LEE SEHAM, Esq. *pro hac vice*
LUCAS K. MIDDLEBROOK, Esq. *pro hac vice*
NICHOLAS P. GRANATH, Esq., *pro hac vice*
STANLEY J. SILVERSTONE, Esq., *pro hac vice*
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
445 Hamilton Avenue, Suite 1204
White Plains, NY 10601
Tel: 914 997-1346; Fax: 914 997-7125

NICHOLAS J. ENOCH, Esq., State Bar No. 016473
LUBIN & ENOCH, P.C.
349 North 4th Avenue
Phoenix, AZ 85003-1505
Tel: 602 234-0008; Fax: 602 626 3586

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI, Plaintiffs, vs. US AIRLINE PILOTS ASSOCIATION, US AIRWAYS, INC., Defendants,	Case No. 2:08-cv-1633-PHX-NVW (Consolidated) **DEFENDANT USAPA'S TRIAL BRIEF ON REMEDY**
Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI, Plaintiffs, vs. Steven H. BRADFORD, Paul J. DIORIO, Robert A. FREAR, Mark. W. KING, Douglas L. MOWERY, and John A. STEPHAN, Defendants.	Case No. 2:08-cv-1728-PHX-NVW

The Court has scheduled the Remedy Phase of the trial to commence on Wednesday, May 12, before a verdict is rendered. Just after resting, Plaintiffs filed a "Trial Brief On Remedy." (Doc. # 447). This was in addition to Plaintiffs' earlier "Trial Brief on Contested Issues Of Law." (Doc. # 355). Defendant submits this brief in response, and to address the Bench Trial, which appears to raise no fact issues. In so doing, Defendant hereby incorporates by reference "Defendant USAPA'S Trial Brief (Bench Trial)" (Doc. # 353) and "Defendant USAPA's Proposed Findings Of Fact And Conclusions Of Law" (Doc. # 397).

I. RESPONSE TO PLAINTIFFS' BRIEF.

1) Plaintiffs' "Additional Findings" Are Unsupported And In Any Case Immaterial To The Injunction Remedy.

The Court should reject Plaintiffs' "additional findings" because they are unsupported in the record and in any case not necessary to craft a lawful and prudent injunction.

First, Plaintiffs seek "additional findings *relevant to liability,*" but these are conclusory and there is no attempt to support them with evidence and in any case finding them would invade the province of the Jury. This Court already determined that Defendant has a 7th Amendment right to a jury trial. (Doc. # 202). The Court set trial by "jury on the issue of liability." (Doc. # 224). The Court further determined that:

> This jury trial will only address the liability facts underlying Plaintiffs' class action. An additional bench trial will adjudicate any injunction-specific facts shortly thereafter, and any monetary relief owing to the named plaintiffs and/or the class could be dealt with in subsequent

proceedings. (Doc. # 250 at 3:4).

And at trial the Court determined that the Jury would answer only a General Verdict, so there are no interrogatories. What Plaintiffs seek now are admittedly "liability facts" not injunction-specific facts. Consequently, there is no legal significance to Plaintiffs' wish list.

Second, what Plaintiffs assert as "un-controverted evidence" for findings "relevant to remedy" simply misrepresents the record and unashamedly invites this Court to replace the System Board of Adjustment. The issue of the furlough and any "losses" resulting from the Airline not "operating according to the Nicolau award" are in the dismissed Counts I and II. These are within the exclusive province of the System Board. The Board is hearing Plaintiffs' grievance on exactly this issue at the end of this month. And, asking this Court to find what was the "intent" of the Transition Agreement is exactly what the RLA reserves to the exclusive jurisdiction of the System Board, to interpret and apply collective bargaining agreements.

2) <u>A Declaration That The Company And The "Pilots" Are "Contractually Bound" To Negotiate Nicolau Is Precluded By This Court's Dismissal Of the State Claim And Would Unlawfully Extend This Court's Authority Over Non-Parties.</u>

The first of four remedies Plaintiffs now seek is a Declaration that the Company and "its pilots" are contractually bound to incorporate Nicolau without conditions and restrictions in a new CBA. The Court should reject this out of hand for the following reasons:

As a threshold matter, Plaintiffs have no breach of contract claim in this case. That was not pled. In addition, this remedy does not appear in Plaintiffs' "Proposed Findings Of Fact And Conclusions Of Law." (Doc. # 395).

