Marty Harper (#003416)
mharper@stklaw.com
Kelly J. Flood (#019772)
kflood@stklaw.com
Andrew S. Jacob (#22516)
ajacob@stklaw.com
SHUGHART THOMSON & KILROY, P.C.
Security Title Plaza
3636 N. Central Ave., Suite 1200
Phoenix, AZ 85012
Phone: (602) 650-2000
Fax: (602) 264-7033
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

DON ADDINGTON, *et al.*; Plaintiffs, vs. US AIRLINE PILOTS ASSOCIATION, and US AIRWAYS, INC., Defendants.	CASE NO. 2:08-CV-1633-NVW **APPLICATION FOR PRELIMINARY INJUNCTION** (Oral Argument And Evidentiary Hearing Requested)

Plaintiffs DON ADDINGTON, JOHN BOSTIC, MARK BURMAN, AFSHIN IRANPOUR, ROGER VELEZ, and STEVE WARGOCKI filed a hybrid action arising out of the merger of America West and US Airways that asserts: (1) breach of contract against the entity surviving the merger, US Airways (the "Company"); and (2) violation of the duty of fair representation against the bargaining agent for the Company's pilots, US Airline Pilots Association ("USAPA").

Plaintiffs, on behalf of themselves and other premerger America West pilots, file this Application for a preliminary injunction to enjoin the Company from furloughing any premerger America West pilot before it re-furloughs all US Airways pilots who were on furlough status at the time of the merger.

Plaintiffs are entitled to this relief because their collective bargaining agreement (CBA) gives them contract seniority rights over pilots who were on furlough at the time of the merger and because inequitable conduct tips the balance of hardships strongly in their favor. This Application is supported by the Memorandum of Points and Authorities that follows.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND[1]

A. The Merger Of America West And US Airways

In May 2005, America West merged with US Airways, a larger airline that was on the brink of liquidation. The entity surviving the merger uses the name US Airways. For ease of reference, Plaintiffs use "Company" to refer to this entity and use "America West" and "US Airways" to refer to both the pre-merger entities and to the divisions of the Company derived from those entities.

Plaintiffs are pilots who were employed by America West under a collective bargaining agreement (CBA) prior to the merger and are currently employed by the Company under that same CBA. *2004 CBA* (doc. 1-2). As members of the bargaining unit, Plaintiffs have standing to enforce their CBA against America West and its successor, the Company. *In re UAL Corp.*, 443 F.3d 565, 570 (7th Cir. 2006).

Differences in the makeup of the America West and US Airways pilot groups prevented a simple blending of the pilot workforces. The three most material differences were that: (1) America West had less than half as many pilots as US Airways; (2) its pilots generally had more recent dates-of-hire (because America West was a newer airline); and (3) its pilots were all on active status (whereas almost one third of the US Airways pilots were on furlough status).

[1] Plaintiffs have competent evidence to prove every fact stated in this Application and are prepared to present this evidence at the convenience of the Court.

To address these differences and otherwise in furtherance of the merger, the Company and its pilots (both America West and US Airways pilots) entered into a multilateral contract. *Transition Agreement* (TA) (doc. 1-3). This binding contract defined how the two pilot groups would integrate their seniority lists and how the Company would transition to integrated pilot operations. Between the pilots, the Transition Agreement was an ordinary commercial contract. Between each pilot group and their respective airlines, however, it was a contractual modification of the applicable CBA.

The Transition Agreement established that the members of each pilot group had contractual duties to: (1) create an integrated seniority list, if necessary, by binding arbitration; and (2) bargain in good faith to negotiate a single CBA that would apply to all Company pilots and implement this integrated seniority list. TA at §§ IV.A, V. The Transition Agreement also modified each of the two CBAs so as to: (1) allow the Company freedom of action that would have otherwise been foreclosed; (2) require the Company to accept the integrated seniority list created in the arbitration; and (3) require the Company, under defined circumstances, to institute integrated pilot operations using that seniority list. TA at §§ II.B.2, II.B.4.e, V.G, VI.A.

