Nicholas Granath, Esq., *pro hac vice*
ngranath@ssmplaw.com
Lucas K. Middlebrook, Esq., *pro hac vice*
lmiddlebrook@ssmplaw.com
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
nick@lubinandenoch.com
LUBIN & ENOCH, PC
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

US Airways, Inc., a Delaware Corporation,

Plaintiff,

vs.

Don Addington, an individual, *et al*

and

US Airline Pilots Association,

Defendants.

Case No. 2:10-CV-01570-PHX-ROS

MEMORANDUM IN SUPPORT OF DEFENDANT USAPA'S EMERGENCY MOTION TO STAY ALL FURTHER PROCEEDINGS

I. SUMMARY

Currently pending before the Ninth Circuit Court of Appeals is a request to stay issuance of the Ninth Circuit's mandate in *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174 (9th Cir. 2010).[1] That mandate, when issued, will remand the matter back to the District of Arizona, with "direction that the action be **DISMISSED**." *Id*. at 1184. (emphasis in original). The Addington defendants named in this action, who are the *exact* plaintiffs in the pending Ninth Circuit matter, have based the requested stay of the mandate on their:

> bona fide intention to make proper and timely application to the Supreme Court of the United States for a writ of certiorari.

(Declaration of Nicholas Granath, ¶ 5, Ex. B at 1). If the writ of certiorari is granted by the United States Supreme Court and the Ninth Circuit is required, upon remand, to rule on the merits, then there is a likely possibility that premature adjudication of this action will result in inconsistent rulings between this Court and the Ninth Circuit. Given that no harm will result to *any of the parties* if a stay of this action is granted, judicial efficiency and economy weigh heavily in favor of staying this action pending final disposition by the Supreme Court of the *Addington v. USAPA* matter.

II. PROCEDURAL BACKGROUND

On September 4, 2008, the same six individual US Airways' pilots, formerly employed by America West, that are named as defendants in this action, filed a hybrid

[1] A copy of the decision is attached, for the convenience of the Court, as Exhibit A to the Granath Declaration.

duty of fair representation ("DFR") claim against their union, the US Airline Pilots Association ("USAPA") and their employer, US Airways, Inc. ("US Airways").[2] US Airways fought vigorously for and was granted dismissal from that lawsuit on the ground that "the System Board of Adjustment had exclusive jurisdiction over [the claims against the Company]." *Addington*, 606 F.3d at 1178. The lawsuit then proceeded solely against USAPA, and a trial resulted in the issuance of a permanent injunction directing USAPA to use the seniority proposal (the Nicolau Award) of its decertified predecessor in bargaining towards a single contract with US Airways. *Id*. (explaining terms of district court injunction).

USAPA immediately appealed the district court's findings and conclusions on an expedited basis, and on June 4, 2010, the Ninth Circuit Court of Appeals determined that the DFR claim was never ripe and remanded "to the district court with directions that the action be dismissed." *Addington*, 606 F.3d at 1184. On June 10th of this year, the Addington plaintiffs petitioned the Ninth Circuit for an en banc rehearing, but that request was denied on July 8 with no judge of the Ninth Circuit requesting a vote. (Granath Decl. ¶ 6, Ex. C).

On July 14, 2010, one day before the Ninth Circuit mandate was scheduled to issue, the Addington plaintiffs filed a motion to stay the mandate pending the filing of a petition for writ of certiorari to the United States Supreme Court. (Granath Decl. ¶ 5, Ex. B). USAPA opposed the Addington plaintiffs' request to stay the mandate, the plaintiffs

[2] *See Addington, et al v. US Airline Pilots Association, et al*, 2:08-cv-01633-NVW.

chose not to file a reply, and the matter is currently pending decision by the Ninth Circuit. The Addington plaintiffs' ninety days to petition the Supreme Court is currently running.