Second, Plaintiffs sought a contract theory in the State claim and this Court properly dismissed it.

Third, it is axiomatic that this Court has no authority to order non-parties to do anything. *Zepeda v. United States Immigration & Naturalization Serv.*, 753 F.2d 719, 727 (9th Cir. 1983) (a court "may not attempt to determine the rights of persons not before the court"); Fed. R. Civ. P. 65(d) (court may enjoin a party or an officer, agent, servant, employee, or attorney of a party, or persons in active concert with them); *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1287 (9th Cir. 2009) ("The text of Rule 65(d) is exclusive, stating that an injunction can permissibly bind 'only' those persons listed in Rule 65(d)."). Both the company and the "the pilots" are non-parties. Only USAPA is a party.

Fourth, Plaintiffs cite cases that are a *non sequitur* to the relief they claim, even if it were lawful. The *Castaneda* case is distinguishable. There the parties before the court -selected arbitration through their labor contract. Here, USAPA was not a party to any arbitration; it is stipulated that the ALPA MEC merger representatives were. Even if USAPA were a party, the Nicolau arbitration was pursuant to ALPA Merger Policy, not a CBA, but in *Castaneda* the court was addressing an arbitration conducted under a CBA. Moreover, the sentence quoted by Plaintiffs is not the full sentence – "...courts

should not disrupt such awards" (sentence continues in the case with "except on the grounds..."). In the case at bar, the Jury is not asked to "disrupt" the award, it's being asked whether there was a breach of the duty of fair representation. Likewise, the citations to *Hines* and *Edelman* are inapposite. Both these cases concern run-of-the-mill grievances that arise under CBA's where all parties were before the court. But here this Court has absolutely no jurisdiction over the parties to the Nicolau arbitration – the ALPA MEC merger representatives – that was conducted under a predecessor union's internal policies.

Fifth, federal courts do not interpret collective bargaining agreements as a matter of law and the Transition Agreement is a collectively bargained agreement. Other than a mere "peek" at the merits, the Railway Labor Act grants the System Board of Adjustment the exclusive jurisdiction to interpret and apply CBAs. *See*, *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 94, 58 L. Ed. 2d 354, 99 S. Ct. 399 (1978); *Air Line Pilots Ass'n., Int'l v. Eastern Air Lines, Inc*., 869 F.2d 1518, 1521 (D.C. Cir. 1989); *Railway Labor Exec. Ass'n v. Norfolk & W. Ry. Co.,* 833 F.2d 700, 704 (7th Cir. 1987); *Independent Union of Flight Attendants v. Pan American World Airways, Inc*., 789 F.2d 139, 141 (2d Cir. 1986); *Brotherhood of Locomotive Engineers Division 269 v. Long Island Rail Road Co*., 85 F.3d 35, 37 (2d Cir. 1996).

3) An Order Directing USAPA To Negotiate To "Incorporate Nicolau" With "Equal West Pilot Representation" And Submit To A Single Ratification Vote Was Never Pled, Would Violate Labor Law, Would Frustrate Or Prevent Any Successful Negotiations, And Would Hopelessly Entangle This Court In Ongoing Bargaining.

The second of four remedies Plaintiffs now seek is an order directing USAPA with "equal West Pilot representation" to negotiate a single CBA that incorporates Nicolau and then present it for a single ratification vote by all "USAPA members." The Court should reject this remedy because:

First, Plaintiffs seek a remedy that compels USAPA to accept a particular bargaining position, i.e. Nicolau with no modifications allowed. This is a remedy devoid of any legal authority whatsoever and contravenes well settled case law that ***forbids a court from mandating a specific bargaining result***. *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 108, 90 S. Ct. 821 (1970) ("allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based – private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract); *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 74, 111 S. Ct. 1127 (1991) ("The Government has generally regulated only 'the *process* of collective bargaining,'" *citing H. K. Porter*); *United Steelworkers v. NLRB*, 441 F.2d 1005, 1009 (D.C. Cir. 1970) ("Congress has made it clear that the obligation of good faith bargaining 'does not compel either party to agree to a proposal or require the making of a concession'"); *Tex Tan Welhausen Co. v. NLRB*, 434 F.2d 405, 407 (5th

