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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 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

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

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

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

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

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

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

Dated: March 17, 2016.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION AND ISSUES PRESENTED

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

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

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

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

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

FACTUAL BACKGROUND

1. The Flow-Through Agreement

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

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

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

To illustrate, we provide the following simplified hypothetical:

> On January 1, 1999, Eagle pilot John Johnson starts flying as a captain at Eagle. In autumn, American decides that, on November 5, 1999, it will bring on 40 pilots. American is required to offer half of those slots to eligible pilots at Eagle. Because Johnson is one of the 20 most senior Eagle pilots who have not yet been offered a position at American, he is entitled to one of those 20 positions. However, Eagle exercises its 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.

McDaniels Decl. ¶ 28.

2. Pilots' "length of service" at American

The Flow-Through Agreement determined certain terms of employment for Flow-Through Pilots once they reached American. For example, at American, a pilot's pay is determined in part by the pilot's "length of service," to which Plaintiffs also refer as "classification seniority." *Id*. ¶ 11; Complaint ¶ 16. Length of service for pay purposes is distinct under the CBA from a pilot's "occupational seniority," which is used when pilots bid on the aircraft and routes they would like to fly. Complaint ¶ 16.[2] Ordinarily, length of service is counted from the date that a pilot enters the American Airlines payroll, excluding any time that the pilot spent on furlough. McDaniels Decl. ¶ 13. Under the Flow-Through Agreement, this general rule applies to the Flow-Through Pilots: their length of service begins when they enter the American Airlines payroll—not when they entered the Eagle payroll or when they became entitled to a position at American. *Id*. ¶¶ 29, 33 & Exh. 1 ¶ III(C).

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

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[2] At American, pilots' length of service affects their pay as well as other benefits, and the CBA includes different definitions of length of service depending on its particular application. Because these 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.

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

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

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

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

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

4. American's merger with USAir

In 2013, American merged with USAir, necessitating the integration of American's pilot seniority list with the two seniority lists in place at USAir. Complaint ¶ 58; Brown Decl. ¶¶ 5-9; Declaration of Thomas Duncan, filed herewith, ¶ 20.[3] These three seniority lists will be integrated through a binding arbitration process known as the seniority list integration ("SLI") arbitration, which is currently ongoing. Duncan Decl. ¶¶ 25-26 & Exh. 18. APA is not a party to the seniority integration process; rather, each of the three pilot groups has authority to present a proposal to an arbitration panel, through a pilot committee and counsel selected by each pilot group. Duncan Decl. ¶ 26 & Exh. 18. Count II attacks actions of the committee representing pre-merger American pilots, known as the American Airlines Pilots Seniority Integration Committee or "AAPSIC." *See* Complaint ¶¶ 83-89; Duncan Decl. ¶ 5. Plaintiffs incorrectly attribute AAPSIC's actions to APA itself; in fact, APA is bound through an agreement with the participants not to interfere with any of the committees, including AAPSIC. Duncan Decl. ¶¶ 26-27 & Exh. 18 at ¶ 8(a).

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

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

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

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

ARGUMENT

I. Summary Judgment Standard

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

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

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

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

A. Count I is untimely.

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

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

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

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

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

The Complaint alleges that APA did not negotiate for Flow-Through Pilots to receive credit for time at Eagle, but negotiated for other pilot groups to get credit "for service at other airlines, including TWA, TWA LLC, US Airways, Reno Air, AirCal, and Mid-Atlantic Airways." Complaint ¶ 52(d). All of these airlines were merged into American. McDaniels Decl. ¶ 34.[6] Eagle, in contrast, has never merged into American but continues to operate as a separate airline. McDaniels Decl. ¶ 16.[7]

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

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

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[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.

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

[8] *United Air Lines v. Evans* was superseded by the Lilly Ledbetter Act, with regard to Title VII 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 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 been superseded by the Ledbetter Act with regard to Title VII claims).

