immediate hardship on the [challenging pilots],” *id.*, because, due to many of the
 11 same contingencies that rendered the claim speculative, the litigants could not “show that withholding
 12 review would result in direct and immediate hardship and would entail more than possible financial
 13 loss,” *id.* at 1180 (internal quotations omitted). The same is true here: until the arbitration panel issues
 14 a final seniority decision that takes effect, any harm to Plaintiffs from the AAPSIC’s current proposal
 15 (which the arbitration panel may or may not adopt) is entirely speculative and thus no “direct and
 16 immediate hardship” will result from “withholding judicial consideration.” *Id.* at 1180. Indeed,
 17 Plaintiffs could not even provide an estimate of their damages on Count II in their Initial Disclosures,
 18 explaining that “Damages arising from loss of seniority position arising from the SLI process are not
 19 included as that process has not concluded.” Exh. 50 at 6:13-15. There is simply “no hardship where
 20 the [actions] the Plaintiffs challenged neither impose[d] any obligation upon [the Plaintiffs], nor in any
 21 other respect ha[d] any impact upon them felt immediately . . . in conducting their day-to-day
 22 affairs.”). *Addington I*, 606 F.3d at 1180 (internal quotations omitted).²³ As such, under *Addington I*,
 23 any claim based upon AAPSIC’s conduct in the SLI arbitration is not ripe for adjudication.

24
 25 ²³ *Addington I* cannot be distinguished from the present case on the ground that it concerned a
 26 seniority integration negotiation, whereas the present case concerns a seniority integration arbitration.
 27 Indeed, the ripeness rule of *Addington I* is, if anything, more directly applicable to an arbitration
 28 because the parties to a negotiation may have a greater ability to coerce the other side’s agreement to
 their proposal through the use of economic means such as a strike, a lockout, unilateral implementation
 (Footnote continued)

1 The same panel’s subsequent decision in *Addington v. US Airline Pilots Ass’n*, 791 F.3d 967
2 (9th Cir. 2015) (“*Addington II*”), in which neither party disputed ripeness, is not to the contrary.
3 Although the court found the SLI dispute there ripe for adjudication, it did not overrule *Addington I*.
4 Indeed, the contrast between the two decisions illustrates why Plaintiffs’ claim here is unripe. In both
5 *Addington* cases, the plaintiffs claimed the union defendant had attempted to avoid implementation of
6 a prior seniority integration arbitration award (the “Nicolau award”) arising from the merger of USAir
7 and American West Airlines. That merger was governed by a Transition Agreement providing that the
8 integrated seniority list would come into effect only if a condition precedent occurred—namely, if a
9 single CBA was executed at USAir covering USAir pilots, including the former America West pilots.
10 The defendant union had taken steps to prevent that condition from occurring, however, and by the
11 time of *Addington II*, it had succeeded by negotiating an agreement that ensured a single CBA at
12 USAir would never come into existence and the Nicolau award would thus never take effect.
13 *Addington II*, 791 F.3d at 981. The *Addington II* court concluded that the defendant union’s
14 “abandonment of the Transition Agreement’s process for implementing the Nicolau Award is no
15 longer speculative or contingent; it is a settled fact,” *id.*, on the basis of the existence of a binding

16
17
18 of contract terms, or simple bargaining leverage. In an arbitration, however, the decision is made by an
19 independent third party. Thus, any harm flowing from either party’s position is even more speculative
in an arbitration than in a negotiation.

20 *Addington I* cannot be distinguished on this ground for several additional reasons. First, the
21 present case involves an interest arbitration, in which the arbitrators actually determine the terms of the
22 parties’ contract, which is merely an alternative mechanism of negotiating a contract. Second, in
23 reaching its decision, the *Addington I* court analyzed and relied on prior decisions in the arbitration
24 context finding that claims for breach of the duty of fair representation arising from the union’s
25 handling of the arbitration did not accrue until the arbitration was complete and the arbitrator had
26 issued a final decision. *See* 606 F.3d at 1183-84. As the court concluded, “In the grievance context,
27 too, we have required that a final outcome be reached before allowing a suit based on a union’s
allegedly violative conduct that led to the decision.” *Id.* As the court explained, such a rule recognizes
28 “that the arbitrator’s final decision could make the employee whole despite the union’s errors, and that
the arbitrator could change his mind at any time prior to issuing a final and binding decision.” *Id.* at
1184 (quoting *Kozy v. Wings W. Airlines, Inc.*, 89 F.3d 635, 640 (9th Cir. 1996)). That observation is
equally applicable here.