Cir. 1970) (following *Porter*'s ruling that the Board is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement); *NLRB v. Atlantic International Corp*., 664 F.2d 1231, 1233 (5th Cir. 1981) ("The notion that the Board may require a party to comply with what it speculates the outcome of negotiations would have been had good-faith bargaining taken place clearly contravenes the holding of *H. K. Porter Co., Inc. v. NLRB, 397 U.S. 99, 90 S. Ct. 821, 25 L. Ed. 2d 146 (1970) Porter* forbids the Board from requiring a company and a union to bargain to a foreordained result."); *East Bay Chevrolet v. NLRB*, 659 F.2d 1006, 1009 (9th Cir. 1981) ("the Board may not prescribe the substantive terms of a collective bargaining agreement, either directly or indirectly"); *Clearwater Finishing Co. v. NLRB*, 670 F.2d 464, 468 (4th Cir. 1982) ("*H. K. Porter* Co. stands for the proposition that the Board has no authority to order agreement on mandatory subjects of bargaining"); *Hyatt Management Corp. v. NLRB*, 817 F.2d 140, 143 (D.C. Cir. 1987) ("Cases subsequent to *H.K. Porter* have recognized that neither the courts nor the Board can change or nullify substantive contractual provisions") (citations omitted); *Amalgamated Clothing & Textile Workers Union & Local 1566 (Belding Hemingway Co.)*, 246 N.L.R.B. 747 (1979), *enforced*, 662 F.2d 1044 (4th Cir. 1981) (Board refusing to require union to execute a settlement agreement proposed by the employer that the union had wrongfully refused to accept).

The NLRB's decision in *Amalgamated Clothing & Textile Workers* is particularly instructive. In that case, both the Administrative Law Judge and the Board

found that the union had engaged in certain unfair labor practices relating to the termination of employee Overstreet for failing to give the company proper notice that she was taking sick leave. Shortly after the termination, the company offered to reinstate Overstreet pursuant to a written settlement agreement provided that the agreement was signed by both the employee and her union. Thereafter, the union's grievance committee voted to reject the company's offer on the ground that it violated the contract. However, there was evidence that, during the grievance committee meeting, one of the committee members brought up the fact that Mrs. Overstreet was not a union member. The ALJ found that the union's refusal to sign the settlement agreement – which he was convinced was related to the fact that Overstreet was a non-member – was the sole reason why Overstreet had not been reinstated. As a result, the ALJ recommended that the union request the company to reinstate Overstreet, and ordered the union to "sign the company proposal … should the Company require that this be done as a condition to Overstreet's reinstatement." *Id*. at 751. The Board affirmed the ALJ's ruling, except that it did not adopt the ALJ's recommendation that the union be ordered to sign the company's settlement proposal because "[s]uch requirement has the potential of forcing the parties to rewrite the contract in contravention of the principles set forth in *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970)." *Id*. at 748 n.4. Thus, even though the Board found that the union had committed an unfair labor practice by refusing to sign the settlement proposal, the remedy could not include an order to sign the proposal.

Second, Plaintiffs now seek a remedy of a single ratification vote. This is not what was pled. It does not appear in Plaintiffs' "Proposed Findings Of Fact And Conclusions Of Law." (Doc. # 395). And what Plaintiffs' Amended Complaint pled was just the *opposite*: "Defendants shall not amend the West CBA without the approval of the Court unless such amendment is ratified by a majority of the West Pilots." (Doc. # 86 at ¶ 123 A. (3)). Plaintiffs are not entitled to seek a remedy they did not plead. Were it otherwise, Defendant's right to a fair trial and due process would be denied because Defendant never had notice of the remedy.