Specifically, after the Transition Agreement modifications, the 2004 CBA required the Company to institute integrated pilot operations using the integrated seniority list when, by June 30, 2006, the pilots and Company had not agreed on a single CBA and were not actively negotiating toward such agreement. *See id.* at § V.G. Regardless that these conditions have been present for more than two years, the Company has not fulfilled this duty.

B. <u>The Nicolau Arbitration</u>

In October 2006, the pilots submitted their seniority dispute to final and binding arbitration before George Nicolau. In furtherance of this arbitration, each pilot group had

"active and voluntary participation in the arbitration; . . . chose a committee to represent them in the arbitration, . . . chose counsel to represent the[m] . . ., and argued vigorously for their positions;" and no member of either group "objected to the process, refused to arbitrate or made any attempt to seek judicial relief." *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir.1991) (with such circumstances, intra-union seniority arbitration is binding on individuals).

The arbitration was carried out, as required by the original CBAs and as stated in the Transition Agreement, according to standards established by ALPA, the union representing both groups of pilots.[2] *ALPA Merger Policy* (doc. 1-4). In compliance with those standards, Mr. Nicolau conducted evidentiary hearings where both sides were represented and fully presented their evidence and arguments. Following these hearings, Mr. Nicolau entered a binding arbitration award. *Nicolau Award* (doc. 1-7).

The Award identified substantial inequities with the date-of-hire scheme proposed by the US Airways Pilots, noting in particular that it "integrated a number of furloughed US Airways Pilots with active America West Pilots." The Award also rejected some aspects of the scheme proposed by the America West pilots. It concluded by creating an integrated seniority list that: (1) maintained relative seniority among the pilots from each side; (2) placed the 500 most senior US Airways pilots ahead of all America West pilots; (3) placed about 1,750 US Airways Pilots, who were on furlough status at the time of the merger, at the bottom of the list; and (4) filled the middle of the list with a proportionate blend of the America West pilots and the remaining US Airways pilots. On December 20, 2007, the Company accept this integrated seniority list.

[2] "ALPA" is the acronym for the Airline Pilots Association, International, the authorized bargaining agent for both pilot groups until April 18, 2008.

C. The US Airways Pilots Refused To Implement The Nicolau Award.

According to ALPA Merger Policy § 45.H.5.b, "The Award of the Arbitration Board shall be final and binding on all parties to the arbitration." Regardless, the US Airways Pilots refused to cooperate with implementation of the Award and refused to negotiate a single CBA. Moreover, they formed a new union, USAPA, in a transparent effort to avoid commitments to support the Nicolau Award that they saw as linked to their ALPA membership. The more numerous US Airways pilots had enough votes by themselves to get USAPA certified as the bargaining agent for all Company pilots. This occurred on April 18, 2008.

D. The Company Offered Recall To All Furloughed US Airways Pilots.

Prior to the merger, the US Airways pilots made substantial bankruptcy related concessions in their pay and conditions of employment. As a consequence of these concessions, the US Airways pilots' CBA was substantially more advantageous for the Company's finances than the America West pilots' CBA. The Company, therefore, had economic incentive to assign flying to US Airways, in preference to America West. Separate operations allowed the Company to do this.

Under the terms of separate operations (as set out in the Transition Agreement), the Company was allowed to recall all of the US Airways pilots on furlough status at the time of the merger in preference to hiring new America West pilots. It was also allowed to hire 90 new US Airways pilots while hiring only 20 new America West pilots (six of whom are former US Airways pilots who are probably transferring back to US Airways)[3]. As a result, since May 2005 the number of active US Airways pilots increased by 239 while the number of active America West pilots decreased by 118.

Now, the Company wants to furlough America West pilots, while retaining newly hired and recalled US Airways pilots.

[3] Numbers are approximate.

E. The Company Is Retaining Recalled US Airways Pilots On Active Status While Furloughing America West Pilots.

On June 12, 2008, the Company announced plans to reduce its mainline domestic capacity by furloughing 175 America West pilots and 125 US Airways pilots. The Company plans to do so while retaining on active status hundreds of US Airways pilots who did **not** have jobs at the time of the merger. Retaining these pilots while furloughing premerger America West pilots breaches both express and implied duties arising under the 2004 CBA, Transition Agreement, ALPA Merger Policy and the Nicolau Award.

