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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

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT USAPA'S RULE 12(b) MOTION TO DISMISS

Oral Argument Requested

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A. Background Facts.

i) The Merger and Formation of ALPA's Seniority Proposal.

In 2005, US Airways, Inc. and America West Airlines, Inc. merged into a single carrier known as US Airways. *Addington v. US Airline Pilots Association*, 606 F.3d 1174, 1177 (9th Cir. 2010). 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." (Mowrey Decl. ¶ 9). 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. (Mowrey Decl. ¶ 10).

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"). 606 F.3d at 1177. 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. (Mowrey Decl. ¶ 11). The parties to the arbitration were the "US Airways Pilot Merger Representatives and the America West Pilot Merger Representatives." 606 F.3d at 1177.[1] These Merger Representatives were subject to expulsion from ALPA if they resisted the ALPA-governed process or merger criteria. (Mowrey Decl. ¶ 12).

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. (Mowrey Decl. ¶ 12). Subsequent to the seniority integration arbitration in this matter, ALPA Merger Policy re-introduced "longevity" as a criterion upon which seniority integration could be based. (Mowrey Decl., ¶ 13, Ex. A at p. 12).

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. 606 F.3d at 1177. "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. (Mowrey Decl. ¶ 14).

Nevertheless, the "seniority integration proposal could be implemented only as part of a single CBA." 606 F.3d at 1177. That single CBA, in turn, "would require approval by the East Master Executive Council, the West Master Executive Council, and a majority of

[1] US Airways previously *stipulated* that these were the parties prior to its dismissal from the *Addington* litigation. (Case No. 08-1633, Doc. # 77, ¶ 26).

each of the East and West pilot groups, **effectively giving each side a veto**." *Id*. (emphasis added). Since rank-and-file pilots had no participation in the development of ALPA Merger Policy or the TA, their sole opportunity for democratic input came at the tail end of the process, at which point they were permitted by ALPA to vote yes or no on any contract incorporating the seniority proposal. (Mowrey Decl., ¶ 15, Ex. B).

In the instant case, the ALPA arbitration culminated in a May, 2007 decision referred to as the "Nicolau" Award. 606 F.3d 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. (Mowrey Dec. ¶ 16). It resulted, for example, in the placement of probationary West pilots with under two months seniority – who had never flown a revenue trip for the airline – above East pilots who had more than sixteen *years* of credited length of service. (Mowrey Decl. ¶ 16).

A vigorous dissent by Arbitration Board member Captain James Brucia objected that the Nicolau Award improperly failed to consider post-merger evidence confirming the economic opportunities inherent in the vitality of East operations and higher East pilot attrition rates. (Mowrey Decl. ¶ 17, Ex. C). Chairman Nicolau responded in his opinion that ALPA Merger Policy prohibited him from considering this evidence. (Mowrey Decl. ¶ 17).

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 whose Merger Representatives were the parties to the arbitration. *See US Airways MEC v. America West MEC*, 525 F. Supp. 2d 127 (D.D.C. 2007). The Nicolau Award also provoked federal court litigation by an East pilot group against ALPA based on ALPA's allegedly deliberate introduction of an erroneous East pilot seniority list, which prejudiced their standing on the Nicolau list. *Naugler v. Air Line Pilots Ass'n, Int'l,* 2008 U.S. Dist. LEXIS 25173 (E.D.N.Y. Mar. 27, 2008). That federal court litigation is still pending.

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." 606 F.3d at 1178. ALPA attempted to break the Nicolau-generated impasse by sponsoring intense efforts to foster a compromise between its West and East MECs. However, 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. (T.A. §§ XII.B & E). Ultimately, ALPA was unsuccessful in its attempt to get the East and West Pilots to "reach a compromise." 606 F.3d at 1178. During these efforts, ALPA applied "extreme pressure" on the West MEC to moderate its position; however, the West MEC persisted in its refusal to compromise.

ALPA President John Prater advised both East and West pilots that they were entitled to employ their respective democratic rights to protect their interests and that there

was "no required timetable" for resolving the dispute. (Mowrey Decl. ¶ 15, Ex. B at 1). One of the options offered by ALPA President Prater was to pursue interim modification to the existing collective bargaining agreements on a two-contract basis. (Mowrey Decl. ¶ 19, Ex. E).

ii) The Formation of USAPA and Its Goal of Resolving ALPA's Nicolau-Generated Impasse.

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. 606 F.3d at 1177.[2] An impasse had arisen, and it was an impasse of potentially indefinite duration since neither the Transition Agreement 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 greater democratic participation, transparency in union governance, and

[2] US Airways President, Scott Kirby, specifically recognized that ALPA's Nicolau-generated impasse had stalled bargaining since "May of 2007," and specifically commented to investors in April, 2008 that the change in bargaining representatives from ALPA to USAPA was "a good thing" because it meant the company was finally "able to get back to talking to [its] pilots and having formal negotiations with them." (Doc. # 19-4 at 9).

constitutionally-mandated membership ratification of all collectively-bargained agreements. This platform was in response to ALPA's denial of membership participation and/or ratification in such fundamental issues as the development of ALPA Merger Policy, the TA, and surrender of the East pilots' pension during bankruptcy proceedings.

With respect to the issue of seniority integration, USAPA sought to overcome the negotiating impasse by constructing a new seniority 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. (Mowrey Decl. ¶ 20). 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.[3] During the ten-year time frame, West pilots would nonetheless be permitted to bid into East operations based on their seniority. By contrast, the status quo of the ALPA-negotiated TA, "place[s] a 'fence' between East and West operations, such that each would continue to operate under its respective CBA," thereby precluding West pilots from bidding into East operations. 606 F.3d at 1177.

Significantly, within the specified ten-year time frame, the majority of East pilots will have retired, thereby opening up thousands of promotional opportunities for junior West pilots within East operations – opportunities that were never previously available to them. To this day, US Airways has never responded to USAPA's seniority integration proposal. (Mowrey Decl. ¶ 20). Moreover, USAPA's seniority proposal remains just that – a proposal, which is subject to alteration as a result of internal union processes and collective bargaining. (Mowrey at ¶ 27).

The complaint in the *Addington* litigation consisted of three counts. Counts I and II were brought against US Airways. (08-cv-01633, Doc. # 86). Count I alleged that, in its

[3] USAPA has been subject to repeated threats of litigation by angry East pilots upset with the fact that USAPA's proposed conditions and restrictions will block them from bidding into West pilot bases for a ten year period. The most recent threat was communicated a mere five days before this lawsuit was filed. (Mowrey Decl. ¶ 37, Ex. F). USAPA was also subject to litigation by a group of East pilots who alleged that USAPA should be obliged to retroactively apply date-of-hire seniority principles. *Breeger v. US Airline Pilots Ass'n*, 2009 U.S. Dist. LEXIS 40489 (W.D.N.C. May 12, 2009). The *Breeger* case was dismissed on ripeness grounds.

planned implementation of pilot furloughs, the Company failed to furlough in accordance with the Nicolau list, but instead, furloughed from East and West operations independently in accordance with the respective East and West pilot seniority lists. Count II alleged that US Airways had failed to bargain in good faith toward the implementation of the Nicolau Award as allegedly required by the Transition Agreement. This court (the Honorable Judge Wake presiding) dismissed both Count I and Count II on the grounds that the alleged claims were contract-based and, therefore, within the exclusive jurisdiction of an arbitration panel referred to as the System Board. *Addington v. US Airline Pilots Ass'n*, 588 F. Supp. 2d 1051, 1063 (D. Ariz. 2008). A hearing date before the System Board was subsequently scheduled, however, the *Addington* plaintiffs declined to proceed. (Doc. # 33 at pp. 5-8).