Without any advance notice to USAPA, US Airways filed the current action on July 26, 2010, apparently in anticipation of an imminent Ninth Circuit mandate directing dismissal of *Addington*. The current action alleges similar facts and raises the same issues as *Addington* and invites this Court to end-run the recent ruling by the Ninth Circuit that such issues are premature and unripe.

III. FACTUAL BACKGROUND

In 2005, US Airways, Inc. and America West Airlines, Inc. merged into a single carrier known as US Airways. *Addington*, 606 F.3d at 1177. The merger raised the issue as to how seniority would be integrated between the two airlines' respective employee groups.

With the exception of the pilots, every unionized employee group at US Airways proceeded with integration on the basis of date-of-hire seniority or "dovetailing." With respect to the flight attendants, mechanics, baggage handlers, and stores keepers, the corresponding union negotiated directly for date-of-hire seniority integration, which the union and the carrier agreed to be a fair and equitable approach.

At the time of the merger, the Air Line Pilots Association ("ALPA") was the collective bargaining agent for both the US Airways pilots ("East") and the America West pilots ("West"). *Id.* Under the ALPA structure, the two pilot groups' separate collective bargaining agreements ("CBA") were administered by their respective Master

Executive Councils (MEC's). *Id.*

ALPA maintained an internal union "Merger Policy" which, in the absence of an agreement between unelected "Merger Representatives," provided that ALPA's seniority integration proposal would be determined by an internal Arbitration Board composed of two non-voting ALPA members chosen from ALPA's Master List of Pilot Neutrals and an ALPA-approved arbitrator who acted as the Arbitration Board's Chairman. The parties to the arbitration, as found by the Ninth Circuit, were "the US Airways Pilot Merger Representatives and the America West Pilot Merger Representatives." *Id.* These Merger Representatives were subject to expulsion from ALPA if they resisted the ALPA-governed process or merger criteria.

The Arbitration Board was obligated to render a decision consistent with criteria set forth in ALPA Merger Policy. Whereas these criteria had historically placed primary emphasis on date-of-hire seniority, in 1991, ALPA Merger Policy had been amended (without a vote of the rank-and-file pilots) to eliminate any reference to date-of-hire seniority.

On September 23, 2005, US Airways, America West and ALPA entered into a "Transition Agreement" ("TA"), which addressed the process of the two airlines' operational merger as it related to the pilots. *Id.* "Under the TA, the carriers agreed not to object to ALPA's seniority integration proposal, provided it did not result in certain additional costs." *Id.* As with ALPA Merger Policy and the ALPA Constitution, rank-and-file pilots were never allowed to vote on the TA.

Nevertheless, the "seniority integration proposal could be implemented only as

part of a single CBA." *Id*. That single CBA, in turn, "would require approval by the East Master Executive Council, the West Master Executive Council, and a majority of each of the East and West pilot groups, **effectively giving each side a veto**." *Id*. (emphasis added). The only say the Pilots had in the process came at the tail end when they were finally allowed by ALPA to vote yes or no on any contract incorporating the Nicolau Award.

In the instant case, the ALPA arbitration culminated in a May, 2007 decision referred to as the "Nicolau" Award. *Id*. at 1177. Nicolau disregarded date-of-hire seniority principles in favor of granting super seniority to more junior West pilots, based ostensibly on a snapshot evaluation of the respective airlines' economic status at the time of the merger. It resulted, for example, in the placement of probationary West pilots with under two months seniority above East pilots who had more than sixteen years of credited length of service.

The Nicolau Award provoked state court litigation between the East and West MEC's concerning whether the Award had properly adhered to ALPA Merger Policy criteria; however, this litigation was discontinued after ALPA's decertification and the consequent dissolution of the two MEC's. *See US Airways MEC v. America West MEC*, 525 F. Supp. 2d 127 (D.D.C. 2007).

