Lee Seham, Esq., *pro hac vice*
lseham@ssmplaw.com
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

USAPA'S MOTION TO DISMISS THE ADDINGTON CROSS-CLAIM AND MEMORANDUM OF LAW IN SUPPORT THEREOF

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii-iv

MOTION 1

MEMORANDUM OF POINTS & AUTHORITIES 1

I. FACTS 1

A. Background Facts 1

B. Procedural Facts 1

II. ARGUMENT 4

A. This Court Lacks Subject Matter Jurisdiction Over The Cross-Claim 4

1. Standard on 12(b)(1) Motion to Dismiss for Lack of Jurisdiction 4

2. The Cross-Claim is a "Carbon Copy" of the Dismissed Claim in *Addington* and is Therefore Unripe for the Same Reasons Already Set Forth by the Ninth Circuit, Barring this Claim by Application of *Res Judicata* 4

3. Any Contractual Entitlement to Claim Nicolau Is Within the Exclusive Province of the System Board of Adjustment, but the Addington Defendants Have Voluntarily Abandoned and Waived that Claim 11

B. The Cross-Claim Should Be Dismissed for Failure to State a Claim for Violation of the Duty of Fair Representation, Facially or Substantively 13

1. Standard on 12(b)(6) Motion to Dismiss for Failure to State a Claim 13

2. The Cross-Claim Fails to State a Valid Claim for Breach of the Duty of Fair Representation Against USAPA 13

TABLE OF AUTHORITIES

Cases:

Ackley v. Western Conf. of Teamsters,
985 F.2d 1463 (9th Cir. 1992) 17

Acri v. Int'l Ass'n of Machinists,
781 F.2d 1393 (9th Cir. 1986) 17

Addington v. Bradford,
2008 U.S. Dist. LEXIS 105831 (D. Ariz. Dec. 24, 2008) 14

Addington v. US Airline Pilots Ass'n,
606 F.3d 1174 (9th Cir. 2010)..... *passim*

Addington v. US Airline Pilots Ass'n,
588 F. Supp. 2d 1051 (D. Ariz. 2008).....12

Air Line Pilots Ass'n v. O'Neill,
499 U.S. 65 (1991) 7, 14, 15

Americopters, LLC v. F.A.A.,
441 F.3d 726 (9th Cir. 2006) 4

Andrews v. Louisville & Nashville R.R. Co.,
406 U.S. 320 (1972) 11

Ashcroft v. Iqbal,
__ U.S. __, 129 S. Ct. 1937 (2009) 13

Ass'n of Flight Attendants v. Horizon Air Inus., Inc.,
280 F.3d 901 (9th Cir. 2002) 11

Associated Transport, Inc.,
185 NLRB 631 (1970) 17

Baggarly v. United Steelworkers of Am.,
142 L.R.R.M. 2108 (W.D. Ky. 1991) 17

Beck v. United Food & Commercial Workers,
506 F.3d 874 (9th Cir. 2007) 16

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 13

Bensel v. Allied Pilots Ass'n,
387 F.3d 298 (3d Cir. 2004) 17

Bhd. of Locomotive Eng'rs v. Louisville & Nashville R.R. Co.,
373 U.S. 33 (1963) 11

Carr v. Pacific Maritime Ass'n,
904 F.2d 1313 (9th Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991) 11

Cardenas v. Anzai,
311 F.3d 929 (9th Cir. 2002) 5

Complete Auto Transit, Inc. v. Reis,
451 U.S. 401 (1981) 14

Considine v. Newspaper Agency Corp.,
43 F.3d 1349 (10th Cir. 1994) 15

Consol. Rail. Corp. v. Ry. Labor Executives' Ass'n,
491 U.S. 299 (1989) 11

Croston v. Burlington N.R.R. & IAM,
999 F.2d 381 (9th Cir. 1993) 11

Deboles v. Trans World Airlines, Inc.,
552 F.2d 1005 (3d Cir.), cert. denied, 434 U.S. 837 (1977) 17