1 agreement not subject to any future contingencies. Only that rendered the claim that the union violated
2 its duty of fair representation by negotiating that agreement sufficiently ripe for adjudication, *id.*

3 Here, by contrast, Plaintiffs have not pleaded, and cannot plead, that APA or AAPSIC has
4 taken any action with that kind of decisive final effect, much less has negotiated any such final,
5 definite, and binding agreement not subject to any future contingencies. It remains entirely unknown
6 what outcome the arbitrators will reach. Rather, at this time, the focus of the Plaintiffs' Count II can
7 only be on the AAPSIC's current position in the arbitration, which is subject to the contingencies
8 discussed above. As such, that claim should be dismissed as unripe for adjudication.

9 **V. Even if the remainder of Count II were ripe, no reasonable jury could conclude**
10 **that the Association acted arbitrarily, discriminatorily, or in bad faith in the SLI**
arbitration.

11 Finally, even if the Count II claim based on AAPSIC's current arbitration strategy decisions
12 were ripe, it would fail as a matter of law. First, Plaintiffs have no evidence that AAPSIC's current
13 arbitration strategy discriminates against them or is in bad faith. To the contrary, AAPSIC's current
14 arbitration proposal argues for pilots' longevity *not* to be a factor in the SLI decision, as Plaintiffs
15 admit (*see* Complaint ¶ 69: "The other participants [in the SLI arbitration] urged that longevity should
16 be a factor in the resulting seniority list; APA took the position that longevity should not be a
17 factor").²⁴ This position favors Plaintiffs and the putative class members by preventing their status as
18 relative newcomers to American from being held against them in the seniority integration, and
19 Plaintiffs have informed AAPSIC they "agree on that approach." Exh. 41.²⁵

20 Second, Plaintiffs cannot show that AAPSIC's challenged arbitration strategy decisions were
21 arbitrary. As just noted, Plaintiffs do not challenge AAPSIC's position that longevity should *not* be a
22

23
24 ²⁴ In the SLI arbitration context, "longevity" simply means the period of time for which a pilot
25 has flown for a carrier. In this brief, we follow the Complaint in using the term "longevity" as a
potential factor in integrating the seniority lists to distinguish it from "length of service," which (as
noted above) is used as a factor in determining the different issue of a pilot's pay.

26 ²⁵ Nor can Plaintiffs point to the withdrawn Stipulation or Proposal as evidence of
27 discrimination or bad faith, as both were withdrawn months ago, before the arbitration commenced on
the merits, for reasons unrelated to this litigation. And, for the same reasons discussed above in Section
28 III, Plaintiffs have no evidence of discrimination or bad faith on the part of APA.

1 factor in the SLI decision. Rather, their complaint is that, in addition to that position, AAPSIC should
 2 have introduced in the arbitration “evidence in support of including service at American Eagle as part
 3 of any longevity factor used for an integrated seniority list,” Complaint ¶¶ 86, just in case the arbitrators
 4 reject AAPSIC’s position and decide to use longevity as a factor in the SLI decision. In essence, they
 5 contend that AAPSIC has breached its duty of fair representation by declining to introduce evidence in
 6 the SLI arbitration to support a “fallback” position that could undermine its principal position.