In any event, even if each of these mergers generated a new claim, the most recent claim arose in December 2013, when American and USAir merged, and the former USAir pilots became employed by American. Brown Decl. ¶¶ 7-11. At that time, American began paying the former USAir pilots under the system Plaintiffs complain of, i.e. including time at USAir in calculating their length of service. Brown Decl. ¶¶ 7-13.[9] Thus, the challenged policy was most recently applied approximately 18 months before Plaintiffs filed their lawsuit, far outside the limitations period.

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

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

(3) Plaintiffs' letters to APA

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

[9] Plaintiffs have not alleged that they were unable to find out about the rules for pay of US Airways pilots until after January 6, 2015. Any such claim would be implausible because the rules were widely known at American and APA, and were not confidential or secret. Brown Decl. ¶ 13. 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.

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

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

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

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

[10] Plaintiffs' situation is directly analogous to that of the plaintiffs in *Spenlau*, in which locomotive engineers at a railroad had seniority rights to a different position, trainman, at the same

(Footnote continued)

Here, until any Eagle pilot *actually began work at American*, the pilot was not part of APA's bargaining unit and was not owed a duty by APA. *See, e.g., Spenlau*, 279 F.3d at 1315. Until that time, Plaintiffs were working at Eagle under the exclusive representation of ALPA, *see* McDaniel Decl. ¶¶ 15-16, and therefore could not have been represented by APA. *See McNamara-Blad*, 275 F.3d at 1171.[11] Indeed, APA was barred by the duty of fair representation from advancing the Eagle pilots' interests at the expense of the pilots in its bargaining unit. *McNamara-Blad*, 275 F.3d at 1173.

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

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

[11] Thus, for example, in arbitrations conducted under the Flow-Through Agreement, ALPA represented all Eagle pilots, even those pilots who had already received seniority numbers at 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).

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

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

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

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

[13] APA preserves all arguments regarding the timeliness of Plaintiffs' claim regarding the 2015 CBA, but does not argue in this motion that the claim is untimely.

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

Additionally, plaintiffs must be able to demonstrate 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); *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). Where, as here, the alleged breach concerns the union's conduct in collective bargaining, the causation element requires a plaintiff to prove that if the union had advanced the negotiating proposal favored by the plaintiff, "the company would have acceded to the union's demands." *Ackley*, 958 F.2d at 1472; *Bishop*, 1998 WL at *18.[14]

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

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

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[14] Although Plaintiffs' burden on this point is heavy, that is simply the consequence of substantive federal labor policy. As the Ninth Circuit has explained, the duty of fair representation "test for causality" in the bargaining context "is difficult to satisfy, and rightly so," given the wide range of reasonableness accorded to the union's bargaining conduct; "[o]therwise . . . the bargaining process would be under constant siege in the courts." *Ackley*, 958 F.2d at 1472. "Both union members and employers have a strong interest" in "the long-term stability of labor-management contracts," and "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)

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

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

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additional length of service credit if they had been furloughed from American, which they were not. Their claim is instead that APA should have negotiated an *altogether different* benefit: additional length of service credit for all pilots who were working either for American or for another airline owned by American's parent corporation during the post-September 11 furlough, regardless of whether 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.

Duncan Decl. ¶ 19.[16] In sharp contrast, American pilots forced out of their jobs via furlough suffered disruptions to their careers and lifestyles not experienced by those who merely remained at Eagle—they had to look for new jobs, adjust to new workplaces, and possibly experience periods of unemployment or the need to relocate their families. *See* Duncan Decl. ¶¶ 14-15.

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

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

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

[17] Although Plaintiffs assert that the TWA LLC pilots "did not perform work for [American]" before being furloughed, Complaint ¶ 42, the undisputed facts demonstrate that TWA LLC was recognized by the National Mediation Board as part of a single airline operation with American. *See* 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.