As the Ninth Circuit held, "[a] majority of East Pilots strenuously objected to the Nicolau Award and opposed its implementation … [and] the East Master Executive Council determined that the East Pilots would never ratify a CBA that incorporated the Nicolau Award." *Id*. at 1178. ALPA attempted to break the Nicolau-generated impasse

by sponsoring intense efforts to foster a compromise between its West and East MECs. ALPA Merger Policy only required ALPA to use all "reasonable means" to negotiate for the implementation of the seniority integration proposal provoked by the Arbitration Board. *Id*. at 1177. Moreover, under the Transition Agreement referenced in US Airways' Complaint, ALPA and US Airways had the right to modify or even terminate the TA by mutual agreement. (§§ XII.B & E). Nevertheless, ALPA was unsuccessful in its attempt to get the East and West Pilots to "reach a compromise." *Id*. at 1178.

From August 17, 2007 until the date of ALPA's decertification on April 18, 2008, there were no further negotiations towards a single CBA between ALPA and US Airways. *Id*. at 1178. An impasse had arisen, and it was an impasse of potentially indefinite duration since neither the TA nor ALPA Merger Policy contained a timetable or deadline within which to complete a new, single CBA. The Ninth Circuit specifically recognized the existence of this impasse and its practical effect:

> ALPA had been unable to broker a compromise between the two pilot groups, and the East pilots had expressed their intentions not to ratify a CBA containing the Nicolau Award. Thus, even under the district court's injunction mandating USAPA to pursue the Nicolau Award, it is uncertain that the West Pilots' preferred seniority system ever would be effectuated.

Id. at 1180.

Dismayed with the inability to secure a combined contract, and dissatisfied with past ALPA representation, certain East pilots formed an independent union, USAPA, to challenge ALPA as the pilots' collective bargaining agent. *Id*. USAPA campaigned on a platform of overcoming the negotiating impasse by constructing a new seniority integration proposal that would effectively preserve for East and West pilots the job

opportunities generated by their respective operations. In furtherance of this platform, "USAPA adopted a constitution that established an 'objective' of 'maintaining uniform principles of seniority based on date of hire and the perpetuation thereof, with reasonable conditions and restrictions to preserve each pilot's un-merged career expectations.'" *Id.*

On "November 29, 2007, the National Mediation Board certified a representation election. USAPA won the election and was certified as the collective bargaining representative for the entire group of pilots, East and West, on April 18, 2008." *Id.* Subsequent to its certification, USAPA formed a negotiating committee and resumed collective bargaining with the carrier; however, USAPA had not yet submitted any seniority proposal to the carrier when, on September 4, 2008, the Addington plaintiffs commenced their action claiming that USAPA breached its duty of fair representation because it intended not to adopt the Nicolau Award.

On September 30, 2008, USAPA presented to the carrier its first seniority integration proposal. *Id.* Consistent with its constitutional objective, the USAPA seniority integration proposal provided for a combined list based on date-of-hire, modified with conditions and restrictions designed to protect each pilot's un-merged career expectations. For example, the proposal provided for a ten-year "fence" that prevented senior East pilots from displacing junior West pilots from their existing positions and preserved the promotional opportunities arising from West attrition *exclusively* for West pilots. Significantly, within the specified ten-year time frame, the majority of East pilots will have retired, thereby opening up hundreds of promotional opportunities for junior West pilots within East operations – opportunities that were never

previously available to them. US Airways "had not yet responded to the proposal when the district court entered its permanent injunction." *Id*.

"Until the single CBA was negotiated, with few exceptions, the [ALPA-negotiated] TA placed a 'fence' between East and West operations, such that each would continue to operate under its respective CBA." *Id*. at 1177. The district court in *Addington*, based on an unripe DFR claim, subjected USAPA to a court order to adopt, as its own, the Nicolau proposal of its decertified predecessor, which ALPA itself had been unable to implement. In addition, the court order forbade any modification of the Nicolau proposal, thereby prohibiting USAPA from continuing ALPA's efforts to seek a satisfactory middle ground. The injunction also forbade USAPA from continuing ALPA's efforts to negotiate interim modifications of the two existing East and West CBA's. *See id*. at 1178 (setting forth injunction terms).