The Company claims that it must furlough America West pilots if it is cancelling America West flights. That, however, is not true. In fact, the Transition Agreement allows the Company to assign flights that were neither scheduled nor announced as of September 23, 2005, to America West—and there are plenty to assign.. The fact that the Company expanded its US Airways active pilot roster by 239 pilots since September 23, 2005, shows that there are a substantial number of such flights. The Company, therefore, could assign some or all of these flights to America West. It refuses to do so.

If the Company were operating according to the Nicolau integrated seniority list hundreds of US Airways pilots would be subject to furlough ahead of the first premerger America West pilot. The Company would be operating according to the Nicolau integrated seniority list if the US Airways pilots **and** the Company had not breached express and implied contract duties that were established in the Transition Agreement. If the US Airways pilots had honored their duties, they would have cooperated with the negotiation of a single CBA, and the Company would now have integrated pilot operations using that CBA. If the Company had honored its duties, it would have implemented the integrated seniority list after June 30, 2006, because the US Airways pilots were not cooperating with CBA negotiations.

II. LEGAL ARGUMENT

A. The Company Is In Breach Of Express CBA Language.

The 2004 CBA, as amended by the Transition Agreement, provided that the Company must implement the integrated seniority list either: (1) within 12 months of negotiation of a single CBA, *id.* at VI.A; or (2) after June 30, 2006, if negotiations for a single CBA were suspended, *id.* at § V.G. These duties did not change when USAPA replaced ALPA. *See Assn. of Flight Attendants, AFL-CIO v. USAir, Inc.*, 24 F.3d 1432, 1437 (C.A.D.C. 1994) (noting, after a change of bargaining agent, that there was no change in "the parameters of the duty to bargain").[4] Therefore, the Company has a present duty to use the Nicolau integrated seniority list when selecting pilots for furlough. By selecting premerger America West pilots for furlough out of this order, the Company is in breach of the 2004 CBA, as amended by the Transition Agreement.

B. The Company Violated The Implied Covenant Arising From The CBA.

The law of implied covenants applies to the interpretation of duties under a CBA. *Dickeson v. DAW Forest Products Co.*, 827 F.2d 627, 630 (9th Cir. 1987) (recognizing that courts may "expand by implication the provisions of a collective bargaining agreement more readily than the provisions of an ordinary contract"). This is because a CBA:

> is more than a contract; it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate.... The collective agreement covers the whole employment relationship. It calls into being a new common law-the common law of a particular industry....

United Steelworkers of Am. v. Warrior's Gulf Navigation Co., 363 U.S. 574, 578-80 (1959) (citations omitted).

[4] Similarly, USAPA has the same CBA duties that ALPA had when it was the bargaining representative, until the Company and pilots agree otherwise. *See Order of Ry. Conductors & Brakemen v. Switchmen's Union of N. Am.*, 269 F.2d 726, 730 (5th Cir. 1959).

The Company is breaching the 2004 CBA by furloughing premerger America West pilots ahead of hundreds of US Airways pilots who it recalled to active status after the merger. This constitutes breach of contract because: (1) the implied covenant requires the Company to protect Plaintiffs' reasonable expectations; (2) Plaintiffs reasonable expectations were that they would have priority to be retained during a reduction in service over recalled US Airways pilots; and (3) The Company can reduce service without defeating those expectations. The Court should enjoin further breach of the CBA because Plaintiffs are very likely to prevail on the merits and because the hardships tip strongly in their favor.