Flow-Through Pilots. *Simo*, 322 F.3d at 618. Plaintiffs' Complaint attempts to do so by asserting a list of examples of alleged mistreatment they have suffered at the hands of APA. As shown above, however, APA did not represent the affected Eagle pilots when these events occurred. *See supra* at 10-12. Far from demonstrating animus towards Flow-Through Pilots, these events simply illustrate APA's vigorous advocacy for the pilots it actually did represent. *See McNamara-Blad*, 275 F.3d at 1173; *see also Flight Attendants in Reunion v. American Airlines, Inc.*, ___ F.3d ___, 2016 WL 611970 *5 (2d Cir. Feb. 16, 2016) (holding that hostile union conduct occurring prior to the time the union owed plaintiffs a duty of fair representation cannot evidence union's present animus toward them). For the same reason, Plaintiffs gain nothing through their assertion that APA was hostile to them because it "did not desire pilots employed at American Eagle to have any rights to flow-up to [American], but desired only to secure the right for [American] pilots to flow-down to American Eagle." Complaint ¶ 76. To the extent APA had any such desire, it would have reflected only APA's entirely appropriate advocacy in favor of the pilots it represented at the time—i.e., American pilots who might need to flow down. Plaintiffs cannot infer an illegitimate animus from conduct not only consistent with but mandated by the duty of fair representation. *See McNamara-Blad*, 275 F.3d at 1173.[19]

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

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

[19] Plaintiffs also cannot show animus merely by noting that they are less numerous than other groups of pilots. *See* Complaint at ¶ 76. If that sufficed to show animus, then any minority employee group adversely affected by union action would automatically be able to succeed on a duty of fair representation claim. Finally, Plaintiffs have no evidence at all to support the notion that APA harbors 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.

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

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

To prove causation, Plaintiffs must establish that if, instead of proposing the Letter G length of service credit for furloughed pilots, APA had proposed the agreement that Plaintiffs prefer—additional length of service credit for all pilots who were working either for American or for another airline owned by American's parent corporation during the post-September 11 furlough, regardless of whether or not those pilots incurred any injury from the furlough—"the company would have acceded to [that] demand[]." *Ackley*, 958 F.2d at 1472.[20] This they cannot do, as they have no such evidence.

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.

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

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[20] Although *Ackley* applied the causation rule in the context of a claim that union officers misinformed union members as to the terms of a proposed collective bargaining agreement prior to a ratification vote, other decisions make clear that it applies to any claim for violation of the duty of fair representation arising from the union's bargaining conduct. *See, e.g., Spellacy v. Airline Pilots Ass'n – 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).

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

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

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

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

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

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

Plaintiffs cannot make any credible argument that the challenged Stipulation and Proposal caused them any cognizable harm during the short period of time (less than three months for the Stipulation and only eleven days for the Proposal) that they were in effect. Nor do Plaintiffs allege that they suffered any such harm, but instead allege only that they will suffer harm in the future: that they "*will* suffer *future* damages, including reduced employment opportunities, wages and benefits," and "*will* have their positions on the AAL pilot seniority list adversely affected . . . ." Complaint ¶ 88 (emphasis added); *see also* Exh. 50 (Plaintiffs' Initial Disclosures), at 6:13-15 ("Damages arising from loss of seniority position arising from the SLI process are not included as that process has not concluded."). But those allegations cannot be based on the withdrawn Stipulation and Proposal, which were withdrawn before arbitration proceedings on the merits began, but only on a prediction as to the effect on the eventual seniority integration arbitration decision of AAPSIC's *current* position (i.e., the remaining portion of Count II).[21] Nor do Plaintiffs seek any non-monetary relief that can reasonably be predicated on the withdrawn Stipulation and Proposal, but only on AAPSIC's current position. *See* Complaint ¶ 89.[22]

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[21] To be sure, Plaintiffs also allege that they "have accrued and continue to accrue the costs of attorneys' fees incurred in establishing the breaches of duty by APA and attempting to mitigate the 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.

[22] In any event, Plaintiffs' request for "an injunction to make up any monetary loss" from the 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.

