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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

US AIRWAYS, INC., a Delaware corporation, *et al.*, *Plaintiff,* vs. Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI, on behalf of themselves and all other similarly-situated individuals, and US AIRLINE PILOTS ASS'N, an unincorporated association, *Defendants.*	CASE NO. 2:10-cv-01570-PHX-ROS **ADDINGTON PILOTS' RESPONSE IN OPPOSITION TO** ***USAPA'S MOTION TO DISMISS THE ADDINGTON CROSS-CLAIM* (DOC. #50)**

Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI (the "Addington Pilots"), on behalf of themselves and all other similarly-situated individuals, file this *Response In Opposition To USAPA's Motion To Dismiss The Addington Cross-Claim (Doc. #50)*. The Court should deny relief on this motion because Rule 18(b) [1] allows

[1] References to "Rule" are to the Federal Rules of Civil Procedure.

pleading a claim against USAPA to determine whether USAPA has been breaching its duty of fair representation ("DFR") by disregarding the Nicolau Award and promoting its date-of-hire seniority list (hereinafter, "seeking a non-Nicolau CBA"). The Addington Pilots properly make this claim as direct declaratory defendants and as Rule 19 parties. They properly seek injunctive relief and damages now because they can only assert their DFR claim once, pursuant to the doctrines of merger and bar. This response is supported by the Memorandum of Points and Authorities that follows.

Dated this 18th of October, 2010.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. OVERVIEW AND FACTUAL BACKGROUND

US Airways properly joined the Addington Pilots, pursuant to Rule 19, because they are necessary parties to avoid inconsistent obligations. This is so because the Addington Pilots will have a cause of action against US Airways and/or USAPA relating to USAPA's breach of the duty of fair representation (DFR) in at least one of two ways: as a result of their current appeal or as a result of impending action on the part of US Airways.

The parties' disagreement has been ongoing for years. US Airways and America West merged in 2005. The pilot groups from each airline, referred to as the East Pilots (US Airways) and West Pilots (America West), agreed to integrate their respective seniority lists as part of the integration of airline operations. The pilot groups have diametrically opposite positions on seniority integration. The West Pilots' position is that pilots who were actively working at the time of the merger should be put ahead of pilots who were on furlough at the time of the merger. The East Pilots' position is that the seniority list must be ordered strictly by date-of-hire, even if that places more than a thousand East Pilots who were on furlough ahead of working West Pilots.

The two pilot groups agreed to use binding arbitration conducted by George Nicolau to determine an equitable method of seniority integration. The seniority list resulting from that arbitration, referred to as the Nicolau Award, put 500 East Pilots at the top of the seniority list and placed all East Pilots who were on furlough below the West Pilots, all of whom were working.

The East Pilots objected to the Nicolau Award and vigorously prevented its implementation. For example, they refused to participate in collective bargaining that had to be completed before any integrated seniority list could be implemented. They also withdrew support from the union that represented both pilot groups, causing it to be decertified. They formed a new union,

USAPA, and voted to have it represent the bargaining unit. Five months later, USAPA presented a date-of-hire seniority list to the airline that put more than a thousand East Pilots who had been on furlough at the time of the merger ahead of hundreds of West Pilots who had been working. To this day USAPA's goal is to have a non-Nicolau CBA with US Airways.

The Addington Pilots initiated an action on behalf of the West Pilots. The issue of breach of the duty of fair representation was decided by a jury after a 10-day trial. The jury found that USAPA's actions were intended to frustrate implementation of the Nicolau Award. It found that USAPA represented the West Pilots in bad faith because its sole objective was to benefit East Pilots, rather than to benefit the bargaining union as a whole. The District Court issued an injunction ordering USAPA to bargain with US Airways in good faith using the Nicolau Award. USAPA appealed. A divided panel of the Ninth Circuit Court of Appeals ruled that the Addington Pilots' case was not ripe. The Addington Pilots have filed a Petition for Writ of Certiorari in the United States Supreme Court.