The district court in *Addington* did proceed to trial on the Count III DFR claim later determined, by the Ninth Circuit, to be unripe. During the trial, the district court barred USAPA from presenting:

- Any evidence challenging the process, procedure or decision of the Nicolau Award despite clear precedent allowing unions, based on principled objections to the process, to revisit seniority integration instituted through a disputed arbitration *See Associated Transport, Inc*., 185 N.L.R.B. 631 (1970);
- Any evidence of other seniority integrations at US Airways that resulted in a date-of-hire system despite existing case law that specifically referenced industry standards in general, and the seniority integration of other employee groups in particular, as evidence supporting the agreement that the union had acted within a wide range of reasonableness;
- Any evidence challenging the independent merits of ALPA Merger Policy including evidence detailing how ALPA Merger Policy had undergone a political process whereby consideration of a pilot's date-of-hire had been deliberately excised in 1991.

Subsequent to a finding of liability, the district court ordered USAPA 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. 606 F.3d at 1178 (setting forth injunction terms).

iii) The Company's Dilatory Bargaining Strategy with USAPA.

After its certification, USAPA's Negotiating Advisory Committee ("NAC") resumed bargaining with the Company towards a single pilot CBA in June, 2008. (DiOrio Decl. ¶ 7). Since that time, over the course of two years, out of some 30 sections, USAPA and the Company have reached tentative agreements on 5 minor contract sections, and are close to tentatively agreeing to 3 additional minor sections. Despite the progress made on these "minor issues," the parties have made little, if any, progress on the major high cost sections of the contract. (DiOrio Decl. ¶ 9). The lack of progress on these significant sections is attributable to the Company's dilatory bargaining tactics.

First, the Company has failed to provide USAPA with the necessary information required for the union's contract costing expert to accurately determine what specific contract changes will ultimately cost. (DiOrio Decl. ¶ 11). The Company's refusal to provide this necessary information to USAPA is a gratuitous wrench thrown into the bargaining process solely for the sake of delay.

Second, in the two years since USAPA resumed negotiations, the Company has engaged in a take-it-or-leave-it approach to bargaining. Each and every time USAPA offers proposed solutions to areas of disagreement, the Company has responded with a "no"

and counters only with their original position. (DiOrio Decl. ¶ 13). In addition, the Company has purposefully made itself a moving target. The Company has routinely presented contract concerns to USAPA, but when USAPA responds with a proposed solution, the Company either ignores the proposal or raises new and completely unrelated objections. (DiOrio Decl. ¶ 14).

It is obvious to the USAPA negotiators that the Company is deliberately dragging out the pace of negotiations in order to prolong separate operations under the bankruptcy wages currently paid to pilots – a tactic that resulted in a $279 million profit last quarter and an immediate stock sell-off by many of the Company's executives. (Doc. No. 19-5 at 2). A member of the Company's Board of Directors, Bruce Lakefield, openly admitted during a recent conversation with USAPA NAC member Jeff Davis that the Company was intentionally dragging out negotiations in order to "preserve cash." (Davis Decl. ¶ 3).

The Company's request for declaratory relief, although disguised as a tool to "promptly … complete negotiations with USAPA for a combined collective bargaining agreement," (Compl. ¶ 34) is nothing more than another wrench thrown into the collective bargaining process for the purpose of delay. The Company's expressions of neutrality are farcical. It claims to want an agreement, but now sues to compel USAPA to adopt a seniority proposal, which its CEO, Doug Parker, explained would be "*impossible to get ratified*."[4] The Company claims that it is prejudiced by the lack of an agreement, but has engaged in tactics to delay bargaining. By letter dated December 4, 2009, the Company opposed the mediatory services of the National Mediation Board (NMB) on the grounds

[4] *See* Mowrey Decl. ¶ 19, Ex. E.

that a "chasm" existed between the parties.[5] As of the date of this submission, USAPA and the Company have reached a tentative agreement with respect to only 8 of 30 contract sections.

The Company's lawsuit constitutes a new and formidable impediment to the collective bargaining process. US Airways evaded participation in the *Addington* litigation by successfully arguing before this Court that any issue concerning its supposed obligation to negotiate toward the implementation of the un-ratifiable Nicolau Award was within the exclusive jurisdiction of the System Board. Thereafter, neither the *Addington* plaintiffs nor the Company sought to pursue the matter further. Now, almost two years after the commencement of the *Addington* litigation, and only after the Ninth Circuit dismissed the action as unripe in a published decision acknowledging that the implementation of the Nicolau Award was effectively unattainable, does the Company seek, through litigation, to prolong the impasse so that its executives can continue to reap the benefits of the pilots' divide.

B. Procedural Facts.

On September 4, 2008, the same six individual pilots named as defendants in this action filed a hybrid suit against their union, USAPA, and employer, US Airways. They alleged in Count I that the company breached the existing labor contract (including its supplemental Transition Agreement) by failing to furlough in accordance with the Nicolau list, and, in Count II, a breach of contract action for failing to negotiate in good faith toward the implementation of the Nicolau list in a new, single collective bargaining agreement.

[5] DiOrio Decl.¶ 15, Ex. A.

Count III was a claim for violation of the duty of fair representation against USAPA for merely *intending* not to implement the Nicolau list (USAPA had not made any seniority proposal when suit was filed).

US Airways fought vigorously for, and was granted, dismissal on the grounds that "the System Board of Adjustment had exclusive jurisdiction." 606 F.3d at 1178. The Company agreed to arbitrate Counts I and II in a class action grievance, but when the *Addington* plaintiffs voluntarily abandoned their grievance, the company acquiesced. The *Addington* lawsuit then proceeded against USAPA and a trial resulted in the issuance of a permanent injunction directing USAPA to implement the Nicolau list as its own proposal *Id*. On multiple grounds, including ripeness, USAPA appealed and did so on an expedited basis. The *Addington* plaintiffs never appealed the district court's dismissal of counts I and II. On June 4, 2010, the Ninth Circuit determined that the DFR claim was never ripe and remanded to the district court "with directions that the action be dismissed." *Id.* at 1184.

On June 10th of this year, the *Addington* plaintiffs petitioned the Ninth Circuit for a rehearing *en banc* but that request was denied on July 8 when not a single judge requested a vote (the decision is published). The *Addington* plaintiffs next filed a motion to stay the mandate pending the filing of a petition for writ of certiorari to the United States Supreme Court, which was also summarily denied. The *Addington* plaintiffs' ninety days to petition the Supreme Court does not expire until on or about October 4, 2010. On August 13, the *Addington* lawsuit was dismissed by the district court and judgment entered for USAPA.

Prior to dismissal, however, the *Addington* defendants in this matter filed a motion to transfer the instant case to Judge Wake (08-1633, Doc. # 642), as well as a motion for

relief from judgment (08-cv-01633, Doc. # 645). Their Rule 60(b) motion seeks to continue the dismissed DFR action before the same judge who earlier ruled against USAPA. Both motions remain pending.