Hardcastle v. Western Greyhound Lines,
303 F.2d 182 (9th Cir. 1962) 16

Hass v. Darigold Dairy Prod. Co.,
751 F.2d 1096 (9th Cir. 1985) 16

Humphrey v. Moore,
375 U.S. 335 (1964) 15

Laturner v. Burlington N., Inc.,
501 F.2d 593 (9th Cir. 1974) 17

Maldonado v. Morales,
556 F.3d 1037 (9th Cir. 2009), *cert. denied*, __ U.S. __ (2010) 5

McCready v. White,
417 F.3d 700 (7th Cir. 2005) 4

McNamara-Blad v. Ass'n of Prof. Flight Attendants,
275 F.3d 1165 (9th Cir. 2002) 17

Merritt v. IAM,
613 F.3d 609, 188 L.R.R.M. 3227 (6th Cir. July 22, 2010) 16

Miguel v. Country Funding Corp.,
309 F.3d 1161 (9th Cir. 2002) 4

Peterson v. Kennedy,
771 F.2d 1244 (9th Cir. 1985) 14

Rakestraw v. United Airlines, Inc.,
981 F.2d 1542 (7th Cir. 1992)..... 15, 17

Simo v. Union Needletrades,
322 F.3d 602 (9th Cir. 2003) 14

Stock W., Inc. v. Confederated Tribes,
873 F.2d 1221 (9th Cir. 1989) 4

Truck Drivers & Helpers, Local Union 568 v. NLRB,
379 F.2d 137 (D.C. Cir. 1967) 17

Vaca v. Sipes,
386 U.S. 171 (1967) 14

Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme,
433 F.3d 1199 (9th Cir. 2006) 5

Yong v. I.N.S.,
208 F.3d 1116 (9th Cir. 2000) 9

Statutes:

Railway Labor Act, 45 U.S.C. § 151, *et. seq*. ..... *passim*

Rules:

L.R. Civ. P. 7.1(d)(2) 1

Fed. R. Civ. P. 12(b)(1) 4

Fed. R. Civ. P. 12(b)(6) 13

MOTION

Defendant, the US Airline Pilots Association ("USAPA"), hereby moves the Court, pursuant to Rule 12(b)(1) and 12(b)(6) to dismiss the *Addington* co-defendants' cross-claim against USAPA for breach of the duty of fair representation (Doc. # 34, filed Sept. 7, 2010), with prejudice, stating as grounds, the law of the case, *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174 (9th Cir. 2010), and the doctrines of *res judicata* and collateral estoppel, and as set forth below herein.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS.

A. Background Facts.

This Court has been briefed on the substantive facts underlying the duty of fair representation ("DFR") cross-claim brought by defendants Addington, Bostic, Burman, Iranpour, Velez and Wargocki (collectively "*Addington* defendants" or "defendants"). Therefore, pursuant to LR Civ. P. 7.1(d)(2), USAPA incorporates by reference the factual summary provided in its motion to stay these proceedings[1] and the declarations submitted in support of its motion to dismiss the Company's complaint.[2]

B. Procedural Facts.

This Court has also been briefed on the procedural history relevant to this matter.[3] USAPA will not duplicate those procedural facts here. However, an overview of the *Addington* defendants' DFR claim and its recent dismissal by the Ninth Circuit is necessary to demonstrate why immediate dismissal of the current cross-claim is required, and to

[1] *See* Doc. # 18 at pp. 3-8.
[2] *See* Doc. # 39-41.
[3] *See* Doc. # 49 at pp. 1-2. *See also* Doc. # 18 at pp. 1-3.

highlight why the *Addington* defendants' decision to cut and paste their unripe complaint and file it as a cross-claim in this action is nothing short of vexatious.

On September 4, 2008, the same six individual pilots that are named as defendants in this action filed a hybrid DFR claim against their union, USAPA, and their employer, US Airways. US Airways 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 v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1178 (9th Cir. 2010). 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, ALPA, in bargaining towards a single contract with US Airways. *Id*. USAPA appealed the district court's partial judgment and permanent injunction on an expedited basis to the Ninth Circuit.