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

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

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

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

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

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

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[23] *Addington I* cannot be distinguished from the present case on the ground that it concerned a seniority integration negotiation, whereas the present case concerns a seniority integration arbitration. Indeed, the ripeness rule of *Addington I* is, if anything, more directly applicable to an arbitration 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)

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

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

Addington I cannot be distinguished on this ground for several additional reasons. First, the present case involves an interest arbitration, in which the arbitrators actually determine the terms of the parties' contract, which is merely an alternative mechanism of negotiating a contract. Second, in reaching its decision, the *Addington I* court analyzed and relied on prior decisions in the arbitration context finding that claims for breach of the duty of fair representation arising from the union's handling of the arbitration did not accrue until the arbitration was complete and the arbitrator had issued a final decision. *See* 606 F.3d at 1183-84. As the court concluded, "In the grievance context, 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 "'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.

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

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

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.

Finally, even if the Count II claim based on AAPSIC's current arbitration strategy decisions were ripe, it would fail as a matter of law. First, Plaintiffs have no evidence that AAPSIC's current arbitration strategy discriminates against them or is in bad faith. To the contrary, AAPSIC's current arbitration proposal argues for pilots' longevity *not* to be a factor in the SLI decision, as Plaintiffs admit (*see* Complaint ¶ 69: "The other participants [in the SLI arbitration] urged that longevity should be a factor in the resulting seniority list; APA took the position that longevity should not be a factor").[24] This position favors Plaintiffs and the putative class members by preventing their status as relative newcomers to American from being held against them in the seniority integration, and Plaintiffs have informed AAPSIC they "agree on that approach." Exh. 41.[25]

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

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[24] In the SLI arbitration context, "longevity" simply means the period of time for which a pilot 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.

[25] Nor can Plaintiffs point to the withdrawn Stipulation or Proposal as evidence of 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 III, Plaintiffs have no evidence of discrimination or bad faith on the part of APA.

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

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

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

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

(Footnote continued)

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

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

CONCLUSION

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

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

Dated: March 17, 2016.

Respectfully submitted,

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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 **[PROPOSED] ORDER GRANTING DEFENDANT ALLIED PILOTS ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT** Fed. R. Civ. P. 56 Date: April 21, 2016 Time: 1:30 p.m. Courtroom: 3 - 17th Floor Judge: Hon. Richard Seeborg

The Motion for Summary Judgment or, in the Alternative, for Partial Summary Judgment filed on March 17, 2016, by Defendant Allied Pilots Association ("APA") came on regularly for hearing on April 21, 2016. Having considered the argument and evidence presented by the parties, the Court holds that the motion should be granted for the following reasons.

The standard for evaluating summary judgment motions is well established. Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Here, because Plaintiffs will bear the burden of production and proof at trial, APA need only point to an "absence of evidence" supporting plaintiffs' position. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 325 (1986). If APA meets this initial burden, the burden then shifts to Plaintiffs to demonstrate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324.

Plaintiffs' Second Amended Complaint states two counts against APA, each for breach of the duty of fair representation ("DFR") that APA owes to the pilots employed by Defendant American Airlines ("American") under the Railway Labor Act, 45 U.S.C. § 151 *et seq*. ("RLA"). Count I is based on APA's conduct in collective bargaining with American and in representing the American pilots in grievances arising under various collective bargaining agreements. Count II is based on APA's conduct in the seniority list integration ("SLI") arbitration that is currently ongoing among American, American's pilots, and two pilot groups employed by U.S. Airways, which is being merged into American. As explained below, the Court finds neither of these claims to be viable.

1. Count I. Most of Count I is time-barred because the allegations supporting that claim involve incidents that occurred prior to January 6, 2015, six months before Plaintiffs filed their initial complaint in this action. The statute of limitations for DFR claims arising under the RLA is six months. *See, e g., Lea v. Republic Airlines, Inc.*, 903 F.2d 624, 633–34 (9th Cir. 1990). Here, all but one of the allegations on which Count I is based involve the terms of collective bargaining agreements and arbitration proceedings dating from 1997 through 2010. Indeed, all of those allegations concern APA's conduct *prior* to the time it began to serve as the collective bargaining representative of

Plaintiffs and the members of the requested class, during which time they were employed by a separate airline, American Eagle ("Eagle"), and were represented by a different labor organization, the Air Line Pilots Association ("ALPA"). As such, not only is Count I time-barred insofar as it arises from those allegations, but it would be meritless even if not time-barred because APA owed Plaintiffs and the members of the requested class no DFR during that time period; rather, ALPA represented them and owed them a DFR. *McNamara-Blad v. Ass'n of Prof'l Flight Attendants*, 275 F.3d 1165, 1169-72 (9th Cir. 2002).