Third, Plaintiffs now seek a remedy of "equal West pilot representation." It is not clear what this means. If it means altering USAPA's constitution or policies then it is nothing more than a request for this Court to meddle in the Defendant's self-governance and the Court should reject that as a matter of law. Under the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 402 *et seq* (which applies to unions subject to the RLA (29 U.S.C. § 402(J) (1)), courts are bound to adhere to a longstanding policy against intervention in the internal affairs of the union. *Local No. 48, United Bhd. of Carpenters & Joiners of America v. United Bhd. of Carpenters & Joiners of America*, 920 F.2d 1047 (1st Cir. 1990) (internal operations of unions are left to union officials chosen by members to manage those operations, except in very limited instances expressly provided for in the LMRDA); *Newman v. Local 1101, Communication Workers of America, ALF-CIO*, 570 F.2d 439 (2d Cir. 1978) (only where there is clear and convincing proof that union action against a member was

part of a purposeful and deliberate attempt by union officials to suppress dissent within the union should federal courts act under LMRDA, otherwise the court is bound to adhere to the longstanding policy against intervention in the internal affairs of the union); *Schuchardt v. Millwrights and Machinery Erectors Union No. 2834*, 380 F.2d 795 (10th Cir. 1967) (LMRDA does not project absolute judicial control into internal management of unionism).

If it means just waiting for West pilots to become members, there is no need for an injunction because West pilots are already free to join (as the Court so instructed the Jury during the trial). USAPA cannot be placed in peril of having to defend against a contempt action for something that it is already doing.

Fourth, Plaintiffs' argument once again calls upon this Court to interpret the TA in a manner only an Adjustment Board can.

Fifth, the assertion that ALPA could have put the East MEC in Trusteeship in order to put to a vote a CBA with Nicolau in it runs head-long into a mountain of evidence that makes this rank speculation. Not only was ALPA not willing to do that, and had broadcast the same to all pilots, but there is overwhelming evidence that any such vote would have been heavily defeated. It was stipulated that the East pilots were very opposed to the Nicolau award:

> 16. The Nicolau Award generated considerable negative reaction among many East pilots. On or about July 25, 2007, the East MEC determined that the East pilots would never ratify a single collective bargaining agreement that incorporated the Nicolau List.

> 17. A majority of East Pilots strenuously objected to the Nicolau Award and were opposed to its implementation. (Doc. # 417 at p. 5).

And the notion that ALPA was preparing to put the East MEC under trusteeship is directly countered by Defendant Exhibit 1122, the Prater letter. What ALPA's highest officer publicly told all the pilots was this:

> "I want to assure that trusteeship will ***not*** be used to deprive you of your right to separate membership ratification. That protection – for each MEC and each pilot group ... exists in ALPA Merger Policy." [original emphasis]

And Jack Stephan, the East MEC Chair testified that the trusteeship imposed on LEC 41 had nothing to do with the Nicolau award (Tr. 1317:20 – 1318:3) and that he, the East MEC Chair, remained loyal to ALPA.[1]

Sixth, the argument that the pilots "in effect" agreed that they could be compelled is yet another back door attempt to re-do the dismissed state claim. The pilots are not the defendant in this case. There is no contract claim, nor could there be under law. And pilots owe no duty of fair representation.

4) <u>Ordering The Airline Or Any Other Non-party To Do Anything Is Outside This Court's Jurisdiction.</u>

The third of four remedies Plaintiffs now seek is an order directing the "Airline to begin using the Nicolau Award ... even if a single CBA is not yet finalized." The Court should not only reject this, it should consider sanctions against Plaintiffs.[2]

First, this is a remedy never pled.

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[1] It was imposed because the LEC was accused of disloyalty to ALPA.

[2] This is nothing more than a backdoor attempt to have this Court order a remedy in

Second, the only case cited, *Bernard,* is wildly off point. In *Bernard*, the court ordered a "tainted" agreement set aside, and a temporary system for promotions and furloughs established. But here there is no agreement in place to be set aside, much less a "tainted" one. The Transition Agreement continues to govern.

Third, this is a naked call to exceed the Court's authority. Incredibly, it is not enough for Plaintiffs to have this Court order a dismissed, non-party, here the company, to take actions, even more the Plaintiffs would skip a contract altogether. This is simply an invitation for judicial activism unrestrained by any law. Defendant hereby incorporates by reference the Company's response (Doc. # 430) on this issue and for this limited purpose.