Without any advance notice to USAPA, US Airways filed the current action on July 26, 2010. This was in anticipation of an imminent Ninth Circuit mandate directing complete dismissal of the *Addington* DFR suit (and hence, at long last, the need to bargain over USAPA's seniority proposal). The current action alleges the same facts and issues as the original *Addington* litigation did, and merely invites this Court to issue an advisory opinion that effectively end-runs the recent ruling by the Ninth Circuit.

III. ARGUMENT.

A. The Case Does Not Present a Ripe Case or Controversy for Same Reasons Articulated by the Ninth Circuit in *Addington.*

The Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq*., is not a grant of jurisdiction to federal courts. Instead, the Act merely makes available an additional remedy. *Ybarra v. Town of Los Alto Hills*, 500 F.2d 250 (9th Cir. 1974); *Correspondent Servs. Corp. v. First Equities Corp*., 442 F.3d 767 (2d Cir. 2006). Moreover, the plaintiff has the burden of establishing jurisdiction. *Thomson v. Gaskill*, 317 U.S. 442, 446 (1942). In a 12(b)(1) factual attack on subject matter jurisdiction no "presumptive truthfulness attaches" to plaintiff's allegations. *Ritza v. Int'l Longshoremen's & Warehousemen's Union*, 837 F.2d 365, 369 (9th Cir. 1988). The court does not accept conclusory allegations as true. *Zappia Middle East Const. Co. Ltd., v. Emirate of Abu Dhabi*, 215 F.3d 447, 1253 (2d Cir. 2000). The court must weigh the evidence before it, and find the facts, but enjoys broad discretion to receive and consider extrinsic evidence. *Stalley ex rel. U.S. v. Orlando Regional Healthcare Systems Inc*., 524 F.3d 1229, 1232 – 33 (11th Cir. 2008). A federal court is presumed to lack subject matter jurisdiction until the contrary affirmatively appears. *Stock W., Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

As with any other federal litigation, a declaratory judgment action must be ripe. *Preiser v. Newkirk*, 422 U.S. 395 (1975). "The Declaratory Judgment Act … does not lessen this jurisdictional requirement; rather, the Act is interpreted as requiring the same showing required by Article III." *Daines v. Alcatel*, 105 F. Supp. 2d 1153, 1155 (E.D. Wash. 2000) (*citing Aydin Corp. v. Union of India*, 940 F.2d 527, 528 (9th Cir. 1991)). "In actions for declaratory judgment invoking the RLA ... a dispute appropriate for resolution

... 'must not be *nebulous or contingent*, but must have taken on fixed and final shape.'" *Atlas Air, Inc. v. Air Line Pilots, Ass'n*, 232 F.3d 218, 227 (D.C. Cir. 2000) (emphasis added). Addressing the same facts now presented to this Court, the Ninth Circuit has held that the contingencies related to the East-West seniority dispute are so numerous as to preclude a finding of ripeness. *Addington*, 606 F.3d at 1174.

In its decision of June 4, 2010, the Ninth Circuit first articulated the precepts of ripeness applicable to this Court. The ripeness doctrine rests, in part, on the Article III requirement that federal courts decide only cases and controversies, and in part, on prudential concerns. 606 F.3d at 1174 (*citing Maldonado v. Morales*, 556 F.3d 1037, 1044 (9th Cir.2009), *cert. denied* _U.S._ (2010)). The ripeness doctrine is "intended to 'prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Id.* To determine whether a case is ripe, the court must "consider two factors: 'the fitness of issues for judicial decision," and 'the hardship to the parties of withholding court consideration.'" 606 F.3d at 1174 (*citing Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1211-12 (9th Cir.2006)).

A question is fit for decision when it can be decided without considering "contingent future events that may or may not occur as anticipated, or indeed may not occur at all." *Id*. (*citing Cardenas v. Anzai*, 311 F.3d 929, 934 (9th Cir.2002)).[6] Addressing the facts before it, the Ninth Circuit in *Addington* held both that a number of contingencies existed that necessarily precluded a finding of ripeness and that, furthermore, the West pilots had failed

[6] "Where a dispute hangs on future contingencies that may or may not occur, it may be too impermissibly speculative to present a justiciable controversy [for purposes of the Declaratory Judgment Act]" *Educ. Credit Mgt. Corp. v. Coleman*, 560 F.3d 1000, 1005 (9th Cir. 2009) (citations omitted).

to identify a sufficiently concrete injury.

With respect to the issue of contingencies, the Ninth Circuit held:

> **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 is. Because these contingencies make the claim speculative, the issues are not yet fit for judicial decision.

Id. at 1180 (emphasis added).

The Ninth Circuit explained, there can be no effective DFR analysis of a proposal over which there has been *no negotiation*: "USAPA's final proposal may yet be one that does not work the disadvantage Plaintiffs fear, *even if that proposal is not the Nicolau Award*." *Id*. at 1181 (emphasis added). Moreover, even with the advent of a "final" proposal, no DFR (or hybrid DFR) liability could exist without completion of the ratification process since no West pilot would "actually be affected by USAPA's seniority proposal" until that time. *Id*. at 1180.

Furthermore, precisely because of this ratification requirement, the Ninth Circuit rejected USAPA's failure to adopt the Nicolau Award as constituting a "sufficiently concrete injury":

> 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 is membership.**

Id. at 1180 n.1 (emphasis added). Indeed, the Ninth Circuit attributed the inability to move forward with a contract incorporating the Nicolau Award **not** to the actions of labor unions, but rather to the pilots' exercise of their democratic franchise:

> As demonstrated by ALPA's similar difficulties in reaching a CBA, the pilot

> groups, and individual pilots with their ratification/non-ratification powers, are the major contributors to the absence of a CBA under these circumstances.

Id. at 1181 n. 2.

US Airways concedes that, in the instant case, the parties are addressing the "same facts that previously were litigated."[7] Indeed, the facts have not changed, in part, because the Company, to date, has never responded to USAPA's seniority proposal presented on September 30, 2008.

Nevertheless, the Company's Count I seeks to condemn USAPA and the pilots it represents to a negotiating posture that would guarantee an interminable impasse. Whereas the perpetuation of such an impasse could produce an enormous economic benefit for the Company, it would cause only harm to USAPA and its members.

In addition to the contingencies expressly identified by the Ninth Circuit, there are other further contingencies that would either: 1) resolve the controversy within the pilot group, 2) address and/or neutralize the potential for any "injury" to the Company, and/or 3) obviate altogether the divisive issue of seniority integration. None of these potential solutions can be addressed without further collective bargaining. Furthermore, the Company's unseemly race to the courthouse will have the certain effect of short-circuiting these options.

i) Resolving the Controversy Within the Pilot Group.

USAPA – as the certified collective bargaining agent – has the exclusive authority and obligation to negotiate in the collective interest of the bargaining unit it represents. Part of that bargaining process is the resolution of conflicts that arise within the bargaining

[7] *See* Doc. # 1, Complaint, ¶ 16.

unit. That is the Union's job, not the Company's. Indeed, the Company's determination to create a certified class of West pilots for the purpose of evading the existing negotiating process runs counter to its obligations under the Railway Labor Act. *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.").