The sole allegation underlying Count I that is arguably not time-barred concerns APA's conduct in negotiating a provision of a January 2015 collective bargaining agreement with American, "Letter G," at which time APA represented, and owed a DFR to, Plaintiffs and the members of the requested class. Letter G restored up to two years length of service credit (which determines the wages earned by American's pilots) for pilots who had been furloughed, i.e., laid off, from their positions at American. While Plaintiffs are not excluded from obtaining additional length of service credit under Letter G, as a practical matter it does not benefit them because they were never furloughed from American. Rather, during the period of furloughs at American, they were held back at Eagle, waiting for jobs to open up for them at American under the so-called "Flow-Through Agreement," which provided certain job opportunities at American to Eagle pilots. Plaintiffs' claim is that, instead of negotiating the terms embodied in Letter G, APA should have negotiated different terms with American that would have provided them with additional length of service credit for the time they were employed by Eagle and waiting to "flow-up" to American. Summary judgment on Count I insofar as it arises from that claim is appropriate because Plaintiffs have presented no evidence upon which a reasonable factfinder could conclude that APA breached its DFR by negotiating Letter G or that APA's negotiating conduct caused Plaintiffs' claimed injury of lower wages.

In assessing claims for breach of the DFR, courts take a "highly deferential" approach, "recognizing the wide latitude that [unions] need for the effective performance of their … responsibilities." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991). To prevail on the "breach" element of the claim, a plaintiff must show that the union acted arbitrarily, discriminatorily, or in bad faith. *Id.* at 67. A union's conduct is arbitrary "only if … the union's behavior is so far

outside a wide range of reasonableness as to be irrational." *Id.* A union's conduct is discriminatory only if "substantial evidence" demonstrates that the conduct is "intentional, severe, and unrelated to legitimate union objectives," *Beck v. United Food & Commercial Workers Union, Local 99*, 506 F.3d 874, 880 (9th Cir. 2007), and that it arises from "prejudice or animus," *Simo v. Union of Needletrades, Indus. & Textile Employees, Sw. Dist. Council*, 322 F.3d 602, 618 (9th Cir. 2003). To show bad faith, a plaintiff must provide "substantial evidence of fraud, deceitful action, or dishonest conduct." *Beck*, 506 F.3d at 880.

Additionally, a plaintiff must also be able to satisfy the "causation" element of the DFR claim by proving 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); *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). Where, as here, the alleged breach concerns the union's conduct in collective bargaining negotiations, the causation element requires a plaintiff to prove that if the union had advanced the negotiating proposal favored by the plaintiff, "the company would have acceded to the union's demands." *Ackley*, 958 F.2d at 1472; *Bishop*, 1998 WL 474076 at *18.

Plaintiffs cannot satisfy either the "breach" or the "causation" elements of their DFR claim, and thus that claim must fail. First, Plaintiffs have not shown that APA acted arbitrarily, discriminatorily, or in bad faith in negotiating Letter G. APA did not act arbitrarily because the terms of Letter G are not irrational. Letter G was intended to compensate pilots for a particular harm – furlough – that Plaintiffs did not incur. Nor is the harm that Plaintiffs claim to have incurred – being held back at Eagle while waiting for jobs to open up for them at American, and possibly being displaced from their choice of assignments at Eagle (but not being furloughed from Eagle) – comparable to the harm incurred by pilots who were actually furloughed by American. Moreover, Plaintiffs failed to rebut APA's showing that such agreements to restore length of service credit to furloughed pilots are negotiated at other airlines and that APA has previously negotiated such agreements before Letter G. For the same reasons, Plaintiffs have not shown that the negotiation of Letter G was "unrelated to legitimate union objectives," *Beck*, 506 F.3d at 880, which therefore precludes them from proving that it was discriminatory. Nor have Plaintiffs presented any evidence of "prejudice or animus" in the

negotiation of Letter G. *Simo*, 322 F.3d at 618. Additionally, Plaintiffs have presented no evidence that APA acted in bad faith by negotiating Letter G, i.e., that it engaged in fraud, deceit, or dishonest conduct. Finally, Plaintiffs have presented no evidence of causation, i.e., that if, instead of proposing Letter G, APA had proposed the terms that Plaintiffs prefer, "the company would have acceded to [that] demand[]." *Ackley*, 958 F.2d at 1472.