5) <u>This Court Has No Authority To Enjoin "East Pilots" To Do Or Not Do Anything.</u>

The fourth of four remedies Plaintiffs now seek is an order enjoining "USAPA and East Pilots" from "filing or asserting grievances related to recalling furloughed West Pilots or assigning West Pilots to East aircraft." The Court should reject this:

First, this Court has no authority to enjoin non-parties such as pilots, as a matter of law. *Zepeda v. United States Immigration & Naturalization Serv.*, 753 F.2d 719, 727 (9th Cir. 1983) (a court "may not attempt to determine the rights of persons not before the court"); Fed. R. Civ. P. 65(d) (court may enjoin a party or an officer, agent, servant, employee, or attorney of a party, or persons in active concert with them); *Comedy Club,*

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advance of Plaintiffs' Count I and II arbitration scheduled for later this month.

Inc. v. Improv West Assocs., 553 F.3d 1277, 1287 (9th Cir. 2009) ("The text of Rule 65(d) is exclusive, stating that an injunction can permissibly bind 'only' those persons listed in Rule 65(d).").

Second, pilots have an ***individual statutory right to file grievances under the RLA.*** *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 740, 89 L. Ed. 1886, 65 S. Ct. 1282, n.39 (1945) ("The individual employee's rights cannot be nullified merely by agreement between the carrier and the union. They are statutory rights, which he may exercise independently or authorize the union to exercise in his behalf."); *Andrews v. Louisville & Nashville Railroad*, 406 U.S. 320, 322 (1972); *Landers v. National Railroad Passengers*, 485 U.S. 652 (1988); *Pyles v United Airlines Inc.,* 79 F.3d 1046, 1052 (11th Cir 1996) ("Appellant should first have attempted to pursue his grievance before a system board of adjustment individually (or with counsel) and without any union assistance); *Miklvic v. USAir, Inc*, 21 F.3d 551, 555 (3rd Cir. 1994) ("In contrast to other labor statutes such as the Labor Management Relations Act, nothing in the Railway Labor Act prevents an employee from bringing an arbitration on his or her own behalf, without the support of a union. *45 U.S.C. § 153* First (j)); *Slagley v. Illinois Cent. R.R.,* 397 F.2d 546 (7th Cir. 1968) (employee's right to submit grievance to Adjustment Board is "statutory and cannot be nullified by agreement between the carrier and the union"); *Burkevich v Air Line Pilots*, 894 F.2d 346, 349-50 (9th Cir. 1990) (in bankruptcy, no DFR where union settled only "group" as opposed to individual claims); *Stevens v. Teamsters Local 2707,* 504 F. Supp. 332, 334 (W.D.

Wash. 1980) (airline employees have statutory right to pursue grievances individually, and in some cases will be parties entitled to submit matters to the system board).

Third, USAPA has a corresponding duty of fair representation to process meritorious grievances. *Vaca v. Sipes*, 386 U.S. 171, 194 (1967) ("a union must, in good faith and in a nonarbitrary manner, make decisions as to the merits of a particular grievance"); *Zuniga v. United Can Co*., 812 F.2d 443 (9th Cir. 1987); *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986); *Dutrisac v. Caterpillar Tractor Co*., 749 F.2d 1270 (9th Cir. 1983).

Fourth, the cases Plaintiffs cite are misplaced. The first case, *Abbot Laboratories* is not a labor law case, it is a patent case. The *Butler* case is a reversed 8th Circuit case that was unique to facts therein and it should not be relied on. In *Butler*, after judgment was entered, the union *itself* actually posted a notice inviting employees affected by Butler's new seniority status to file grievances, and 14 employees did so. Thus, on the *Butler* facts the union was actively working to undermine the judgment. That is a fact that has not even been *alleged* in the case at bar (as this Court observed, it's a bit premature to begin contempt proceedings until there has been a chance to comply). Like a contempt proceeding, the Court can only issue this kind of injunctive relief if there is first an allegation, and second, proof that Defendant solicited such grievances to undermine an issued injunction. As a practical matter, this remedy would be impossible to enforce because grievances can be written in countless ways and interpreted in many more. A *Butler*-type of remedy would entangle this Court in daily contract

enforcement.