While USAPA's appeal was pending, the *Addington* defendants filed a second amended complaint in the district court to add allegations asserting a disjointed theory of joint and several liability against USAPA and individual East pilots for conduct that occurred prior to USAPA being certified as the collective bargaining representative. (Doc. # 612 at ¶ 75, in 2:08-cv-01633). The *Addington* defendants concocted this new theory of damage liability in an attempt to overcome the fatal causation issues that plagued their complaint as it related to their request for monetary damages.[4] USAPA promptly moved to

[4] The new theory was an attempt to escape the observation made by the district court in *Addington* prior to trial that because it was entirely speculative when a new contract should be negotiated, "we could end up in a situation where a damage claim could fail later on entirely even though a liability claim and injunctive relief of some sort is granted here." (Trial Tr. 1056:19 to 1057:6).

dismiss the second amended complaint. That motion was fully briefed and awaiting oral argument when the district court in *Addington* stayed all further matters pending decision by the Ninth Circuit Court of Appeals. (2:08-cv-01633, Doc. # 637).

On June 4, 2010, the Ninth Circuit issued its decision that the *Addington* defendants' DFR claim was not ripe and remanded to the district court with "directions that the action be dismissed." 606 F.3d at 1184. Following issuance of the Ninth Circuit's decision, the *Addington* defendants filed two separate petitions with the Ninth Circuit. The first asked the Ninth Circuit to rehear the entire case *en banc*. The second, labeled as a "petition for clarification," was a request that the Ninth Circuit 'clarify' its decision to allow the *Addington* defendants' damage claim to proceed in the district court despite the fact that the underlying DFR claim had been determined to be unripe. USAPA opposed both petitions, and on July 8, on the same day the *en banc* request was rejected, the Ninth Circuit "panel voted to deny the petition for clarification." (Doc. # 19-3 at 2).

After striking out at the Ninth Circuit, the *Addington* defendants have engaged in a flurry of frivolous filings designed to end-run the Ninth Circuit's ruling and revive their unripe DFR claim.[5] They first filed a motion with the district court in *Addington*, pursuant to Fed. R. Civ. P. 60(b), seeking relief from the judgment which, following the mandate from the Ninth Circuit, dismissed the action in its entirety. In this filing, the *Addington* defendants conjured up the same frivolous ripeness rationale that is currently included in their cross-claim – that their claim is somehow ripe simply because US Airways filed a declaratory judgment action. The briefing on the *Addington* defendants' 60(b) motion

[5] And in so doing have boasted through internet publications that "DFR II is upon us" and "*Addington* is not going away." (Decl. Ex. A).

concluded on August 27, and is currently pending decision by the Hon. Neil V. Wake. The present cross-claim is, in the words of the *Addington* defendants, a mere "carbon copy of the original Addington complaint against USAPA." (Declaration of Nicholas Paul Granath, Esq. hereinafter "Decl." at Ex. A).[6]

II. ARGUMENT.

A. This Court Lacks Subject Matter Jurisdiction Over the Cross-Claim.

1. Standard on 12(b)(1) Motion to Dismiss for Lack of Jurisdiction.

Verifying its subject matter jurisdiction is a federal court's "first duty" in every case. *McCready v. White*, 417 F.3d 700, 702 (7th Cir. 2005). "The party asserting federal jurisdiction has the burden of establishing it." *Miguel v. Country Funding Corp*., 309 F.3d 1161, 1164 (9th Cir. 2002). In considering a motion to dismiss for lack of subject matter jurisdiction, the court "is not confined by the facts contained in the four corners of the complaint--it may consider facts and need *not* assume the truthfulness of the complaint." *Americopters, LLC v. F.A.A.*, 441 F.3d 726, 732 n.4 (9th Cir. 2006). 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). "Like other challenges to a court's subject matter jurisdiction, motions raising the ripeness issue are treated as brought under Rule 12(b)(1)." *St. Clair v. Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

2. The Cross-Claim is a "Carbon Copy" of the Dismissed Claim in *Addington* and is Therefore Unripe for the Same Reasons Already Set Forth by the Ninth Circuit, Barring this Claim by Application of *Res Judicata*.

