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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

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

I. SUMMARY

Defendant, US Airline Pilots Association ("USAPA"), submits this memorandum in reply to the memoranda filed by Plaintiff, US Airways, Inc. (Doc. # 31), and Defendants Addington, Bostic, Burman, Iranpour, Velez, and Wargocki (hereinafter referred to as the "Addington Defendants") (Doc. # 26), in opposition to USAPA's Emergency Motion to Stay all Further Proceedings. In view of the potential for inconsistent results, judicial economy and the interests of the parties demands that this action be stayed or that, in the alternative, the Addington defendants renounce their intention to apply to the U.S. Supreme Court for a writ of certiorari in *Addington v. US Airline Pilots Association*, 606 F.3d 1174 (9th Cir. 2010).

II. ARGUMENT

I. US Airways Misrepresents and Misstates the Facts.

US Airways makes several factual misrepresentations and misstatements, which are material to the motion, hence require correction. US Airways' statements that "USAPA has made … seniority proposals favored by the East Pilots" (Doc. # 31 at 2:8-9) and that, in the *Addington* lawsuit, "USAPA advanced the position of the East Pilots" (Doc. # 31 at 4, fn. 1) are both factually incorrect. Equating USAPA with the "East Pilots" for purposes of the seniority issue is inaccurate because, *inter alia:* (i) USAPA has been sued by a group of East Pilots over its seniority proposal, *see Breeger v. US Airline Pilots Association*, Case No 3:08-cv-490 (W.D.N.C. Apr. 23, 2009) (unpublished), adopted by 2009 U.S. Dist. LEXIS 40489 (W.D.N.C. May 12, 2009); (ii) other East Pilots have threatened to sue USAPA over the conditions and restrictions

attached to its seniority proposal; and (iii) USAPA's proposal would result in scores of West Pilot recalls from their current furloughs in lieu of East pilots scheduled to be recalled.

A similar misstatement is US Airways' claim that the "West Pilots" have made "conflicting demands" on US Airways to accept their seniority position. (Doc. # 31 at 4:7-10). However, there is no *monolithic* West Pilot group. The West Pilot class has been decertified as a result of the dismissal of the *Addington* litigation.[1] Further, the West Pilots do not all share common interests: for example, under USAPA's seniority proposal, the most senior West pilots would have access to widebody aircraft and the most junior West pilots would be brought back to work from furlough. US Airways' acknowledgment that it is subject to the negotiating demands of a group of pilots who are not the certified collective bargaining representative reflects that the Company is unlawfully negotiating with an entity other than USAPA, the certified union for all pilots. *See Barthelemy v. Air Line Pilots Ass'n*, 897 F.2d 999, 1007 (9th Cir. 1990) (the "RLA 'imposes the affirmative duty on the employer to treat only with the true representative, and hence the negative duty to treat with no other.").

US Airways incorrectly – and in contradiction of its own factual stipulations in the *Addington* litigation – described the Nicolau seniority arbitration as being "between the two pilot groups." (Doc. # 31 at 3:22-23). This statement is directly contradicted by the

[1] Pursuant to the Ninth Circuit's mandate, the *Addington* matter (08-cv-01633) was dismissed for lack of subject matter jurisdiction on August 12, 2010. (*See* 08-cv-01633, Doc. # 652).

Stipulated Statement of Facts in *Addington*, in which the *Addington* plaintiffs, USAPA, and US Airways agreed that:

- "Pursuant to ALPA Merger Policy, in October 2006, the US Airways MEC [Master Executive Council] and the America West MEC referred their dispute to mediation and arbitration." (Stipulation, ¶ 21);

- "The East and West ALPA MEC merger representatives submitted their dispute to a Board of Arbitration chaired by George Nicolau (the 'Nicolau Arbitration')." (Stipulation, ¶ 26);

- "The West ALPA MEC was represented in the Nicolau Arbitration by merger representatives appointed by the West ALPA MEC." (Stipulation, ¶ 28);

- "The East ALPA MEC was represented in the Nicolau Arbitration by merger representatives appointed by the East ALPA MEC." (Stipulation, ¶ 29).

Thus, according to US Airways' own factual stipulations, the parties to the Nicolau Arbitration were the East and West ALPA MEC Merger Committee representatives, not the East and West pilot groups. *See also Addington*, 606 F.3d at 1177 (Ninth Circuit finding that the Nicolau Arbitration was "between the US Airways Pilot Merger Representatives and the America West Pilot Merger Representatives.").