1. The Implied Covenant Requires That The Company Not Act To Defeat Plaintiffs' Reasonable Expectations.

A contract is breached by a party who "uses its discretion for a reason outside the contemplated range—a reason beyond the risks assumed by the party claiming a breach." *Southwest Sav. & Loan Ass'n v. SunAmp Systems, Inc.*, 172 Ariz. 553, 558-59, 838 P.2d 1314, 1319-20 (App. 1992). The implied covenant precludes one party from "exercise[ing] discretion retained or unforeclosed under a contract in such a way as to deny [the other party] a reasonably expected benefit of the bargain." *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Loc. No. 395 Pension Trust Fund*, 201 Ariz. 474, 492, ¶ 66, 38 P.3d 12, 30 (2002). "[A] contracting party may not exercise a retained contractual power in bad faith." *Id.* "[A] party may . . . breach its duty of good faith without actually breaching an express covenant in the contract." *Id.* at 491, ¶ 64, 38 P.3d at 29 (citations omitted). "Good faith performance of enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Restatement (Second) of Contracts* § 205 cmt. a (1979). The implied covenant was breached here because the Company "wrongfully exercised a contractual power for a reason beyond the risks that [Plaintiffs] assumed in the

Agreement, [and] for a reason inconsistent with [Plaintiffs'] justified expectations." *Wells Fargo*, 201 Ariz. at 492, ¶ 67, 38 P.3d at 30.

2. Plaintiffs Reasonably Expected That They Would Be Retained In Preference To Hundreds Of Recalled US Airways Pilots.

Plaintiffs expected, in the event that the Company had a reduction of service, that they would be retained in preference to the hundreds of recalled US Airways pilots. This expectation was reasonable for at least three reasons. These reasons are set out below.

a. The Company Promised That The Recalled US Airways Pilots Would not Displace Premerger America West Pilots.

Plaintiffs expectations were reasonable because they were encouraged by Company statements. Prior to finalization of the Transition Agreement, the heads of both airlines jointly stated that they "expect[ed] that no employee who already had been furloughed prior to the merger would be permitted to bump an active employee out of a job." In other words, if the US Airways pilots on furlough status at the time of the merger were recalled, they would not displace the premerger America West pilots. Equivalent language is found in § IV.A.2 of the Transition Agreement and § IV.A of ALPA Merger Policy. Plaintiffs, therefore, reasonably expected that they would be retained in preference to the recalled US Airways pilots.

b. Seniority Relationships Ordinarily Do Not Change.

Plaintiffs expectations were also reasonable because established seniority relationships between pilots ordinarily do not change. *See* Karl M. Ruppenthal, 14 *Indust. & Labor Relations Rev*., 528, 534 (1961) (generally fixed once established). Plaintiffs, therefore, reasonably expected that US Airways pilots lucky enough to be recalled after the merger would not jump ahead of them in seniority. Plaintiffs reasonably expected, if there were any furloughs after the US Airways pilots were recalled, that those recalled pilots would be furloughed ahead of premerger America West pilots.

c. Plaintiffs Expectations Were Fair And Reasonable.

Finally, Plaintiffs expectations were reasonable because they were fair. During separate operations, the active US Airways pilots moved higher on their roster of active pilots with each recall of a US Airways pilot from furlough. Similarly, the active America West pilots moved higher on their roster of active pilots with each hiring of a new America West pilot. In § II.B.7 of the Transition Agreement, the America West pilots agreed that the Company would recall furloughed US Airways pilots before it hired any new America West pilots. The America West pilots, therefore, lost opportunities to move higher on their seniority list. It is only fair, if the America West pilots lost these opportunities, that the recalled US Airways pilots should be furloughed ahead of the premerger America West pilots.

3. The Company Can Protect Plaintiffs' Reasonable Expectations.

Section II.B.4 of the Transition Agreement: (1) provided that no America West pilot "will fly as a crewmember on an aircraft" in the US Airways fleet; and (2) allocated flying originating East of the Mississippi to the US Airways Pilots if it was "current and announced" as of September 23, 2005 (subject to some limitations). Otherwise, the Transition Agreement did not expressly restrict the Company assigning flights to America West airplanes and pilots.

The Company added enough flights after the merger to employ 239 additional US Airways pilots. Because these flights were added after the merger, most if not all were not "current and announced" as of September 23, 2005. The Company, therefore, can assign any or all of these flights to America West airplanes and pilots. Flights that have employed 239 US Airways pilots ought to be sufficient to employ the premerger America West pilots that the Company plans to furlough.