Addressing the same facts and same pleading now presented to this Court through

[6] The referenced publication is distributed by an entity referred to as "Leonidas, LLC." This entity is responsible for financing the litigation efforts of the Addington pilots and controlling legal strategy decisions.

the *Addington* defendants' cross-claim, the Ninth Circuit 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 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)).

Addressing the facts before it, the Ninth Circuit in *Addington* held that a number of contingencies existed that necessarily precluded a finding of ripeness and that, furthermore, the West pilots had failed to identify a sufficiently concrete injury warranting judicial relief. 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 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 its membership.**

Id. at 1180 n.1 (emphasis added).

The same contingencies described by the Ninth Circuit in its June 4th decision – negotiation and ratification – continue to exist today. They are not in dispute, or could not reasonably be disputed. First, US Airways has not responded to USAPA's seniority proposal (Doc. # 39 at 5, ¶ 20). Second, USAPA and US Airways have not completed negotiations towards a single CBA – in fact the parties have tentatively agreed to only 8 out of a total of 30 contract sections (Doc. # 40 at 1-2, ¶ 7). Finally, even when a CBA is tentatively agreed to by USAPA and the Company, USAPA membership must still ratify that agreement before there is a "final product" upon which a DFR claim could be based.

No contract-ratification vote of the membership has taken place, and because there is no tentatively agreed to CBA (let alone seniority term) no ratification vote is yet scheduled. In addition to these continued contingencies, the *Addington* defendants have yet to suffer a "sufficiently concrete injury" warranting judicial consideration. 606 F.3d at 1180.

The *Addington* defendants' alleged harm remains as wholly speculative now as it did three months ago when the Ninth Circuit dismissed their original action for lack of ripeness. In fact, their 'carbon-copy' cross-claim continues to allege their injuries as "lost promotions," "furlough[s]," and "demot[ions]," which they contend would not have occurred absent USAPA's actions because "Pilot Integration using the Nicolau Award would have been fully completed before October 2008." (Doc. # 34 at 28, ¶¶ 117-119). Yet, these were the **exact** injuries alleged by the West pilots in *Addington*, which the Ninth Circuit has already rejected as nothing more than mere conjecture:

> We also conclude that withholding judicial consideration does not work a direct and immediate hardship on the West Pilots. …
>
> Plaintiffs correctly note that certain West Pilots have been furloughed, whereas they would still be working under a single CBA implementing the Nicolau Award. **It is, however, at best, speculative that a single CBA incorporating the Nicolau Award would be ratified if presented to the union's membership.** 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. …
>
> Plaintiffs seek to escape this conclusion by framing their harm as the lost opportunity to have a CBA implementing the Nicolau Award put to a ratification vote. Because merely putting a CBA effectuating the Nicolau Award to a ratification vote will not itself alleviate the West Pilots furloughs, **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.

606 F.3d at 1180-1181 (emphasis added). Therefore, according to the Ninth Circuit in *Addington*, which this Court is bound to follow, the *Addington* defendants' DFR cross-claim "can be brought only after negotiations are complete and a 'final product' has been reached." *Id*. at 1182 (*citing Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65, 78 (1991)). And there can be no mystery over what constitutes a "final product" of bargaining, because the Ninth Circuit clearly defined it to be completion of negotiation plus ratification. *See Addington*, 606 F.3d at 1180 (final product does not exist "until the airline responds to the proposal, the parties complete negotiation, and the membership **ratifies** the CBA ..."). Therefore, until both negotiations and ratification are complete, any DFR claim advanced by the West Pilots and alleged damages stemming from the theory that a contract containing the Nicolau Award should have been implemented is not only "speculative," but in light of the Ninth Circuit's decision it is utterly frivolous.

The *Addington* defendants now seek to escape the Ninth Circuit's decision by alleging that their 'carbon copy' DFR cross-claim suddenly ripened in "July or August, 2010" (doc. # 34 at 9, ¶ 15), based on the alleged occurrence of three things – none of which include a negotiated and ratified collective bargaining agreement:

a) The district court vacated the judgment and injunction in Case No. 08-CV-1633;

b) USAPA indicated in public statements that it **intended** to demand that US Airways agree to implement a date-of-hire seniority list in the CBA **currently under negotiation;** and

c) US Airways filed a ripe declaratory judgment action seeking a ruling on whether, by making such demands, USAPA would be in breach of its duty of fair representation.