Also misstated by US Airways is the basis for the *Addington* plaintiffs' claims against the Company in the *Addington* litigation. US Airways states in its opposition memorandum that "[i]n *Addington*, the West Pilots sued US Airways for breach of a collective bargaining agreement based on US Airways' furlough of certain pilots." (Doc. # 31 at 7:25-27). That was Count One of the *Addington* complaint. US Airways fails to mention that Count Two of the *Addington* complaint was a claim against the Company for failure to negotiate in good faith by failing to negotiate for a "single collective

bargaining agreement that would implement the Nicolau List." (*Addington* Complaint, ¶ 91). **Count Two of the *Addington* complaint raises the same issue as US Airways' complaint in this case**, in that US Airways alleges that:

> USAPA's current and continued insistence on an integrated seniority list that is based on "date-of-hire" principles rather than the Nicolau Award violates Section 2, First, of the Railway Labor Act because such insistence constitutes a failure "to exert every reasonable effort" to reach agreement with US Airways on a combined collective bargaining agreement.

(Doc. # 1, ¶ 40). US Airways neglects to mention that **Count Two of the *Addington* complaint was dismissed for lack of subject matter jurisdiction**, and was scheduled for an arbitration hearing, which was never held because the *Addington* plaintiffs waived their right to proceed with the arbitration.[2]

II. Neither US Airways Nor The Addington Defendants Have Established that They Will be Harmed by a Stay.[3]

In direct contradiction to what US Airways has told its *shareholders*, the Company represents to *this Court* in opposition to this motion that a "single agreement is critical to the success of US Airways because it finally will allow the combination of its pilots into a single, unified workforce…." (Doc. # 31 at 1:5-6). However, as shown in USAPA's motion, the Company has taken a much different position in its representations to investors.

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[2] A copy of the Addington defendants' letter waiving their right to proceed with arbitration is attached as Exhibit I to the Reply Declaration of Nicholas P. Granath (*See* Doc. # 33).

[3] The Addington defendants do not even claim that they will be harmed at all if a stay is issued.

Corporate officers have repeatedly stated that the Company does not need a single pilot agreement as a "big cost saving measure" (Granath Decl., 8, Ex. E at 9)[4]; that a single agreement will not result in a "big positive financial synergy" (Granath Decl., ¶ 7, Ex. D at 9); that the Company manages "very well" with two separate pilot contracts, and that they could do so "**indefinitely**" (Granath Decl., ¶ 7, Ex. D at 18) (emphasis added). One would assume US Airways is aware of its obligations under SEC Rule 10b-5, and therefore when it "does make a disclosure – whether it be voluntary [like those made in the earnings calls] or required – there is a duty to make it complete and accurate." *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 26 (1st Cir. 1987) (citations omitted).[5]

Not only has US Airways told its shareholders that pilot integration will not result in a financial positive, but CEO Doug Parker has informed investors that integration will actually be a financial *negative* for the Company:

> I just want to comment on that because it still seems to be at least stated by -- I thought the financial community mostly understood this but there is no large financial benefit that we are not receiving because we have -- because we don't have one integrated pilot contract right now, or one seniority list.
>
> As [President] Scott [Kirby] said, it is something in the order of $10 million a year which it is something in the order of $10 million a year which is a savings **but to get there, we are going to have to pay a lot more than that to get pay scales coordinated. Actually, whenever we sign it, it would be a net negative to the financials**, which we've disclosed. But I just want to make sure everybody knows, **it is not as if there is some large**

[4] The original Granath Declaration, along with its exhibits, was filed in support of USAPA's Motion for Stay and can be found on the docket at Doc. # 19.

[5] Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5, makes it unlawful for any person to make any untrue statement of a material fact or omit a material fact that renders the statement made misleading in connection with a securities transaction.

> **integration benefit that we are not receiving because we don't have an integrated seniority list and an integrated contract**.

(Granath Decl., ¶ 7, Ex. D at 9) (emphasis added).

Acknowledging that a stay will not cause any financial harm, US Airways tries to assert that they "will gain important non-financial benefits by finally combining its pilot workforce, including improving morale and mending relations between opposing pilot groups and between the Company and its pilots." (Doc. # 31 at 7:9-12). However, if the Company were honestly concerned about "morale" it would have long ago implemented pay parity between East and West pilots and granted interim pay increases to all of its pilots, who are still being paid bankruptcy level wages. In any event, the Company does not believe that morale is having any impact on operations, as CEO Parker recently stated in a July 22, 2010 Earnings Call that "for our customers you see the operating results we've done because our pilots while they have disputes between the two groups are exceptionally professional and go [fly] the airplanes doing [sic] exceptionally well." (Granath Decl., ¶ 8 Ex. E at 9).[6] The Company's purported interest in "mending relations" deserves even less credit, as it is impossible to see how commencing litigation against its pilots could possibly be consistent with "mending relations."