Since virtually all of the allegations underlying Count I are time-barred, and Plaintiffs have no evidence capable of satisfying the "breach" and "causation" elements of the breach of DFR claim insofar as it arises from the sole remaining allegation of Count I that is at least arguably not time-barred, summary judgment must be granted for APA and against Plaintiffs on Count I.

2. Count II. As noted above, Count II seeks to hold APA liable for breaching its DFR by its conduct in the SLI arbitration, a procedure by which the seniority lists of American, U.S. Airways, and America West Airlines are being merged into a single seniority list, following the merger of America West into U.S. Airways, and the subsequent merger of U.S. Airways into American. Count II is based on three events in the SLI arbitration: (1) a stipulation (the "Stipulation") among the parties to the SLI arbitration providing that pilots' prior service at regional affiliated airlines of American and U.S. Airways, including Eagle, will not be considered in integrating the seniority lists; (2) the terms of the original proposal ("the Proposal") for seniority integration submitted to the arbitration panel by a committee of American pilots charged with representing the interests of the American pilot group in the arbitration, the American Airlines Pilots Seniority Integration Committee ("AAPSIC"), which contained certain terms that Plaintiffs believe would, if adopted by the arbitrators, disadvantage them and the members of the requested class in the seniority integration; and (3) AAPSIC's current arbitration strategy of presenting only the position that no pilot's prior service with any airline should be taken into account in determining the seniority integration (a position with which Plaintiffs do not disagree), rather than also presenting a "fallback" position (and introducing evidence in support thereof) as to how Plaintiffs' prior service with Eagle should be taken into account *if* the arbitration panel rejects AAPSIC's position and decides to take the pilots' prior service into account in determining the seniority integration. The Court assumes for purposes of summary judgment that

AAPSIC's conduct is attributable to APA because APA has not moved for summary judgment on the ground that it is not liable for AAPSIC's conduct.

Count II is moot insofar as it arises from Plaintiffs' first two allegations concerning the Stipulation and the Proposal, both of which were withdrawn before proceedings on the merits began in the SLI arbitration and neither of which had any subsequent force or effect. Rather, no equivalent stipulation has been agreed upon and, on September 19, 2015, AAPSIC submitted an entirely different proposal containing none of the features of its original Proposal which Plaintiffs challenged.

Article III of the Constitution limits the jurisdiction of all federal courts to resolving actual "Cases" and "Controversies." U.S. Const. art. III, § 2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (citing *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). If a claim is moot, it must be dismissed; "Mootness is a jurisdictional question because the [federal courts are] not empowered to decide moot questions or abstract propositions . . . ." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (internal quotations omitted). An "actual controversy" ceases to exist, and the underlying claim predicated upon it is moot, if it becomes "impossible for th[e] court, if it should decide the [claim] in favor of the plaintiff, to grant him any effectual relief whatever." *Mills v. Green*, 159 U.S. 651, 653 (1895). More recently, the Ninth Circuit has held that a "case becomes moot when interim relief or events have deprived the court of the ability to redress [a] party's injuries." *Am. Cas. Co. v. Baker*, 22 F.3d 880, 896 (9th Cir. 1994) (internal quotation marks omitted); *accord San Lazaro Ass'n v. Connell*, 286 F.3d 1088, 1095 (9th Cir. 2002).