(Doc. # 34 at 10, ¶15) (emphasis added). These new ripeness allegations are nonsensical or, at best, mere sophistry:

First, the district court's dismissal of the injunction was in direct response to the Ninth Circuit's mandate directing it to do so because the case *was not ripe*. To assert, as the *Addington* defendants do, that the district court's mandatory *compliance* with the Ninth Circuit's mandate to dismiss for lack of ripeness somehow creates ripeness is not only meritless, it is preposterous. It would seem a proposition of law too obvious to state: district courts do not nullify appellate courts – rather district courts are bound by appellate courts. *See Yong v. I.N.S.*, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000) ("once a federal circuit court issues a decision, the district courts within that circuit are bound to follow it").

Second, the allegation that it is USAPA's "*inten[tion]* to demand that US Airways agree to implement a date-of-hire seniority list in the CBA *currently under negotiation*," (doc. # 34 at ¶ 15b) (emphasis added), serves only to accentuate why the claim continues to be *unripe*. The cross-claim, just as the original *Addington* complaint, is based on nothing more than an alleged "**intention**" to propose a seniority term in a CBA "**currently under negotiation**."[7] Since the cross-claim is not based on a negotiated and ratified agreement – the claim remains unripe.

Finally, the allegation that the *mere filing* of a declaratory judgment action by US Airways instantly converted an unripe DFR claim for the *Addington* defendants into a ripe one finds no support either in law or fact.[8] Even affording the *Addington* defendants the

[7] US Airways argued in *Addington* that the plaintiffs' allegation of a mere *intention* failed to create a ripe case or controversy. (08-cv-1633, doc. # 30 at p. 8, fn 3) ("Not only are these allegations conclusory, they are also not ripe for decision because they only allege what the defendants 'intend' to do, and not what they have actually done.").

[8] When challenged during the course of briefing on the *Addington* defendants' Rule 60(b) motion to produce case law supporting their position that the mere filing of a declaratory

benefit of the doubt, the only effect that US Airways' declaratory judgment action can be said to have on the ripeness of the West pilots' DFR claim is that it demonstrates the Company's position and potential response to a seniority proposal, which is *alleged* neutrality. However, even if the Company maintained such a "neutral" position on seniority, as the Ninth Circuit has held, "the parties [must still] complete negotiations, and the membership [must still] ratif[y] the CBA [before] the West Pilots [will] actually be affected by USAPA's seniority proposal – whatever USAPA's final proposal ultimately is." 606 F.3d at 1180. And even then, under the law of this case, the Ninth Circuit's decision precludes a finding of injury because "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." 606 F.3d at 1181. *See also Id*. at 1184 ("in the context of negotiations toward a CBA, the parties could shift positions until negotiations are complete, and the final agreement could be acceptable to Plaintiffs").

The cross-claim, like the complaint in *Addington*, is filed too early. The Ninth Circuit expressly instructed these *exact* plaintiffs and these *exact* attorneys that their DFR claim "can be brought only after negotiations [between USAPA and US Airways] are complete and a final product has been reached" *id*. at 1182, i.e., after contract ratification. Nevertheless, the *Addington* defendants and their counsel, with the premature filing of the current cross-claim, chose simply to ignore the Ninth Circuit, or worse, to advance frivolous arguments to nullify it. They seek yet again to needlessly entangle the federal courts with on-going collective bargaining and impose unnecessary costs upon their Union.

---

judgment action constituted changed circumstances sufficient to ripen an otherwise unripe DFR claim, they failed to cite a single case supporting such a proposition.

In place of law, indeed in spite of precedent, the *Addington* defendants repeat the mantra that 'Nicolau is binding,' but such repetition does not make it so, and cannot change the fact that the Ninth Circuit has noted "as the district court" did that "USAPA is at least as free to abandon the Nicolau Award as was its predecessor ..." *Id*. 1181 n. 2.