II. WHAT REMEDY THE COURT SHOULD ENTER, IN THE EVENT OF A VERDICT IN FAVOR OF PLAINTIFFS.

The Court does not have authority to prescribe a specific negotiating *result*, but may order reinstatement of the dual ratification requirement so that USAPA would be required to negotiate a single CBA that would satisfy the majority of West and East USAPA members voting separately.[3]

This remedy would effectively restore the political status quo that existed under ALPA. To compel the adoption of the Nicolau Award, on the other hand, would not only indefinitely extend the impasse, but would create a right (Nicolau implementation as part of a single CBA) *that did not even exist under ALPA policy*. Defendant's approach, however, would be consistent with the Court's prior holding that the Plaintiffs' claim has never been substantive but rather merely procedural. (*See* Doc. # 84 at 9:21).

Defendant's suggested remedy comports with applicable labor law while providing Plaintiffs with a specific remedy that addresses a potential Jury finding of liability on the claim they pled. It also would ensure that the Court does not become entangled in ongoing monitoring of the case, or in bargaining. It is a remedy that is workable because the approval of both groups is an objective, identifiable event and such an injunction would have a definitive scope. It is a remedy that capitalizes on the

[3] Defendant does not waive any appeal, right or argument in proposing this remedy.

familiar process of collective bargaining because it gives the union and the company complete freedom to negotiate, unrestrained by any particular outcome. And, it is a remedy that capitalizes on the incentive of securing all of the votes of the Plaintiffs' class, thus guaranteeing that Plaintiffs' interests will be considered and protected, in this instance, from being out-voted by the majority, the very ill that the Plaintiffs have complained of.

Suggested language for a proposed injunction is as follows:

1. Upon reaching a tentative agreement of a new, single collective bargaining agreement, USAPA shall allow separate, dual ratification votes of West and East USAPA members who are eligible to vote according to the USAPA Constitution and Bylaws.

2. The provisions of this Order do not require US Airways to negotiate or reach any agreement with USAPA on the matters described herein.

3. Upon close of the ratification vote for a new, single collective bargaining agreement, this injunction shall dissolve.

4. The provisions of this Order do not abridge the union-constitutional rights, or statutory rights, of members of USAPA in any manner.

Respectfully Submitted,

Dated: May 12, 2009

By: ***/s/ Nicholas P. Granath, Esq.***

Nicholas P. Granath, Esq. (*pro hac vice*)
ngranath@ssmplaw.com
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
2915 Wayzata Blvd.
Minneapolis, MN 55405

Lee Seham, Esq. (*pro hac vice*)
Stanley J. Silverstone, Esq. (*pro hac vice*)
Lucas K. Middlebrook, Esq. (*pro hac vice*)
Theresa Murphy, Esq. (*pro hac vice*)
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
445 Hamilton Avenue, Suite 1204
White Plains, NY 10601

James K. Brengle, Esq. (*pro hac vice*)
Duane Morris, LLP
30 South 17th Street
Philadelphia, PA 19103-4196

Nicholas Enoch, Esq. State Bar No. 016473
stan@lubinandenoch.com
LUBIN & ENOCH, PC
349 North 4th Avenue
Phoenix, AZ 85003-1505

Attorneys for Defendant
US Airline Pilots Association

CERTIFICATE OF SERVICE

This is to certify that on the date indicated herein below true and accurate copies of the foregoing documents and their attachments, *to wit*,

- DEFENDANT USAPA'S TRIAL BRIEF ON REMEDY
- Certificate of Service

were electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all admitted counsel who have registered with the ECF system, including but not limited, to:

Marty Harper MHarper@Polsinelli.com	Don Stevens DStevens@Polsinelli.com	Andrew S. Jacob AJacob@Polsinelli.com
Kelly J. Flood KFlood@Polsinelli.com	Katie Brown KVBrown@Polsinelli.com	

Further, I certify that paper hard copies shall be provided to The Honorable Neil V. Wake, District Court Judge, 401 W. Washington Street, SPC 52, Phoenix, AZ 85003.

On May 12, 2009, by:

/s/ Nicholas Paul Granath, Esq.