It is not for the Company or this Court to determine preemptively what combination of wages, benefits, work rules and seniority provisions would satisfy the interests of the collective pilots or any subgroup therein. Indeed, the Ninth Circuit in *Addington* determined that the federal judiciary's premature involvement in the collective bargaining process could doom the pilots to continuing impasse by saddling USAPA with an un-ratifiable agreement. As the Ninth Circuit recognized, if the final agreement is "acceptable to" the West Pilots, the alleged fear of litigation currently held by US Airways would *never materialize*.[8] By deferring consideration of this premature claim, the parties will be afforded the "opportunity to function [through collective bargaining] to iron out differences." *Young v. City of Detroit*, 652 F.2d 617, 627 (6th Cir. 1981).

Moreover, allowing USAPA the opportunity to negotiate an agreement that satisfies a majority of the West pilot subgroup would dispositively resolve any DFR claim under existing precedent. *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1533 (7th Cir. 1992); *Gullickson v. Southwest Airlines Pilots' Ass'n*, 931 F. Supp. 1534, 1541 (D. Utah 1995), *aff'd*, 87 F.3d 1176 (10th Cir. 1996). ("ratification of a seniority arrangement is a valid

[8] The alleged class is not uniform; there are senior West pilots whose interest is adverse to their disgruntled junior litigants.

defense to complaints about a union's actions in making that arrangement.").[9] Instead of avoiding litigation, the US Airways' lawsuit condemns the parties to litigation.

ii) Neutralizing the Alleged Company Injury.

Among the options to address and/or neutralize the Company's purportedly imminent injury would be negotiated provisions providing for either indemnification or staged implementation. Under an indemnification provision, USAPA could agree to assume the risk of damages arising from a particular seniority integration proposal. Such indemnification provisions are routinely found in collective bargaining agreements that compel employees, under penalty of termination, to pay dues or agency fees to the Union. Indeed, such an indemnification provision is found within the existing East pilot agreement.

Alternatively, a delayed or staged implementation of the seniority term (i.e. Section 22 in the CBA) that deferred operational integration until one-year after the ratification vote could allow the opportunity to determine if pilots approved the integration proposal and postpone the accrual of any damages until any subsequent litigation could be resolved. Indeed, the Ninth Circuit in *Addington* already found that the mere perpetuation of the status quo inflicts no harm on the *Addington* plaintiffs. 606 F.3d at 1180 ("We also conclude that withholding judicial consideration does not work a direct and immediate hardship on the West Pilots").

iii) Obviating the Seniority Integration Issue.

The Company has advised its investors that, even in the absence of pilot seniority integration, it has already obtained virtually all of the operational synergies there are to be

[9] USAPA's balloting process permits a breakdown of the pilot ratification process on a domicile by domicile basis. All West pilots are based at a single domicile – Phoenix. (DiOrio Decl. ¶ 16).

had. (Doc. # 19-4 at 9). If the Company's primary source of injury is a supposed work stoppage or litigation over seniority integration, then a continuation of the existing dual contract approach may be indicated. ALPA – USAPA's predecessor – took the position that interim modifications of the existing two East and West contracts was consistent with the parties' Transition Agreement. (Mowrey Decl. ¶ 18, Ex. D).

B. This Court Has Already Determined that the Purported Dispute Is Within the Exclusive Jurisdiction of the System Board of Adjustment and the *Addington* Plaintiffs' Failure to Process their Grievance Renders the Dispute Moot.

Count II of the *Addington* suit alleged that the Company had violated the Transition Agreement "because it has not been negotiating with USAPA in good faith to institute Integrated Operations by adopting a single collective bargaining agreement that would implement the Nicolau List." (08-1633, Doc. # 86, ¶ 101). US Airways successfully argued in favor of the dismissal of Count II on the grounds that, under the Railway Labor Act, the claim presented a dispute that was within the exclusive jurisdiction of the System Board. 588 F. Supp. 2d at 1064. After the scheduling of their class grievance for hearing before the System Board, the *Addington* plaintiffs elected to withdraw the grievance in favor of focusing exclusively on their Count III DFR claim against USAPA.[10]

Count I of the Complaint in this action replicates the *Addington* claim by asserting that the failure to adopt the Nicolau Award "is not in accord with the requirements of the Transition Agreement…." (Compl. ¶ 39). The replicated contract claim is one that no federal court could ever have jurisdiction over for the same reasons the Company successfully argued to dismiss Count II of the *Addington* plaintiffs' case:

[10] *See* Doc. # 33 at pp. 5-8 (*Addington* plaintiffs' waiver of arbitration).

> It is well established under the RLA that any dispute over the interpretation or application of an airline collective bargaining agreement (called a "minor dispute") must be submitted to final and binding arbitration before an arbitration panel known as a Board of Adjustment, and that the federal courts have no jurisdiction over such disputes.

See US Airways Motion to Dismiss, 08-cv-01633, Doc. # 30, p. 2 (*citing Consol. Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299 (1989) ("Conrail"); *Ass'n of Flight Attendants v. Horizon Air Indus., Inc*., 280 F.3d 901, 904, 906 (9th Cir. 2002)).

It is USAPA's position that the *Addington* plaintiffs' waiver of their class action grievance is dispositive of the claims that the Company now seeks to press on their behalf under Count I of the complaint in the current action. In any event, the question of whether these claims could enjoy a Lazarus-like resurrection is for the System Board to determine. Significantly, until the inception of the instant lawsuit, it has also been US Airways' position that the System Board has sufficient remedial authority to address such claims.[11]

C. <u>The Company Seeks a Ruling of Immunity that Is Neither Appropriate Under the Declaratory Judgment Act or Necessary in Light of the Ninth Circuit's Decision in *Addington*.</u>

Notwithstanding the remote nature of any case or controversy over seniority integration, the Company asserts that it is "entitled," pursuant to Count III of its complaint, to a grant of immunity regardless of any future negotiating posture it may take. (Doc. # 1 ¶ 56).[12] The Company is not entitled to a declaratory judgment under such circumstances. *See Hyatt Int'l Corp. v. Coco*, 302 F.3d 707, 712 (7th Cir. 2002) ("The declaratory

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[11] *See e.g.*, 08-cv-01633, Doc. # 30; 31 ¶ 5: "if the Board of Adjustment determines that US Airways is *incorrect* in its interpretation of the collective bargain agreement ..."; Doc. 48; email by company attorney R. Janger to Arbitrator Bloch, 11 Dec. 08: "We have a Transition Agreement *dispute* that has been filed by [*Addington*]").

[12] Even if this action were brought *after* ratification, because Count III (immunity) is pled in the alternative to *both* Count I (with Nicolau) and Count II (without it), this action will not necessarily resolve the seniority issue, therefore no justiciable case or controversy is presented by it.

judgment plaintiff must be able to show that the feared lawsuit from the other party is immediate and real …").

In the absence of any real case or controversy, the Company's action is reduced to a plea for legal advice from this Court over putative worries about the consequences of fulfilling its acknowledged duty to bargain.

> No doubt, a persuasive argument can be made for extending the use of advisory opinions to all situations in which conflicts may impend … Much of the uncertainty of business management could, perhaps, thus be eliminated. What a comfort it would be, if a declaratory judgment could be made as available as in interoffice memorandum, whenever a board of directors meets to consider a proposed new venture. But that millennium has not yet arrived.