7 That claim must fail, however, because AAPSIC has presented a reasoned explanation for its
 8 strategy decision not to present a “fallback” position, specifically that the use of time flying for
 9 regional airlines for purposes of longevity is not consistent with precedent from prior pilot seniority
 10 integration proceedings, and that presenting such a “fallback” position would detract significantly from
 11 AAPSIC’s primary argument against use of longevity entirely, while misdirecting both time and
 12 resources. Duncan Decl. ¶¶ 44-50. AAPSIC has also provided a reasoned explanation for its decision
 13 not to provide Plaintiffs’ advance notice of its positions: that divulging such information before
 14 presenting the positions in arbitration (at which point they would be made available on the APA
 15 website) would potentially place AAPSIC at a strategic disadvantage in the arbitration by making it
 16 more likely that the other pilots groups would have advance access to AAPSIC’s position, with extra
 17 time to prepare their rebuttals. Duncan Decl. ¶¶ 62-63.

18 As a matter of law, a claim for breach of the duty of fair representation via “arbitrary” conduct
 19 cannot be predicated on such reasoned arbitration strategy decisions. *Patterson v. Int’l Bhd. of*
 20 *Teamsters, Local 959*, 121 F.3d 1345, 1349-50 (9th Cir. 1997) (union’s refusal to introduce evidence
 21 in arbitration to support a “fallback” position not arbitrary where it may have undermined union’s
 22 principal position; “If a union provides a reasoned explanation for not pursuing a potential defense, we
 23 may not second guess its decision . . . [and its conduct] does not amount to a breach of the duty of fair
 24 representation.”); *accord Findley v. Jones Motor Freight, Div. Allegheny Corp.*, 639 F.2d 953, 960 (3d
 25 Cir. 1981); *Montevago v. U.S. Airways, Inc.*, 2009 WL 4908845 *4-*7 (D. Md. Dec. 11, 2009).²⁶

26
 27 ²⁶ See also *Peterson v. Kennedy*, 771 F.2d 1244, 1254 (9th Cir. 1985) (“We have never held
 28 that a union has acted in an arbitrary manner where the challenged conduct involved the union’s
 (Footnote continued)

1 Finally, the “fallback” position that Plaintiffs espouse would involve a reordering of the pre-
 2 merger American seniority list, as it would advance the seniority position of many of the Flow-
 3 Through Pilots based on their date of hire at Eagle, vaulting them above pilots who arrived at
 4 American before the Flow-Through Pilots did so, but after the Flow-Through Pilots were hired at
 5 Eagle. As the Second Circuit recently held, a union does not violate its duty of fair representation in an
 6 airline seniority integration process by refusing to advocate that certain employees it represents should
 7 be credited for past service at another carrier where doing so would result in such a reordering to the
 8 detriment of other employees it represents. *Flight Attendants in Reunion*, 2016 WL 611970 at *1-2, 4-
 9 5.

10 In sum, AAPSIC’s reasoned arbitration strategy decisions regarding which positions to present,
 11 what evidence to introduce, and what strategy to disclose to Plaintiffs before it is presented in the
 12 arbitration are quintessentially judgment calls that are not subject to judicial review. Until the
 13 arbitration award issues, no one will know whether those judgment calls were wise or unwise, but even
 14 if they turn out to have been unwise, they were at worst negligent, and negligence does not breach the
 15 duty of fair representation. *See Patterson*, 121 F.2d at 1349 (“A union does not breach its duty of fair
 16 representation by acting negligently.”); *Peterson*, 771 F.2d at 1254 (“[W]e have held consistently that
 17 unions are not liable for good faith, non-discriminatory error of judgment made in the processing of
 18 grievances.”). As such, even if the non-moot portion of Count II were ripe, it would be meritless.

19 CONCLUSION

20 For the foregoing reasons, the Court should grant APA’s summary judgment motion.

21 ///

22 ///

23 ///

24 ///

25 _____
 26 judgment as to how best to handle a grievance. . . . [W]e do not attempt to second-guess a union’s
 27 judgment when a good faith, non-discriminatory judgment has in fact been made. It is for the union,
 28 not the courts, to decide whether and in what manner a particular grievance should be pursued.”).

Dated: March 17, 2016.

Respectfully submitted,

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

JEFFREY B. DEMAINE
JONATHAN WEISSGLASS
Altshuler Berzon LLP

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

Attorneys for Defendant Allied Pilots Association

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