3. Any Contractual Entitlement Claim to Nicolau Is Within the Exclusive Province of the System Board of Adjustment, but the *Addington* Defendants Have Voluntarily Abandoned and Waived that Claim.

It is well established under the Railway Labor Act, 45 U.S.C. § 151, *et. seq* ("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 System Board of Adjustment, and that the federal courts have no jurisdiction over such disputes. *Consol. Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299 (1989)*; Ass'n of Flight Attendants v. Horizon Air Indus., Inc.*, 280 F.3d 901, 904, 906 (9th Cir. 2002). The jurisdiction of the appropriate adjustment board is "mandatory, exclusive and comprehensive." *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 322-24 (1972); *Bhd. of Locomotive Eng'rs v. Louisville & Nashville R.R. Co.*, 373 U.S. 33, 36-38 (1963); *Horizon Air*, 280 F.3d at 906.

Under the RLA, a plaintiff-employee's obligation to exhaust contractual grievance procedures before bringing a court action for breach of a collective bargaining agreement "applies with equal force to claims brought against a union for breach of the duty of fair representation." *Croston v. Burlington N.R.R. & IAM*, 999 F.2d 381, 386 (9th Cir. 1993) (*quoting Carr v. Pacific Maritime Ass'n*, 904 F.2d 1313, 1317 (9th Cir. 1990)), *cert denied*, 498 U.S. 1084 (1991). Here, the *Addington* defendants have resurrected the allegations from the dismissed *Addington* case, which contend that they are *contractually entitled* to

implementation of the Nicolau seniority proposal based on the Transition Agreement's ("TA") reference to ALPA Merger Policy. (Doc. # 34 at 18). However, there can be no dispute that an RLA System Board of Adjustment has been established pursuant to Section X of the TA to hear disputes arising out of the TA. (Cross-Claim, Ex. B, at § X).

This contractual entitlement claim to Nicolau was raised before in Count II of their original complaint in *Addington* against US Airways. Count II of the *Addington* suit alleged that the Company had violated the TA, "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." (Decl. Ex. B, ¶ 101). This claim was dismissed by the district court for lack of subject matter jurisdiction because it arose "under the operative terms of the Transition Agreement" and therefore constituted a "minor" dispute under the RLA subject to the "exclusive" jurisdiction of the System Board of Adjustment. *Addington v. US Airline Pilots Ass'n*, 588 F. Supp. 2d 1051, 1063 (D. Ariz. 2008).[9] The *Addington* defendants never appealed the district court's dismissal of either Counts I or II against the Company.

Following the dismissal of their claims against the Company, the *Addington* defendants were afforded access to the System Board of Adjustment in order to arbitrate their claim of contractual entitlement to Nicolau. However, after the scheduling of their class grievance for hearing before the System Board, the *Addington* defendants voluntarily elected to withdraw and waive the grievance in favor of focusing exclusively on their

[9] The district court in *Addington*, prior to its dismissal of Count II against the Company, commented that "Count 2 [against US Airways] is inseparable from Count 3 [DFR against USAPA]" and therefore "you can't decide one and not the other, whether it's an arbitrator or me." (Decl., Ex. D).

unripe Count III DFR claim against USAPA.[10] Therefore, it is USAPA's position that the *Addington* plaintiffs' waiver of their class action grievance is dispositive of the allegations in the present cross-claim that they are contractually entitled to Nicolau under the operative terms of the TA. Moreover, any question of whether these claims could even enjoy such a Lazarus-like resurrection is for the System Board to determine – not this Court.

B. The Cross-Claim Should Be Dismissed for Failure to State a Claim for Violation of the Duty of Fair Representation.

1. Standard on 12(b)(6) Motion to Dismiss for Failure to State a Claim.

To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937, 1949 (2009) (*citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, (2007)). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 129 S. Ct. at 1949. Moreover, in determining whether a complaint sufficiently states a claim for relief, the inference that the defendant is liable for the misconduct alleged must be more than "merely possible," but "plausible." *Id*. at 1949-50.