In order to avoid inconsistent obligations resulting from this case or another case brought *against* the airline and USAPA by the Addington Pilots, the judgment in this case must have preclusive effect against the Addington Pilots. Without that, US Airways could be ordered to acquiesce to a non-Nicolau CBA in this action and it could be enjoined from operating under a non-Nicolau CBA in another action. To have preclusive effect, the Addington Pilots must have a full and fair opportunity to litigate the DFR issue in this case. The Addington Pilots are, therefore, properly joined.

The Addington Pilots must seek all their relief on USAPA's DFR breach now because this DFR claim would be subject to merger and bar if they waited to seek some in a separate action. Hence, they properly seek injunctive relief

and damages now in addition to a ruling on liability. This Court should therefore deny relief on USAPA's motion.

II. LEGAL ARGUMENT

A. The ripeness of the DFR issues is not *res judicata*.

Circumstances material to ripeness now and to be developed in this litigation by US Airways were not before the Ninth Circuit in December 2009. The ripeness of the DFR issues arising in the context of this action, therefore, was not fully addressed in *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174 (9th Cir. 2010). USAPA offers no authority that ripeness is *res judicata* when circumstances are materially different. Indeed, the law is to the contrary. "[R]ipeness is assessed based on the facts as they exist at the present moment." *Western Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186, 1204-05 (9th Cir. 2008; *see also Buckley v. Valeo*, 424 U.S. 1, 114-17 (1976) (reversing Court of Appeals decision that certain claims were not ripe because interim events made the claims ripe for review); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 139-40 (1974) (reversing lower court holding that case was not ripe for review because "[i]t is the situation now rather than the situation at the time of the district court's decision that must govern").

A highly significant change of circumstances now is that the Court would not be considering whether "the withholding judicial consideration ... works a direct and immediate hardship on the West Pilots." *Addington*, 606 F.3d at 1180. Rather, it would be considering whether withholding judicial consideration works a direct and immediate hardship on US Airways. Indeed, US Airways' allegations demonstrate this does work such hardship. They show that US Airways will suffer substantial hardship if it is compelled to engage in collective bargaining without the benefit of the declaratory judgment it seeks here. Without the benefit of that declaratory judgment, US Airways risks

liability and financial loss that it could otherwise avoid. The ripeness of the DFR issue here, therefore, is not a matter of *res judicata*.

B. US Airways properly pleads a contingent DFR declaratory claim, pursuant to Rule 18(b).

1. The DFR claim is a contingent claim.

"A party may join two claims even though one of them is contingent on the disposition of the other." Rule 18(b). A claim is properly pled, therefore, regardless that it is contingent on the resolution of other claims. This rule "is unqualified and allows the joinder of any type of contingent claim. The basic purpose of the rule is to reinforce the notion that a party should be able to obtain all the relief to which the party is entitled in a single action." 6A Wright & Miller, *Fed. Prac. & Proc. Civ.* § 1590 (3d ed.). US Airways, therefore, properly pled a claim to determine an issue—USAPA's DFR breach—the ripeness of which may depend on the outcome of other claims. This is clarified by considering US Airways' goal in this action.

As the Addington Pilots understand it, US Airways' goal is to define the course of action that it can take in collective bargaining that will not incur (for the airline) liability to USAPA or to the Addington Pilots and that will not result in a CBA that would be immediately invalidated by the courts.

Two preliminary questions addressing US Airways' potential liability depend on whether USAPA is in breach of its DFR:

1. If USAPA is not in breach of its DFR, is US Airways liable to USAPA if it refuses to make every reasonable effort to reach agreement on USAPA's demand to disregard the Nicolau Award?
2. If USAPA is in breach of its DFR, is US Airways liable to the Addington Pilots if it acquiesces to USAPA's demand to disregard the Nicolau Award?

US Airways, therefore, properly seeks to litigate whether USAPA is in breach of its DFR in order to determine its risks in bargaining with USAPA for a CBA.