Helco Prod. Co., Inc. v. McNutt, 137 F.2d 681, 684 (D. C. Cir. 1943). This suit is a prime example of an employer, in the midst of collective bargaining, seeking a tactical advantage under the guise of a declaratory judgment claim that requires dismissal. *See North Am. Airlines, Inc., v. Int'l Bhd. of Teamsters*, 2005 U.S. Dist. LEXIS 4385, at *43 (S.D.N.Y. Mar. 21, 2005) ("In the context of an ongoing labor negotiation it is particularly inappropriate to have courts opine on the legality of certain proposals by a party to the dispute.") (attached in Addendum).

In any event, in view of the history of the *Addington* litigation, such a demand for immunity seems hardly necessary. The district court in *Addington* required the Company to remain a party even after dismissing Counts I and II precisely due to the possibility that evidence of "collusion" might appear. *Addington*, 588 F. Supp. 2d at 1064 n. 5. It never did. Nor did the fact that the union was subsequently found liable on a DFR claim lead to a

finding of collusion. Instead, the Company was ultimately dismissed as a party.[13] As remote as the possibility of a liability finding against USAPA on a DFR claim is, more remote still is the possibility of a finding of DFR collusion against the Company.[14] Only the Union owes a duty of fair representation and, to the extent they have not been waived, any contract-based claims previously asserted against the Company are, indisputably, within the exclusive jurisdiction of the System Board.

D. Absence of Hardship.

In addition to being unfit for judicial decision, this action is not ripe because withholding consideration presents *no hardship* to any party. "To meet the hardship requirement, a litigant must show that withholding review would result in direct and immediate hardship and would entail *more than possible financial loss*." 606 F.3d at 1180 (citing cases) (emphasis added). But the Company cannot make this showing, and the Ninth Circuit has already explained, at length, why the *Addington* plaintiffs have yet to suffer a "sufficiently concrete injury" warranting judicial relief. *Id*. at 1180-1181.

With respect to US Airways, the Complaint merely alleges that the plaintiff may "potentially" suffer financial loss (Doc. # 1, ¶ 17), whether from a work stoppage, litigation or delay in negotiating a contract. But potential monetary loss is admittedly speculative, and bare conclusory allegations such as these are inadequate to prove hardship as a matter of law.[15] Furthermore, any allegation by US Airways that a work stoppage is imminent or

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[13] *See* 08-cv-01633, Doc. # 594, p. 2, line 9.

[14] *See infra* at § III, 4, b.

[15] Not only is the allegation of potential monetary loss speculative, it is simply unbelievable given the Company's posting last quarter of its second highest ($279 million) *profit* since the merger – while still operating under separate pilot contracts. (Doc. # 19-5 at 2).

that it is currently suffering any harm as a result of not having a single pilot contract is wholly contrived and contrary to its prior representations.

As set forth at length in the briefing surrounding USAPA's motion for stay[16], US Airways is currently suffering *zero harm* as a result of the pilot seniority issue. Rather, in reality, it is *benefitting* from the division between its pilots. In fact, Bruce Lakefield, a member of the US Airways Board of Directors recently informed Jeff Davis, a member of USAPA's NAC, that the Company was intentionally dragging out negotiations in order to "preserve cash." (Davis Decl. ¶ 3). This is entirely consistent with CEO Parker's comments to investors that entry into a new single pilot CBA "would be a net negative to the financials." (Doc. # 19-4 at 9). Therefore, US Airways' sudden allegation that it faces "substantial damage to its operations and finances through … protracted negotiations" is simply untrue. (Doc. # 1, ¶ 34).

Finally, contrary to US Airways' allegations, the possibility of a strike is hardly imminent. Collective bargaining under the Railway Labor Act has been described by the Supreme Court as "an almost *interminable* process." *Detroit & Toledo Shore Line RR Co. v. United Transp. Union*, 396 U.S. 142, 149 (1969). A work stoppage would require exhaustion of all of the Act's requirements including a "release" from mediated negotiations by the NMB. *See Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969). Furthermore, US Airways recently argued that invocation of the NMB's mediation services (a necessary first step to any self-help) would not be "fruitful" because "the chasm between the parties' bargaining positions [was] so dramatic." (DiOrio

[16] *See* Doc. # 18 at 10-12 & Doc. # 32 at 4-9 for full discussion of lack of harm suffered by US Airways and its representations to investors detailing same.

Decl. ¶ 15, Ex. A). Moreover, the Company's refusal to supply data necessary to reconcile costing differences between the parties and its take-it-or-leave-it bargaining approach have, in the past two years, resulted in "little, if any, progress" on the major high cost sections of the contract (DiOrio Decl. ¶ 9). Given that the parties' bargaining positions are miles apart on the major non-seniority contract sections and that the NMB only recently invoked its mediation jurisdiction, any allegation that the seniority issue in and of itself presents the possibility of an *imminent* work stoppage is utterly without merit.

E. Prudential Concerns Under the Declaratory Judgment Act Warrant Dismissal.

"District courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995). In this context, "the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration." *Id.* at 288. If a party contests the prudence of the court's exercise of discretion to hear a declaratory judgment claim, the court must articulate the factual circumstance supporting the award. *Government Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir. 1998). USAPA contests it:

Even if this case were justiciable, prudential reasons warrant dismissal:

First, there is related litigation pending that is far better suited to address the alleged case and controversy here. "Parallel proceedings and piecemeal litigation are both disfavored under the Declaratory Judgment Act." *Luther v. Countrywide Fin. Corp.*, 2009 U.S. Dist. LEXIS 100138, at *10 (C.D. Cal. Oct. 9, 2009) (*citing Principal Life Ins. Co. v.*

Robinson, 394 F.3d 665, 672 (9th Cir. 2005)).

The *Addington* plaintiffs – on whose behalf the Company advances this litigation – have stated their intent to file a petition for certiorari with the Supreme Court seeking review of the DFR claim recently dismissed by the Ninth Circuit. (Doc. # 19-4 at 1). Until the Supreme Court denies the petition, or grants it and rules on the merits, the matter is pending. Also pending is a Rule 60(b) motion that seeks to re-open the evidentiary record in the *Addington* litigation. Due to the potential for inconsistent results, pending litigation is a classic prudential ground to decline requests for declaratory relief because such suits serve no useful purpose. *See Mcgraw-Edison Co. v. Preformed Line* 362 F.2d 339, 342 (9th Cir. 1966); *Great Am. Ins. Co. v. Houston Gen. Ins. Co.*, 735 F. Supp. 581, 584 (S.D.N.Y. 1990) (dismissal is appropriate "particularly when there is a pending proceeding in another court, state or federal ...").

Second, a "declaratory judgment should issue only when it will serve a useful purpose." *Int'l Harvester Co. v. Deere & Co.*, 623 F.2d 1207, 1218 (7th Cir. 1980). Therefore, a "court properly acts within its discretion by dismissing a claim for declaratory relief if 'a declaratory judgment would serve no useful purpose.'" *AIU Ins. Co. v. Acceptance Ins. Co.*, 2008 U.S. Dist. LEXIS 95694, at *7 (N.D. Cal. Nov. 17, 2008) (*quoting Wilton*, 515 U.S. at 288). The declaratory relief sought by US Airways will serve no useful purpose, *at this time*, in "clarifying and settling the legal relations between the parties." *Los Angeles County Bar Ass'n v. Fong*, 979 F.2d 697, 703 (9th Cir. 1992).