2. The Cross-Claim Fails to State a Valid Claim for Breach of the Duty of Fair Representation Against USAPA.

To state a facially valid claim for breach of the duty of fair representation a plaintiff must allege, at a minimum, that the union's conduct toward a member is "arbitrary, discriminatory, or in bad faith" (the 'tripartite standard'). *Vaca v. Sipes*, 386 U.S. 171, 190 (19667) (a breach of the duty occurs "only" when a "union's conduct ... is arbitrary,

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

discriminatory, or in bad faith"); *O'Neill*, 499 U.S. at 76; *Simo v. Union Neddletrades*, 322 F.3d 602, 617 (9th Cir. 2003) ("Whether a union acted arbitrarily, discriminatorily or in bad faith requires a separate analysis, because each of these requirements represents a distinct and separate obligation"). The *Addington* cross-claim does no such thing. Instead, it substitutes a breach of contract theory. (Doc. # 34, ¶ 68(b): i.e, the "East Pilots' personal and group obligations").

Aside from failing to plead a facially valid DFR claim, the allegations as pled are barred by law on multiple levels. First, any breach of contract claim involving individual pilots was rejected when the district court (Judge Wake) dismissed the state claims alleging breach of contract against individuals. *Addington v. Bradford*, 2008 U.S. Dist. LEXIS 105831 (D. Ariz. Dec. 24, 2008).

Second, there can be no DFR claim against individuals because only unions owe the duty. *See e.g.*, *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 416 (1981); *Peterson v. Kennedy*, 771 F.2d 1244, 1256 (9th Cir. 1985). Even if the *Addington* defendants' cross-claim had stated a valid DFR by alleging that one of the tripartite standards were violated, it still fails to allege sufficient facts to support a plausible inference that USAPA has engaged in conduct that is either arbitrary, discriminatory or in bad faith, as those terms have been defined by well settled case law.

A union's conduct will be deemed *arbitrary* only if such conduct "can be fairly characterized as so far outside a 'wide range of reasonableness' that it is wholly irrational.'" *O'Neill*, 499 U.S. at 78 (1991). Nothing in the cross-claim makes any fact allegation that USAPA has acted arbitrarily (including intending to meet an objective of a

date of hire based proposal). That is not surprising because in the first suit, at trial, the *Addington* defendants freely abandoned that allegation (for the good reason they could not prove it). Thus, in their briefing to the Ninth Circuit, the *Addington* defendants admitted that the "arbitrary analysis is quite forgiving … [and] the West Pilots … do not make that kind of claim." (Decl. Ex. C). Therefore, because the present cross-claim is but a "carbon copy" of the West pilots' complaint in *Addington*, it comes as no surprise that it also fails to allege that USAPA's conduct was "arbitrary." Even if an arbitrary DFR claim had been pled, it would fail as a matter of law given the Ninth Circuit's observation that seniority integration "upon the basis of length of service … is neither unique or arbitrary." *Laturner v. Burlington N., Inc.*, 501 F.2d 593, 599 n14 (9th Cir. 1974) (*citing Humphrey v. Moore*, 375 U.S. 335, 348 (1964)). "On the contrary, it is a familiar and frequently equitable solution to the inevitably conflicting interests which arise in the wake of a merger." *Id*.

There is no allegation of fact that would support a claim of *discrimination*. That is not surprising either, because the *Addington* defendants have never pled that. Perhaps this is because while discrimination based on *per se* unlawful categories such as race certainly can violate the Duty, it does 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 v. United Airlines, Inc.*, 981 F.2d 1542, 1533 (7th Cir. 1992).

Lastly, there are no fact allegations supporting a bad faith DFR claim. Bad faith requires more than a simple allegation of subjective disadvantage.

> [T]he mere fact that a seniority system in a collective bargaining agreement favors one group more than another does not in itself constitute a breach of the

> union's duty [of fair representation]. Bad faith or intentional discrimination must be shown. In particular, evidence of a bad faith motive or a hostile intent to discriminate against a portion of the union's membership is an essential element necessary to impose a limitation on a union's discretion in bargaining.