The Company, therefore, can reduce service without furloughing premerger America West pilots.

C. Plaintiffs Are Entitled To Preliminary Injunctive Relief

Plaintiffs are entitled to preliminary injunctive relief because they are likely to succeed on the merits and the balance of hardships tips in their favor. "Preliminary injunctive relief is available to a party who demonstrates either: (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its favor." *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001); *see also Sierra Forest Legacy v. Rey*, 526 F.3d 1228, 1231 (9th Cir. 2008) (same). "These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 874 (9th Cir.2000).

1. Plaintiffs Are Likely To Prevail On The Merits

The Company has announced that it plans to furlough Plaintiffs and other America West pilots ahead of all of the hundreds of recalled US Airways pilots. These recalled pilots were not supposed to bump or displace a premerger America West pilot. If the merger had gone as expected, the Company would be operating by the Nicolau integrated seniority list which put all of the now recalled US Airways pilots below the premerger America West pilots. Plaintiffs claims are that the Company is required to both: (1) operate according to the integrated seniority list; and (2) re-assign flights to America West so that it does not furlough premerger America West pilots ahead of the recalled US Airways pilots. Guided by the Supreme Court's *United Steelworkers* doctrine and the preclusive effect of the Nicolau Arbitration, this Court should find that there is a high likelihood that Plaintiffs will prevail on one or both of these claims.

2. Loss Of Seniority Benefits Is Irreparable Harm.

Courts recognize "irreparable harm" where the injury would cause damages that, although pecuniary, are "difficult to ascertain." *Pepsi-Cola Bottling Co. of Pittsburg,*

Inc. v. Pepsico, Inc., 175 F.Supp.2d 1288, 1295 (D.Kan.,2001). *See Foundry Servs., Inc. v. Beneflux Corp.*, 206 F.2d 214, 216 (2d Cir.1953) (Hand, J., concurring) (irreparability of harm includes the "impossibility of ascertaining with any accuracy the extent of the loss").

> An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as a remedy in equity by injunction. Where ascertainment of damages is impossible, or nearly so, or where there is a likelihood of such recurring and constant injury, damages may not be an adequate remedy.

Loc. Union 499 of Intern. Broth. of Elec. Workers, AFL-CIO v. Iowa Power & Light Co., 224 F.Supp. 731, 738 (D.C.Iowa 1964).

Courts have found irreparable harm from improper termination of an employee. *See Teamsters Public Employees Union Loc. No. 594 v. City of West Point*, 338 F.Supp. 927, 930 (D.Neb. 1972) (noting that absent preliminary injunctive relief, "damages will be greatly increased if the plaintiffs are not restored to their employment with the City. This, of course, would not benefit either plaintiffs or defendants."). More specifically, courts have found irreparable harm from improper application of airline pilots seniority rights. *E.g., Bernard v. Air Line Pilots Assn., Intern.*, 873 F.2d 213, 217 (9th Cir. 1989) (noting that "pilots may suffer irreparable harm" from an improper seniority list). Consequently, the injury at issue here is irreparable harm that justifies preliminary injunctive relief.

3. The Balance Of Hardships Tips In Favor Of Plaintiffs.

Equitable considerations require that any hardships from the Company's need to furlough pilots should fall on the US Airways pilots. This tips the balance of hardships, in Plaintiffs' favor. *See id*. at 218.

Bernard shows that the taint of a violation of the duty of fair representation tips the balance of hardships in favor of the party with clean hands. The issue in *Bernard* concerned a seniority merger dispute between 100 Jet America pilots and 500 Alaska Air

pilots. *Id.* at 214. The Alaska Air pilots, contrary to ALPA Merger Policy, unilaterally imposed a seniority agreement (called the "October 6 agreement"). *Id.* at 215. The court determined, because the October 6 agreement was "tainted by the duty of fair representation violation," that this "tips the balance in favor of the Jet America pilots." *Id.* at 218. The decision was upheld on appeal. *Id*.