Because the factual circumstances on which the first portion of Count II is predicated – the existence of a particular Stipulation and Proposal – no longer exist, no judicial decision on those issues could have any effect on the parties' dispute. Any decision by this Court would constitute an "advisory opinion[] . . . . decid[ing] moot questions or abstract propositions" in contravention of Article III and of longstanding judicial practices. *Rice*, 404 U.S. at 245-46. "[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *Id.* at 246. This Court can do nothing to redress any injury from the withdrawn Stipulation or Proposal,

which did not cause any injury in the first place because they were withdrawn before the proceedings on the merits commenced in the arbitration. As such, Count II is moot insofar as it arises from the Stipulation and/or Proposal.

That leaves the allegations regarding AAPSIC's current arbitration litigation strategy – its decision to advance only a primary argument that no pilot's prior service with any airline should be taken into account in determining the seniority integration (a position with which Plaintiffs do not disagree), rather than also presenting the "fallback" position (and introducing evidence in support thereof) that Plaintiffs advocate, as well as AAPSIC's decision not to provide Plaintiffs with certain information they requested about its position before that position was litigated in arbitration. No claim for breach of the DFR based on these allegations is ripe for adjudication. Under governing Ninth Circuit law, no such claim concerning the position taken by the union in the SLI process following an airline merger ripens until that process produces a final seniority list that injures the plaintiffs. *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1177 (9th Cir. 2010). Here, that process has not yet concluded, as there is no arbitration decision at this point, and thus Plaintiffs can demonstrate no injury from AAPSIC's current arbitration strategy. AAPSIC's current arbitration proposal is subject to contingencies that render any challenge thereto premature – specifically, that a panel of neutral arbitrators will select among proposals from three different committees, or adopt parts of multiple proposals, or create a seniority list not based on any of the proposals – and, for the same reasons, forbearing from adjudication of that claim at this point would not work an immediate hardship on Plaintiffs. *See id*. at 1179-80. Thus, any claim based on AAPSIC's current arbitration proposal is not yet ripe.

Finally, even if that claim were ripe, it would fail as a matter of law because a union's reasoned explanation for arbitration strategy decisions, e.g., what arguments to advance, what evidence to introduce, and what strategy to disclose before it is implemented, cannot provide the predicate for a claim for breach of the DFR. First, Plaintiffs have no evidence that AAPSIC's arbitration strategy decisions constitute discrimination against them or were adopted in bad faith. To the contrary, AAPSIC's current arbitration proposal argues for past service *not* to be a factor in the SLI decision, as Plaintiffs admit. *See* Second Amended Complaint ¶ 69. AAPSIC's position thus actually *favors*

Plaintiffs and the members of the requested class. Nor can Plaintiffs show that AAPSIC's challenged arbitration strategy decisions not to present a "fallback" position (or evidence in support thereof) in the arbitration, or to disclose that strategy prior to its presentation in arbitration, were arbitrary. As a matter of law, a claim for breach of the DFR by "arbitrary" conduct cannot be predicated on reasoned arbitration strategy decisions. *Patterson v. Int'l Bhd. of Teamsters, Local 959*, 121 F.3d 1345, 1349-50 (9th Cir. 1997). AAPSIC has presented a reasoned explanation for its decision not to present a "fallback" position (or evidence in support thereof), specifically that the use of time flying for regional airlines for purposes of longevity is not consistent with precedent from prior pilot seniority integration proceedings, and that presenting such a "fallback" position would detract significantly from AAPSIC's primary argument against use of longevity entirely, while misdirecting both time and resources. AAPSIC has also provided a reasoned explanation for its decision not to provide Plaintiffs' advance notice of its positions: that divulging such information before presenting the positions in arbitration (at which point they would be made available on the APA website) would potentially place AAPSIC at a strategic disadvantage in the arbitration by making it more likely that the other pilots groups would have advance access to AAPSIC's position, with extra time to prepare their rebuttals. There the inquiry must end because such decisions are quintessentially judgment calls that are not subject to judicial review.

3. Conclusion. For the foregoing reasons, summary judgment is hereby granted to APA and against Plaintiffs, and the Second Amended Complaint and this entire action is hereby is ordered dismissed with prejudice.

IT IS SO ORDERED.

Dated:

RICHARD SEEBORG
United States District Judge