Merritt v. IAM, 613 F.3d 609, 188 L.R.R.M. 3227, *20 (6th Cir. 2010); *Hardcastle v. Western Greyhound Lines*, 303 F.2d 182 (9th Cir. 1962). "To establish that the union's exercise of judgment was in bad faith, the plaintiff **must** show substantial evidence of fraud, deceitful action or dishonest conduct." *Beck v. United Food & Commercial Workers*, 506 F.3d 874, 880 (9th Cir. 2007) (emphasis added). No fact allegation pleads any form of fraud, deceitful action or dishonest conduct. Instead, the *Addington* defendants have long proclaimed that USAPA openly appealed to a majority for a date-of-hire with conditions and restrictions seniority approach as opposed to Nicolau, which the Ninth Circuit determined "would undoubtedly be rejected by [USAPA] membership." *Addington*, 606 F.3d at 1180 n.1.

What the cross-claim does allege is that USAPA breached its DFR because its decision to pursue a ratifiable seniority system other than Nicolau was done without "a legitimate union objective." (Doc. # 34, p. 25, ¶ 86). This theory fails to state a valid claim. The Ninth Circuit has held that there is no permanency inherent in the concept of seniority, and therefore a union "may renegotiate seniority provisions of a collective bargaining agreement, even though the resulting changes are essentially retroactive or affect different employees unequally." *Hass v. Darigold Dairy Prod. Co.*, 751 F.2d 1096, 1099 (9th Cir. 1985). Even when an internal union arbitration resolves a seniority dispute, it is not improper for a union to pursue an alternative outcome. *Associated Transport, Inc.*, 185 NLRB 631, 635 (1970). Moreover, the Ninth Circuit and others have consistently endorsed

date-of-hire seniority integration as a legitimate union objective. *Laturner*, 501 F.2d at 599; *Rakestraw*, 981 F.2d at 1533 ("dovetailing seniority lists in a merger … **serves the interests of labor as a whole**."); *Truck Drivers & Helpers, Local Union 568 v. NLRB*, 379 F.2d 137, 143 n.10 (D.C. Cir. 1967).

The cross-claim's damage-liability theory, which is also a "carbon copy" of the allegations contained in the second amended complaint in *Addington*, is unsupported by any existing case law and contrary to well settled DFR principles. It alleges liability on conduct that occurred *prior to* USAPA's certification – which is a legal non-starter.[11] The damage theory also mistakenly presumes joint liability on behalf of individual East pilots – who, as a matter of law, owe no duty of fair representation.[12]

Finally, "federal courts have consistently required a direct nexus between breach of [the] duty and resultant damages to the individual or minority segment . . ." *Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1018 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977); *Acri v. Int'l Ass'n of Machinists*, 781 F.2d 1393, 1397 (9th Cir. 1986); *Ackley v. Western Conf. of Teamsters*, 985 F.2d 1463 (9th Cir. 1992) (the DFR injury causation test is "difficult to satisfy, and rightly so."). Therefore, the Ninth Circuit's determination that the West pilots' have failed to identify a "sufficiently concrete injury"[13] must also compel a finding that the regurgitated cross-claim fails to state a valid DFR claim, because there can be no "direct nexus" between the alleged DFR breach and alleged damages.

---

[11] There is no duty of fair representation owed prior to a union's certification. *See Bensel v. Allied Pilots Ass'n*, 387 F.3d 298, 312 (3d Cir. 2004); *McNamara-Blad v. Ass'n of Prof. Flight Attendants*, 275 F.3d 1165, 1170 (9th Cir. 2002); *Baggarly v. United Steelworkers of Am.*, 142 L.R.R.M. 2108 (W.D. Ky. 1991).

[12] *See supra* at p. 15 (citing cases).

[13] *See supra* at pp 7-8.

Respectfully submitted:

Dated: September 30, 2010 By: ***/s/ Nicholas P. Granath***

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

Nicholas 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
nick@lubinandenoch.com
Lubin & Enoch, P.C.
349 North 4th Avenue
Phoenix, AZ 85003-1505

CERTIFICATE OF SERVICE

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

I hereby certify that on this day of September 30, 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/ Lucas K. Middlebrook, Esq.***