A similar taint from a violation of the duty of fair representation (discussed below) tips the balance of hardships in Plaintiffs' favor. Just as in *Bernard*, the Court can balance the equities here to grant interim relief. The US Airways pilots, therefore, should be charged with the inequities of USAPA's violations of the duty of fair representation and their abrogation of their duties to support the Nicolau Award. As in *Bernard*, this taint tips the balance of hardships in favor of the America West pilots.

D. The Court Has Jurisdiction Because USAPA's Violation Of The Duty Of Fair Representation Makes This A Hybrid Action.

The district court generally lacks jurisdiction over a minor dispute—a dispute alleging breach of a CBA provision. *Intl. Assn. of Machinists & Aerospace Workers v. Alaska Airlines, Inc.*, 813 F.2d 1038, 1040 (9th Cir. 1987). The district court, however, has jurisdiction over minor disputes in a hybrid action where, as here, the employee claims "that the employer breached the collective bargaining agreement, and that the union breached its duty of fair representation." *Gardner v. Intl. Tel. Employees Loc. No. 9*, 850 F.2d 518, 520, n.2 (9th Cir. 1988). Such claims make a hybrid action if they have an "inextricable" link. *McKee v. Transco Products, Inc.*, 874 F.2d 83, 86 (2d Cir. 1989). The claims here have such a link.

1. USAPA Violated The Duty Of Fair Representation.

USAPA violated the duty of fair representation because: (1) it was used as a tool by the US Airways pilots to improperly evade their duty to support the Nicolau Award; (2) it determined a seniority negotiating position without giving due consideration to

minority interests; (3) it determined a ripe seniority dispute by majority vote; and (4) it promised to violate the duty of fair representation if elected bargaining agent.

a. The US Airways Pilots Improperly Used USAPA As A Tool.

Air Wisconsin Pilots Protection Committee v. Sanderson, 909 F.2d 213 (7th Cir. 1990), recognized that a new union violates the duty of fair representation if it is used as a tool by the majority to evade their duty to support a seniority arbitration award created under a former union. After an ALPA Merger policy arbitration established an integrated seniority list, the larger of the two merging pilot groups threatened to "oust[] ALPA in favor of a union not pledged to defend the arbitrators' award." *Id*. at 217. The court observed that, had this threat been carried out, it would have been a violation of the duty of fair representation by the **new union** because:

> [A]n attempt by a majority of the employees in a collective bargaining unit to gang up against a minority of employees in the fashion apparently envisaged by the plaintiffs could itself be thought a violation of the duty of fair representation by the union that the majority used as its tool.

Id. The US Airways Pilots actually carried out such threats and used USAPA to oust ALPA. They did this so that they could have a union that was not directly pledged to support the Nicolau Award. Just as predicted in *Air Wisconsin*, this violated the duty of fair representation.

b. USAPA Improperly Adopted Date-Of-Hire Without Giving Due Consideration To America West Pilot Interests

A union violates the duty of fair representation if it decides a bargaining position without considering the interests of all represented workers. *Letter Carriers v. NLRB*, 595 F.2d 808, 811 (D.C.Cir. 1979). In *Letter Carriers*, the union violated the duty because it formulated its policy by having members vote their self-interest. *Id.* at 810.

This kind of election procedure fails to consider the interests of all represented workers because the vote was "motivated solely by self-interest." *Id.* at 812.[5]

USAPA had a similar flaw in its procedure to adopt a date-of-hire policy because it formed the policy before the majority of the members of the bargaining unit had any input, and it requires a supermajority to change that policy. Indeed, USAPA admits that preference for date-of-hire drove its formation and describes itself as "a union constitutionally committed to negotiating a single pilot contract featuring seniority integration based on date of hire principles." Just as in *Letter Carriers*, therefore, this procedure for adopting a negotiating policy violated the duty of fair representation.

c. USAPA Improperly Caused A Ripe Seniority Dispute To Be Decided By Majority Vote.