US Airways also argues that, absent an immediate declaratory judgment, it faces "the possibility of a work stoppage following a release from negotiations if it does not accept USAPA's proposal…." (Doc. # 31 at 2:10-12). Contrary to US Airways'

[6] US Airways also cites the July 22, 2010 Earnings Call for CEO Parker's statement that the Company is "trying very hard to make that work." (US Airways Opp. at 7:13-15). But three key words are missing at the end of that quotation: "trying very hard to make that work, **we do it**." (Granath Decl. ¶ 8, Ex. E at 9) (emphasis added).

characterization, the possibility of a strike is not imminent. Collective bargaining under the Railway Labor Act has been described as "an almost interminable process." *Detroit & Toledo Shore Line RR Co. v. United Transp. Union*, 396 U.S. 142 (1969). A work stoppage would require exhaustion of all of the Act's remedies:

> A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President," who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10.

Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969). A relatively short stay will not delay this already lengthy process.

US Airways argues that "[a] delay in resolving the issues presented by this lawsuit will severely damage US Airways, which is why US Airways filed this action for a declaratory judgment." (Doc. # 31 at 6:3-4). But if the potential for "severe damage" were real, US Airways could have acted sooner – it could have filed a grievance with the System Board of Adjustment either in 2007 (based on ALPA's extended failure to proceed with negotiations toward a single CBA) or in 2008, or at any other time up to and including the present. Alternatively, the Company could have chosen to remain a party to the *Addington* litigation, or, demand that the *Addington* plaintiffs' Count II claim of bad

faith bargaining be addressed by the System Board, the exclusive jurisdiction of which was recognized by the district court in *Addington*. *See Addington v. US Airline Pilots Ass'n*, 588 F. Supp. 2d 1051, 1063 (D. Ariz. 2008).

In *Addington*, US Airways successfully moved to dismiss based on its argument that the System Board of Adjustment had exclusive jurisdiction to interpret and to make determinations regarding the Transition Agreement, which sets forth the procedures for negotiating a single pilot collective bargaining agreement and the process for obtaining Operational Pilot Integration. Although the Company claims that it seeks a declaratory judgment regarding its *statutory* obligations (Doc. # 31 at 8:8), the claims, as defined by both the *Addington* and *US Airways* complaints, are based on the violation of supposed bargaining obligations under the *contract*, i.e. the Transition Agreement.

In contrast, USAPA will certainly be harmed without a stay. US Airways claims that the only hardship that USAPA identified is the need "to allocate valuable time and resources toward prosecution and defense of this action." (Doc. # 31 at 9:19-20). Wrong – the harm is in the **inevitable exposure to multiple and inconsistent litigation.** As USAPA plainly stated in its motion, the potential harm is that, "[t]he Addington parties' Supreme Court petition therefore raises the possibility, even if remote, of a remand requiring the Ninth Circuit to address the arguments on the merits. If 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." (Doc. # 18 at 12-13). The Addington defendants do not deny in their opposition to USAPA's motion that they intend to

petition for certiorari. As a result, there is a risk of inconsistent decisions if this Court proceeds to rule on the same issues raised by US Airways.[7] Indeed, the advent of the Company's purported declaratory action has led to the Addington defendants filing pending motions to transfer and reopen the just dismissed DFR action. How many separate forums are necessary to reach a threshold where the risk of simultaneous and inconsistent decisions results? A stay of this action is therefore required.

US Airways argues that stay orders are more appropriate where a party seeks only damages and does not allege continuing harm. (Doc. # 31 at 13). In this case, however, a stay is appropriate because the **Company has admitted that there is no continuing harm**. As CEO Parker stated, "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." (Granath Decl. ¶ 7, Ex. D at 18). In this case, there is no continuing harm to the Company, there is only a risk of inconsistent decisions – unless a stay is granted pending the *Addington* plaintiffs' intended petition for certiorari. As the Ninth Circuit has held, a stay is appropriate "[i]n the interests of uniform treatment of like suits…." *CMAX, Inc. v. Hall*, 300 F.2d 265, 269 (9th Cir. 1962).

[7] The Addington defendants correctly note that, "USAPA's motion demonstrates that this case is quite closely related to the *Addington* case." (Doc. # 26 at 2:18-19).

III. CONCLUSION

Defendant, US Airline Pilots Association, 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*, 606 F.3d 1174 (9th Cir. 2010), *reh'g denied*, (July 14, 2010), or *in the alternative*, the *Addington* defendants waive the right to pursue any further petitions, appeals, or process from, or in, *Addington et al v. US Airline Pilots Ass'n*, 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: August 23, 2010

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

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CERTIFICATE OF SERVICE

I hereby certify that on this day of August 23, 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.***