For the reasons set forth herein regarding ripeness,[17] the declaratory relief sought in

[17] *See supra* at § III. A.

Count I will serve no useful purpose. Specifically, any declaration that USAPA must bargain for implementation of its predecessor's seniority proposal is nothing more than a reincarnation of the recently vacated injunction in *Addington*, which would force USAPA to bargain for a "contract [that] would undoubtedly be rejected by its membership." *Addington*, 606 F.3d at 1180 n.1. When this *failed* ratification occurs, USAPA would be forced to return to this Court in order to obtain relief from the declaratory judgment. The only thing that would have been achieved by the declaration, as explained by the Ninth Circuit in *Addington*, is an unnecessary prolonging of the "present impasse." *Id*.

Alternatively, a declaration pursuant to Count II, that it is not a violation of law to bargain for something other than Nicolau, also serves no useful purpose. The Ninth Circuit has already commented that "USAPA's final proposal may yet be one that does not work the disadvantages [the West Pilots] fear, **even if that proposal is not the Nicolau Award**." *Id*. at 1180 (emphasis added). Therefore, a declaration from this Court reiterating that very concept is unnecessary. As the Ninth Circuit instructed at the conclusion of its decision, USAPA and US Airways are left to *bargain* and upon completion of negotiations, "the final agreement could be acceptable to [the West Pilots]." *Id*. at 1184. That final agreement, if tested by a future DFR action, will be evaluated under the "wide range of reasonableness" standard applied to labor unions that are required to resolve disputes within their ranks – and not simply by its inclusion or non-inclusion of the Nicolau Award. For these reasons, any declaration issued pursuant to Counts I and II simply serves no useful purpose and for that reason this Court should exercise its broad discretion under the Declaratory Judgment Act to dismiss the action.

Third, while the parties have been engaged in collective bargaining for over two years, they have yet to bargain over seniority. The reality is that the *Addington* plaintiffs commenced their litigation *prior* to USAPA's development of its seniority proposal. While the *Addington* suit was in progress, USAPA and US Airways negotiated over other contractual sections and, with that suit's dismissal, USAPA expected to finally receive a response from the Company. Instead, having successfully dodged full participation in the *Addington* litigation for over two years, the Company now effectively seeks to renew that litigation. Under these circumstances, strong precedent exists to avoid court interference with unfinished bargaining. "Allowing declaratory actions in these situations can deter settlement negotiations and encourage races to the courthouse ... this is something to which our system of justice should not and does not aspire." *Columbia Pictures Indus., Inc. v. Schneider*, 435 F. Supp. 742, 747 (S.D.N.Y. 1977); *Pan Am. World Airways v. Int'l. Bhd. of Teamster*, 275 F. Supp. at 993 (S.D.N.Y. 1967); *Indep. Fed'n of Flight Attendants v. Trans World Airlines*, 1981 U.S. Dist. LEXIS 9857 (W.D. Mo. Sept. 9, 1981) ("public interest does not require that the federal courts referee every tactical move in labor negotiations under the [RLA]").

Fourth, entertaining Count I of the Company's Complaint would bring this Court not only headlong in conflict with the decision of the Ninth Circuit in *Addington*, but also with several other settled principles of applicable law:

- § 152, Fourth of the RLA, allows employees to choose their representatives without employer interference. Here, the pilots chose to decertify ALPA, in part, because its seniority proposal was not capable of ratification. But Count I effectively retaliates against the employees' choice, which is also in violation of the RLA. In addition, the Company's determination to certify a class of a sub-group of the represented pilots runs afoul of its "affirmative duty ... to treat only with the true representative."

Barthelemy, 897 F.2d at 1007.

- Count I is calculated to, or has the effect of, dictating a substantive term of a collective bargaining agreement in violation of Supreme Court precedent. *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 108 (1970). Moreover, the substantive term at issue is the proposal of a de-certified predecessor – ALPA – which even ALPA itself had effectively abandoned.
- Apart from its substance, the relief sought pursuant to Count I constitutes interference by the Court in internal union governance. *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).
- Count I will, or risks, invading the jurisdiction of the National Mediation Board to oversee mediated negotiations as mandated by the RLA. *See, e.g., Switchman's Union v. National Mediation Board*, 320 U.S. 297, 303 (1943).

F. No Claim Is Stated Under the Railway Labor Act.

To avoid dismissal under a Rule 12(b)(6) for failure to state a claim, a plaintiff must allege enough facts to raise claims beyond the level of speculation and the court need not accept as true bald assertions or legal conclusions that are "couched" or "masquerading" as facts. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Regarding claims of violation of § 152, First of the RLA, the Supreme Court has warned that, "great circumspection should be used" by courts to avoid "risk[ing] infringement with the substantive terms of collective bargaining agreements." *Chicago & North Western Ry. Co. v. United Transp. Union*, 402 U.S. 570, 579 (1971); *Regional Airline Pilots Ass'n v. Wings West Airlines, Inc.*, 915 F.2d 1399, 1402 (9th Cir. 1990) (federal courts' obligation is "not to be involved in particulars of the bargaining process"). The Ninth Circuit has described the duty under § 152, First in this way:

> Courts must resist finding violations of the RLA based solely on evidence of hard bargaining, inability to reach agreement, or intransigent positions. At the same time, the duty imposed by the RLA to exert every reasonable effort to reach an agreement 'at least requires the employer to meet and confer with

> the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences.'

Ass'n of Flight Attendants v. Horizon, 976 F.2d 541, 545 (9th Cir. 1992).

The facts establish that it is US Airways, and not USAPA, that has failed to make every reasonable effort to reach an Agreement. The sole allegation that USAPA "currently" violates its obligation under § 152, First is at most actually evidence of just the opposite, of its bargaining, otherwise it is merely evidence of hardened opinion.[18]

The Complaint asserts that USAPA is "inalterably opposed" to the Nicolau list and has conveyed this opposition to its members. (¶ 32). Nevertheless, the mere expression of opinion, collateral to or in bargaining, is not *per se* actionable. *Fed. Express v. ALPA*, 67 F.3d 961, 964 (D.C. Cir. 1995) ("hard bargaining is encouraged by the RLA"; parties "can be expected to take aggressive bargaining positions and freely threaten dire consequences ..."). Merely holding 'inalterably' to a bargaining position taken in good faith is also not actionable. *Flight Attendants v. Trans World Airlines*, 878 F.2d 254 (8th Cir. 1988), *cert. denied*, 493 U.S. 1044 (being adamant about its proposals not a violation); *Kankakee-Iroquois Cnty. Emlyrs. Ass'n v. NLRB*, 825 F.2d 1091 (7th Cir. 1987) (union did not bargain in bad faith when it refused to recede from its position, advanced and maintained in good faith); *Trans Int'l Airline v. Teamsters*, 650 F.2d 949, 958 (9th Cir. 1980) *cert. denied*, 449 U.S. 1110 ("robust, bare-knuckled bargaining" permissible).

At its most specific, the lone allegation is that USAPA's pre and post injunction proposal for a seniority term does not contain the Nicolau list. True, but it does not

[18] As addressed, *supra* at § II, B, this Court has already determined that the "good faith" bargaining claim is a contract-based dispute within the exclusive jurisdiction of the System Board.

precisely for the reason indicated by the Ninth Circuit, which is that the Nicolau list is *not ratifiable* (603 F.3d at 1180), a fact the Complaint does not challenge. Indeed, a superior Section 2, First claim would exist if USAPA were to deliberately pursue an agreement that USAPA, the Company, and the Ninth Circuit have all determined to be *non*-ratifiable. Such a futile gesture would be manifestly inconsistent with the obligation to make "every reasonable effort" to reach an agreement.