US Airways' first cause of action in this case, the same relief sought by the plaintiffs in the *Addington* litigation, seeks to condemn USAPA to the pursuit of an unratifiable proposal – the Nicolau Award – a request that the Ninth Circuit has already recognized is inappropriate for judicial consideration at this time:

> The present impasse, in fact, could well be prolonged by prematurely resolving the West Pilots' claim judicially at this point. Forced to bargain for the Nicolau Award, any contract USAPA could negotiate **would undoubtedly be rejected by its membership**.

Id. at 1180 (emphasis added).

IV. ARGUMENT

A district court has the "power to stay proceedings" as part of its inherent authority to "control the disposition of the cases on its docket with economy of time and effort for itself, for counsel and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). The Ninth Circuit has "sustained, or authorized in principle, *Landis* stays on several occasions." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005).

In determining whether to stay an action, courts must weigh competing interests that will be affected by the granting or refusal to grant a stay. *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). Among these competing interests are: (1) the possible damage which may result from the granting of a stay; (2) the hardship or inequity which a party may suffer in being required to go forward; and (3) the orderly course of justice measured in terms of simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay. *Id*. (*citing Landis*, 299 U.S. at 254-55).

Pursuant to these standards, a "trial court may, with propriety, find it is more efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." *Leyva v. Certified Grocers of California, Inc.*, 593 F.2d 857, 863 (9th Cir. 1979). "This rule applies whether the separate proceedings are judicial, administrative, or arbitral in character, and does not require that the issues in such proceedings are necessarily controlling of the action before the court." *Id*. at 863-64. "In such cases the court may order a stay of the action pursuant to its power to control its docket and calendar and to provide for a just determination of the cases pending before it." *Id*. at

864; *see also, Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (a district court's decision to grant or deny a *Landis* stay is a matter of discretion).

1. A Stay Is Warranted Because There Is No Possibility of Damage.

There is no possibility of damage to *any party* if this Court grants a stay of these proceedings pending final disposition of the *Addington* petition to the Supreme Court.

US Airways will suffer no damage occasioned by a stay of this lawsuit. US Airways has sat idly by and repeatedly professed its "neutral" stance with respect to the pilot seniority issue. In fact, when the *Addington* lawsuit was commenced in this Court in September 2008, US Airways was named as a defendant and had the opportunity to participate in a resolution, but instead fought tooth and nail to be dismissed from that action on jurisdictional grounds.[3] It was not until after the Ninth Circuit issued its ruling, denied an *en banc* rehearing and the *Addington* plaintiffs vowed to petition the Supreme Court, that US Airways felt it was somehow now necessary to seek a declaratory judgment.

US Airways cannot be said to be suffering any harm during the pendency of the *Addington* appellate process, because just last week it reported a quarterly net profit of $279 million, and during an earnings call held on July 22, 2010, trumpeting those profits, US Airways' CEO Doug Parker boasted that they don't "need [a single Pilot CBA] as a big cost saving measure." (Granath Decl. ¶ 8, Ex. E at 9). Similarly, during an August

[3] US Airways is now making arguments in support of this Court's subject matter jurisdiction. However, less than two years ago, it offered the exact opposite arguments against this Court's subject matter jurisdiction. (*See* 08-cv-1633, Doc. # 30, 48).

24, 2008 earnings call, US Airways President Scott Kirby stated that even without a single Pilot CBA the "synergies [from the merger] are all almost all in our numbers today … [and] there won't be a big positive financial synergy from getting to a single agreement." (Granath Decl. ¶ 7, Ex. D at 9).

During that same call, CEO Doug Parker again boasted, as head of the airline, that the lack of a single Pilot CBA was in no way harming the airline:

> The one issue is we have two separate contracts in place for separate groups of pilots and we manage that very well, and we've been doing that since the time of the merger and yeah, **we could do that indefinitely**. Of course we could. We've been doing it for three years.

(*Id*. at 18) (emphasis added).