A union violates the duty of fair representation if it allows a ripe seniority dispute to be decided by a majority vote. *See Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 798-99 (7th Cir. 1976). When a seniority dispute is ripe, the self-interest of each member of the bargaining unit is too clearly defined to allow the dispute to be decided by majority vote. *See id.* Under such circumstances, a court should presume that each member would vote its self-interest. A vote of self-interest cannot give due consideration to minority interests:

> While a union may make seniority decisions within 'a wide range of reasonableness . . . in serving the (interests of the) unit it represents,' **such decisions may not be made solely for the benefit of a stronger, more politically favored group** over a minority group. To allow such arbitrary decision-making is contrary to the union's duty of fair representation which compensates employees for the opportunity to bargain for themselves which they lost when the union became the exclusive bargaining representative for the unit. Such conduct has been held to constitute an unfair labor practice, or a breach of the union's duty of fair representation as developed by the courts independent of unfair labor practice proceedings.

Id. at 798-99 (citations omitted, emphasis added).

[5] This case and other LMRA cases cited below address law that applies under the RLA because the duty of fair representation "applies equally to both the RLA and the LMRA." *Fechtelkotter v. Air Line Pilots Assn., Intl.*, 693 F.2d 899, 903 (9th Cir. 1982).

USAPA caused a representational election that decided a ripe seniority dispute based on members' self-interest no less than the election in *Barton Brands*. Just as in *Barton Brands*, therefore, this election violated the duty of fair representation.

d. USAPA Improperly Promised To Violate The Duty Of Fair Representation If Elected Bargaining Agent.

A union violates the duty of fair representation if it promises to violate the duty of fair representation if elected the bargaining representative. *Truck Drivers and Helpers, Local Union 568 v. NLRB*, 379 F.2d 137, 144 (C.A.D.C. 1967). *Truck Drivers* looked at a certification contest following a merger. UTE represented the larger group of workers. The Teamsters represented the other. UTE's "campaign promise to discriminate against the Teamster employees [was] an unfair labor practice" because a "threatened action which would violate a union's fair representation duty" itself "constitutes an unfair labor practice." *Id.*

By campaigning on promises to impose an improperly derived date-of-hire seniority policy and to prevent implementation of the Nicolau Award, USAPA was campaigning on promises to violate its duty of fair representation. Just as in *Truck Drivers*, therefore, these promises violated the duty of fair representation.

2. This A Hybrid Action.

The requisite link for a hybrid action is satisfied here at least two different ways. First, there are common elements to the proof of the two claims. See *McKee*, 874 F.2d at 86. Second, USAPA violations of the duty would frustrate efforts to obtain relief in front of a System Board. *See Childs v. Pennsylvania Federation Broth. of Maintenance Way Employees*, 831 F.2d 429, 441 (3d Cir. 1987).

There are sufficient common elements because both claims address a dispute over date-of-hire seniority, both claims address the consequences of the Nicolau Arbitration and both claims arise out of the merger. The harm from both claims is the same—out of

order furloughs of America West pilots. Much of "the case to be proved[, therefore,] is the same against both." *McKee*, 874 F.2d at 86.

Plaintiffs cannot obtain relief from a System Board because USAPA's date-of-hire policy is closely aligned with the actions taken by the Company. Plaintiffs, therefore, cannot obtain a fair hearing in front of a System Board comprised of representatives loyal to the Company and USAPA.

III. CONCLUSION

Plaintiffs demonstrate above that they have a strong likelihood to succeed on breach of contract claims against the Company, that absent preliminary injunctive relief they will suffer irreparable harm, and that the balance of hardships tips in their favor. Having, therefore, satisfied the standards for preliminary injunction, Plaintiffs respectfully ask the Court to grant their application for an ORDER that the Company shall not furlough Plaintiffs or any other pilot who was on active service at the time of the merger before it has furloughed all US Airways pilots who were on furlough at that time.

Dated this 18th day of September, 2008.

SHUGHART THOMSON & KILROY, P.C.

/s/ Andrew S. Jacob

By: _____

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

CERTIFICATE OF SERVICE

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

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