Simply making a non-Nicolau proposal is not remotely close to a failure to bargain. In the first instance, extending proposals *is* bargaining. In the second, a date-of-hire term is at least facially valid, particularly in view of the fact that every other unionized employee group on the property combined their seniority lists on a date-of-hire basis.[19] Third, date-of-hire has repeatedly been upheld as the *preferred* method to integrate merged work groups in the Ninth Circuit and elsewhere. *Laturner v. Burlington N., Inc.*, 501 F.2d 59, 5993 (9th Cir. 1974), *cert denied*, 419 U.S. 1109 (1975) (*citing Humphrey v. Moore*, 375 U.S. 335, 347 (1964)) ("it has long been recognized that the use of such a method to integrate seniority rosters is an equitable arrangement for resolving the inevitable conflicts which arise whenever a merger occurs"); *Truck Drivers and Helpers, Local Union 568 v. NLRB*, 379 F.2d 137,143 n. 10 (D.C. Cir. 1967) (date of hire is the standard by which all other methods of seniority integration are judged, therefore "the condemnations of refusal to dovetail are legion"). Fourth, merely because some members are disadvantaged by a seniority term in no way substantiates a DFR claim. *Rakestraw*, 981 F.2d at 1533 (date-of-

[19] Even the district court in *Addington* recognized that, "[t]here is nothing wrong with bargaining for seniority integration based upon date of hire [and that] date-of-hire seniority integration is generally an equitable and feasible solution to the problem of merging seniority lists." *Addington v. US Airline Pilots Ass'n*, 2009 U.S. Dist. LEXIS 61724, at *31 (D. Ariz. July 17, 2009).

hire "serves the interests of labor as a whole ... Majority rule is the norm. Equal treatment does not become forbidden because the majority prefers equality, even if formal equality bears more harshly on the minority"); *Hardcastle v. Western Greyhound Lines*, 303 F.2d 182 (9th Cir. 1962). Fifth, US Airways endorsed strict date-of-hire agreements amongst its other employee groups as "fair and equitable" even where – in sharp contrast with USAPA's proposal – these integrations afforded no conditions or restrictions protecting the respective West employee groups. (Mowrey Decl. ¶¶ 9-10).

Moreover, the Company presents its RLA claim with unclean hands. It has yet to ever bargain with USAPA on seniority and now refuses not only to respond to USAPA's proposal, but even to take a position on the subject (its "neutral"). Even so, the Company admits it *does* have a duty to bargain over seniority which requires it to "bargain with USAPA *now*" (Doc. # 1, ¶¶ 1, 5). *Now*, too, it seeks a court order in Count I premised on forcing USAPA to return to its predecessor's discarded bargaining proposal that cannot be ratified. There is no sufficient allegation, nor could there be a genuine dispute, that USAPA has breached its duty under § 152, First, hence no claim is stated. Instead, the Company has merely raced to the Courthouse to circumvent the Ninth Circuit's admonition to bargain a solution to the seniority issue. *Addington*, 606 F.3d at 1180, fn. 1.

G. No Claim Is Stated for Violation of the Duty of Fair Representation.

To state a claim for breach of the duty of fair representation a plaintiff must allege a union's conduct toward a member is "arbitrary, discriminatory, or in bad faith" (the 'tripartite standard'). *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991). In the context of bargaining, a claim is not ripe until there is a "final product of bargaining."

Addington, 606 F.3d at 1182 (*citing O'Neil* 499 U.S. at 78). If a union acts within a "wide range of reasonableness" its actions are not arbitrary. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953) ("the complete satisfaction of all who are represented is hardly to be expected"). Discrimination based on per se unlawful categories such as race violates the Duty, but not when based on seniority. *Considine v. Newspaper Agency Corp.*, 43 F.3d 1349, 1359-60 (10th Cir. 1994) ("a union does not engage in invidious discrimination when it negotiates a contract whose terms vary according to seniority"); *Rakestraw*, 981 F.2d at 1533. And bad faith requires a showing of "substantial evidence of fraud, deceitful action or dishonest conduct.'" *Beck v. United Food & Commercial Workers Union*, 506 F.3d 874, 880 (9th Cir. 2007).

Controlling precedent makes any future DFR claim groundless, if not frivolous:

Prior to ratification there is no risk of a non-frivolous DFR suit, because according to the Ninth Circuit, until then there is no ripe claim. *Addington*, 606 F.3d at 1180. After ratification, the Complaint suggests a hybrid DFR claim will be commenced, but that is of no significance now unless the Company also demonstrates an "objectively reasonable fear of imminent suit" not merely the potential for a frivolous one sometime in the future. *North Am. Airlines*, 2005 U.S. Dist. LEXIS 4385, at *47 (*citing EMC Corp v. Norand Corp.*, 89 F.3d 807, 811 (Fed. Cir. 1996)) ("any time parties are in negotiation ... the possibility of a lawsuit looms in the background"). But the Company cannot show that a non-frivolous suit is inevitable or that if one occurs that it will reasonably expose the Company to liability:

First, as stated herein above, ratification between these parties is uncertain; there are contingencies that could well prevent ratification. No ratification, no contract, no suit –

ever.

Second, as the Ninth Circuit observed, even with ratification there may never be any *injury* and this is true even if the Nicolau list is excluded. (Indeed, following ratification the parties might reasonably agree to delay implementation of the seniority integration term in order to seek a declaratory judgment after ratification and this too would be before any possible injury).

Third, by any objective measure a re-do of the *Addington* DFR claim is doomed, whether it is solely against USAPA or under the pretense of a hybrid claim. This Court need look no further than the Ninth Circuit's *Addington* decision in this regard because while it did not *rule* on the merits of the *Addington* plaintiffs' theory of entitlement to Nicolau, the Court did *comment* on it. It left no room to doubt that the mere fact that Nicolau is not included in a new contract would not, per se, state a DFR claim.[20] In fact, the majority in *Addington* made it a point to fault the dissent for its implicit "assum[ption] that the Nicolau Award, the product of the internal rules and processes of ALPA, is binding on USAPA." 606 F.3d at 1181 n.3.

Moreover, buttressing the Ninth's comments are settled lines of precedent upholding: i) that seniority is not a vested right but one that can be negotiated by unions; ii) even after a 'binding arbitration' and; iii) affirming date-of-hire as a fair solution in mergers. *Hass v. Darigold Dairy Prod. Co.*, 751 F.2d 1096, 1099 (9th Cir. 1985) (seniority rights are creatures of contract which unions may renegotiate); *Associated Transport, Inc.*,

[20] "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" (606 F.3d at 1181), and "USAPA is at least as free to abandon the Nicolau Award as was its predecessor" *Id.*, fn 3.

185 N.L.R.B. 631 (1970) (notwithstanding prior arbitration union free to renegotiate seniority); *Laturner*, 501 F.2d at 599 (date of hire affirmed as "a familiar and frequently equitable solution to the inevitably conflicting interests which arise in wake of a merger).