Far from being harmed, US Airways is *benefiting* from the continuation of bankruptcy wages that it currently pays its Pilots under the two separate contracts. There is simply no harm to US Airways in staying this action until final disposition by the Supreme Court, and any argument on behalf of US Airways to the contrary is inconsistent with its public statements and should be seen for what it is – contrived solely for purposes of resisting this stay request.

There is absolutely no possibility of damage to the *Addington* parties (here defendants) if this Court were to stay these proceedings. Quite the contrary, the *Addington* parties will be able to allocate their time and resources towards their promised petition to the Supreme Court. And fundamentally, the Ninth Circuit has already found that the *Addington* parties have suffered no identifiable injury:

> Not until the airline responds to the proposal, the parties complete negotiations, and the membership ratifies the CBA will the West Pilots

> actually be affected by USAPA's seniority proposal – whatever USAPA's final proposal ultimately is. …
>
> Plaintiffs have not identified a sufficiently concrete injury. Additionally, USAPA's final proposal may yet be one that does not work the disadvantages Plaintiffs fear, even if that proposal is not the Nicolau Award.

Addington, 606 F.3d at 1180-1181. Indeed, the heart of the analysis finding the *Addington* suit was not ripe centers on the absence of any injury. This is the law of the case.

2. A Stay Is Warranted Because Hardship Is Occasioned by Proceeding with the Current Litigation.

The *Addington* parties have publically vowed to petition the United States Supreme Court to grant certiorari and review the Ninth Circuit's decision, and their pending stay motion to that court is predicated on their representation to do the same. They have also indicated that their petition will not be limited to the ripeness issue, but will trumpet the underlying merits of the appeal, which are directly related to whether the Nicolau Award must be included in any future Pilot contract with US Airways. (Granath Decl. ¶ 5, Ex. B). This is the exact question that US Airways now presents to this Court with its ill-timed declaratory judgment complaint. The *Addington* parties' intended Supreme Court petition therefore raises the possibility, even if remote, of a remand requiring the Ninth Circuit to address the arguments on the merits.

All of the parties to the instant suit (and this Court) will be *harmed*, however, if forced to allocate valuable time and resources towards prosecution and defense of this action prior to a final disposition of the *Addington* matter by the United States Supreme

Court. It is likely that the Supreme Court will deny the request for certiorari, which means that the length of the stay will be relatively short. However, in the off-chance that the Supreme Court decides to grant certiorari, this Court would then be placed in the position of rendering an advisory opinion that may conflict with that of the Supreme Court, or with any future decision of the Ninth Circuit on remand. The parties and this Court would then have devoted unnecessary time and expenses litigating a matter prior to a decision by the Supreme Court or Ninth Circuit – a decision that could directly affect the merits of this action and set binding precedent for this Court. Unfortunately, USAPA has already once been forced to prematurely litigate the *Addington* matter – expending significant amounts of unnecessary time and resources defending a trial of an unripe DFR claim.

3. The Orderly Course of Justice and Judicial Efficiency Favors Granting a Stay.

A "court may, in its discretion, defer or abate proceedings where another suit, involving identical issues, is pending either in federal or state court, and it would be duplicative, uneconomical and vexatious to proceed." *Blinder, Robinson & Co., Inc. v. United States Sec. & Exch. Comm'n*, 692 F.2d 102, 106 (10th Cir. 1982) (citing cases). *See also Tungjunyatham v. Johanns*, 2010 U.S. Dist. LEXIS 53825, at *8 (E.D. Cal. Apr. 30, 2010) (*citing Leyva*, 593 F.2d at 864)) ("staying a case is appropriate when the Court determines that a stay would serve the interests of judicial economy and efficiency, and the parties will not be prejudiced."). Given the overt overlap in issues, there can be no dispute that proceeding with this action prior to a final disposition of the *Addington*

appeal will not only be judicially inefficient, but any decision issued by this Court would potentially risk usurping the jurisdiction of the Ninth Circuit and the United States Supreme Court. Furthermore, the nature of this action – a declaratory judgment request – militates strongly in favor of a stay under these circumstances.