Fourth, even if the Court were to conclude that *USAPA* has a risk of liability, that does not mean the *Company* does. Its fears can easily be discounted at this juncture. There can be no dispute that the Company already prevailed on Counts I and II in the *Addington* lawsuit, and the grievance alleging breach of contract was forever waived. Exposure on a straight contract claim is thus nil. The Company nevertheless conjures up the specter of a collusion theory – which the *Addington* plaintiffs never alleged – but that would predictably fare no better.[21]

To prevail on a collusion claim against the Company the plaintiffs would also have to prevail on the DFR claim against the Union, since there can be no collusive liability without the Union DFR liability as a necessary predicate. *DelCostello v. Teamsters*, 462 U.S. 151, 165 (1983). Even if the necessary DFR predicate could be established, to show collusion plaintiffs would have to show intentional conspiracy to breach the duty. *Crusos v. United Transp. Union, Local 1201*, 786 F.2d 970, 973 (9th Cir. 1986), *cert. denied*, 479 U.S. 934 (1986). That is not possible, however, because the Company acknowledges in its pleadings that it does *not know* if exclusion of Nicolau would violate USAPA's duty.[22] Without the intent to breach the duty, there is no possible act of conspiracy to form the

[21] The Company also mistakenly alleges that the *Addington* plaintiffs pled a discrimination-DFR claim. (Compl. ¶ 57). This is false. No such claim was ever pled, even after amendment. In fact, *Addington* lead counsel went further to affirmatively waive it, on the record, the first day of trial: (Trial Transcript, Day 1, April 28, 2009, at 136:4).

[22] *See* Complaint, ¶ 5 (the company "must have clarification as to the parties' respective rights, constraints, and obligations").

basis for collusion. The current USAPA proposal is lawful on its face and made in good faith, and the Company openly admits that acceptance would "not be the result of actionable 'collusion.'"[23]

H. Plaintiffs Failed to Join a Necessary Party Under Rule 19.

Fed. R. Civ. P. 12(b)(7) allows dismissal of an action for failure to join a necessary and indispensable party under Fed. R. Civ. P. 19.

> "The application of Rule 19 entails a practical two-step inquiry. First, a court must determine whether an absent party should be joined as a 'necessary party' under subsection (a). Second, if the court concludes that the nonparty is necessary and cannot be joined for practical or jurisdictional reasons, it must then determine under subsection (b) whether in 'equity and good conscience' the action should be dismissed because the nonparty is 'indispensable.'"

Greenberg v. Fireman's Fund Ins. Co., 2007 U.S. Dist. LEXIS 86621, at *3 (D. Ariz. Nov. 16, 2007) (*quoting Va. Sur. Co. v. Northrop Grunman Corp.*, 144 F.3d 1243, 1247 (9th Cir. 1998)).

The East pilots individually, or as a proposed class, are improperly excluded. The premise of the Company's sprint to the courthouse on the occasion of the mandate of the Ninth Circuit in *Addington* is its worry over a hybrid-suit against USAPA over a new seniority term, which they say the "West Pilots ... have made clear that they will challenge in a future litigation" just as they did in *Addington*. (Doc. # 1, ¶ 3). Left out by the Company, however, are the East pilots who *also* have sued USAPA over seniority, in *Breeger v. US Airline Pilots Ass.*, 2009 U.S. Dist. LEXIS 40489 (W.D.N.C. May 12, 2009). The *Breeger* plaintiffs' case was dismissed on ripeness grounds at the district court level

[23] *See* Complaint ¶ 58 (correctly citing to *Rakestraw v. United Airlines, Inc.*, 765 F. Supp. 474, 493 (N.D. Ill. 1991), *aff'd in relevant part and rev'd on other grounds*, 981 F.2d 1542 (7th Cir. 1992) and *Kozera v. IBEW*, 892 F. Supp. 536 (S.D.N.Y 1995).

but their issue, the retroactive application of date-of-hire seniority, remains. Also left out from the Company's lawsuit is the group of East pilots currently engaged in litigation against ALPA based on ALPA's introduction of an erroneous East pilot list, which prejudiced their standing on the Nicolau list. *Naugler*, 2008 U.S. Dist. LEXIS 25173. Were USAPA forced into a Nicolau term, the *Breeger* and *Naugler* plaintiffs (or other East pilots) cannot reasonably be expected to sit on their hands. Surely *they* are as necessary as the West pilots.

Also, conspicuously absent are:

- Those East pilots who stridently oppose *any* conditions and restrictions on strict-date-of hire, and who presently threaten legal action in recent correspondence to the Merger Committee;[24]
- Furloughed *junior West* pilots who will not be recalled under the existing contract, but would be entitled to recall prior to more junior East pilots, under USAPA's proposal;
- *Senior* West pilots who, under USAPA's proposal, would obtain immediate access to sought-after widebody flying that exists only in East operations.

With the selective inclusion of only the *Addington* defendants – the obvious collaborators with Count I – the Company's case is imbalanced and subject to dismissal under rule 12(b)(7).[25]

I. Venue Is Improper.

Under Fed. R. Civ. P. 12(b)(3), a defendant may move to dismiss or transfer a complaint for improper venue. When deciding a Rule 12(b)(3) motion, unlike a Rule 12(b)(6) motion, the Court need not accept the pleadings as true and may consider facts outside the pleadings. *R.A. Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir.

[24] *See supra* at fn 3. (*citing* Mowrey Decl. ¶ 37, Ex. F).
[25] Assuming USAPA's Rule 21 motion (Doc. # 35) is not granted.

1996). Once a defendant raises an objection to venue, the plaintiff bears the burden of establishing that the selected venue is proper. *Rio Properties, Inc. v. Rio Intern. Interlink*, 284 F.3d 1007, 1019 (9th Cir. 2002).

Here, the plaintiff has gone forum shopping. This action is subject to dismissal because the Company chose a venue for its tactical advantage that prejudices, or risks prejudice, to USAPA. The current venue is the *only* venue possible where: it is the same venue chosen by the *Addington* plaintiffs; the possibility of transfer within the venue will undermine a fair trial, and which was calculated or had the effect of forcing USAPA to litigate that issue; where West pilots are domiciled in great numbers but almost no East pilots are; and where US Airways is headquartered but thousands of miles from where USAPA is, and from where the NMB is located. Particularly, in declaratory judgment actions, such forum shopping is grounds for dismissal. *See e.g., Essex Group, Inc. v. Cobra Wire & Cable, Inc.*, 100 F. Supp. 2d 912, 916 (N.D. Ind. 2000). A more appropriate venue, considering the NMB's jurisdiction over pending negotiations, would be the District of Columbia where the NMB is headquartered.

III. RELIEF.

Based on the pleadings, evidence, arguments, record, and any testimony, or evidence to be presented in the hearing, USAPA respectfully requests that the Court grant its motion and dismiss Plaintiffs' Complaint with prejudice.

Respectfully submitted:

Dated: September 14, 2010 [26]

By: ***/s/ Lee Seham***

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CERTIFICATE OF SERVICE

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

I hereby certify that on this day of September 14, 2010, I electronically transmitted the foregoing document and all its attachments to the U.S District Court Clerk's Office using the ECF System for filing and transmittal.

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

[26] Originally filed as a lodged brief on September 7, 2010. (Doc. # 38). Re-filed on this date in conformance with the Court's order on USAPA's motion for leave to file overlength brief (Doc. # 42).