The exercise of jurisdiction over a declaratory judgment action is within the discretion of the district court. *Public Affairs Associates v. Rickover*, 369 U.S. 111, 112 (1962). "Consistent with the nonobligatory nature of the remedy, a district court is authorized, in the sound exercise of discretion, to stay or to dismiss an action seeking a declaratory judgment before trial …" *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995). A stay or dismissal is particularly appropriate "where [the declaratory action] is being sought merely to determine issues which are involved in a case already pending …" *McGraw-Edison Co. v. Preformed Line Products Co.*, 362 F.2d 339, 343 (9th Cir. 1966) (*citing Yellow Cab Co. v. City of Chicago*, 186 F.2d 946, 950-951 (7th Cir. 1951)).

The Complaint overtly alleges (and misrepresents) the same or similar facts as were alleged (and misrepresented) in *Addington*. It seeks exactly some of the same, or overlapping relief, that the *Addington* parties sought – a declaration on the legality of USAPA's intention to bargain for a seniority integration that does not include the Nicolau Award.[4] All three counts in the present action purport to seek alternate declaratory relief, but in reality seek merely an advisory opinion.[5] All three counts in US Airways'

[4] Yet the district court in *Addington* refused to grant such declaratory relief once before. *See Addington v. US Airline Pilots Ass'n*, 2009 U.S. Dist. LEXIS 61724, at *81 (D. Ariz. July 17, 2009).

[5] The Complaint is thus subject to dismissal on a variety of grounds.

Complaint implicate the same or overlapping factual and legal issues now on appeal at the Ninth Circuit. The Complaint will also implicate the same or overlapping factual and legal issues that will be presented on petition to the Supreme Court, and again at the Ninth Circuit if the Supreme Court were to reverse and remand and the remainder of USAPA's appeal on the merits would then be taken up. Lastly, US Airways' Complaint includes the *identical parties* to the *Addington* matter.

V. Relief Requested.

Defendant USAPA respectfully requests that this Court grant its motion and order an immediate stay of all further proceedings in this matter until such time that the United States Supreme Court renders its final disposition of *Addington, et al v. US Airline Pilots Ass'n, US Airways, Inc.*, 606 F.3d 1174 (9th Cir. 2010), *reh'g denied*, (July 14, 2010), or *in the alternative*, the *Addington* parties waive the right to pursue any further petitions, appeals, or process from, or in, *Addington et al v. US Airline Pilots Ass'n, US Airways Inc.*, Case No. 2:08-cv-01633-PHX-NVW (consolidated with *Addington et al vs. Bradford, et al.*, Case No. 2:08-cv-1728-PHX-NVW).

Respectfully Submitted,

Dated: July 30, 2010

By: ***/s/ Lucas K. Middlebrook***

Lee Seham, Esq. (*pro hac vice pending*)
Lucas K. Middlebrook, Esq. (*pro hac vice*)
Stanley J. Silverstone, Esq. (*pro hac vice pending*)
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
445 Hamilton Avenue, Suite 1204
White Plains, NY 10601
Tel. (914) 997-1346; Fax (914) 997-7125

Nicholas P. Granath, Esq. (*pro hac vice*)
ngranath@ssmplaw.com
SEHAM, SEHAM, MELTZ & PETERSEN, LLP

2915 Wayzata Blvd.
Minneapolis, MN 55405
Tel. 612 341-9080; Fax 612 341-9079

Nicholas J. Enoch, State Bar No. 016473
enoch@lubinandenoch.com
Lubin & Enoch, PC
349 North 4th Avenue
Phoenix, AZ 85003-1505

CERTIFICATE OF SERVICE

I hereby certify that on this day of 30 July, 2010, I electronically transmitted the foregoing document to the U.S District Court Clerk's Office using the ECF System for filing and transmittal.

By: ***/s/ Lucas K. Middlebrook, Esq.***