2. The DFR claim is valid because the preliminary issues are valid.

The validity of the contingent DFR claim raised in US Airways' action, as shown above, depends on the validity of two preliminary issues. With respect to the first issue, USAPA does not concede that US Airways is free to refuse to bargain for a non-Nicolau CBA. For the purposes of this motion, therefore, the Court should regard the first issue as valid. As for the second question, whether US Airways would be liable to the Addington Pilots for agreeing to a non-Nicolau CBA, relevant authorities make clear that US Airways risks such liability. *See, e.g., Am. Postal Workers Union, etc. v. Am. Postal Workers Union*, 665 F.2d 1096, 1108 (D.C. Cir. 1981) ("There is no question that an employer is jointly liable with a union when, as part of a union's DFR breach the employer breaches a duty owed to the affected worker.") In this instance, US Airways would be in breach of the 2005 Transition Agreement if it agreed to a non-Nicolau CBA. The Transition Agreement established contractual rights that ran between US Airways and the Addington Pilots. Doc. # 34 (Cross-claim) at ¶ 42. In the Transition Agreement, US Airways agreed that "the single integrated seniority list . . . would be created in accordance with ALPA Merger Policy." *Id.* at ¶ 45(m). That list is the Nicolau Award. *Id.* at ¶¶ 52-59. As long as the Transition Agreement is in effect, US Airways would be in breach of a duty owed to the Addington Pilots if it agreed to a non-Nicolau CBA.

Although USAPA argues that the Addington Pilots have waived any action against US Airways by not arbitrating the issue, no waiver invalidates the issue of US Airways' liability to the Addington Pilots. The original Addington

complaint merely alleged that US Airways was in violation of the Transition Agreement for failing to negotiate in good faith a CBA that would implement the Nicolau Award. Although related, that claim is different than the claim made here by US Airways, and the company's new claim necessitates the Addington Pilots' litigation of the DFR claim against USAPA. Moreover, a claim is not precluded by being withdrawn without prejudice. *See Restatement (Second) of Judgments* § 20(1)(b) (1982) (Rule of bar does not apply "[w]hen the plaintiff agrees to or elects a nonsuit."). USAPA cites no authority that holds otherwise. The DFR claim here, therefore, is valid.

C. The Addington Pilots had to be joined to avoid US Airways' risk of inconsistent obligations.

A person must be joined, pursuant to Rule 19(a) if "disposing of the action in the person's absence may. . . leave an existing party subject to substantial risk of incurring . . . inconsistent obligations because of the interest." Rule 19(a)(1)(B)(ii). Obligations are inconsistent where "a party is unable to comply with one court's order without breaching another court's order concerning the same incident." *Delgado v. Plaza Las Americas, Inc.*, 139 F.3d 1 (1st Cir. 1998).

Arguably, US Airways might establish that it must cooperate with USAPA's demands to implement a non-Nicolau CBA. One basis for this could be that US Airways must cooperate with USAPA without regard to USAPA's DFR breach. Another basis could be that USAPA is not breaching its DFR. Either way, the judgment could obligate US Airways to implement a non-Nicolau CBA. In that event the Addington Pilots would have a ripe DFR claim against USAPA if and when USAPA and US Airways sought to implement a non-Nicolau CBA. *See Addington*, 606 F.3d at 1180, n.1. That DFR claim would establish a DFR breach and could establish that US Airways is jointly liable with USAPA. If so, the judgment could enjoin US Airways from implementing a non-Nicolau CBA.

Separate actions could, therefore, create diametrically inconsistent obligations for US Airways. One action could obligate it to implement a non-Nicolau CBA. The other could enjoin such implementation. US Airways avoided such an untenable result by joining the Addington Pilots pursuant to Rule 19(a).

D. As parties adverse to USAPA, the Addington Pilots must obtain all DFR relief in this action.

"Parties who are not adversaries to each other under the pleadings in an action involving them and a third party are **bound by and entitled to the benefits of issue preclusion** with respect to issues they actually litigate fully and fairly as adversaries to each other and which are essential to the judgment rendered." *Restatement (Second) of Judgments* § 38 (1982) (emphasis added). This applies to merger and bar as well as issue preclusion: "[W]here the claims or defenses in the pleadings put parties in an adversarial relation to each other even though they may also be aligned together against a third party, . . . the rules of merger and bar . . . and the rules of issue preclusion . . . are applicable." *Id.* at comment (a).

In other words, a judgment on the DFR claim in this action will bar the Addington Pilots from asserting a subsequent action on their DFR claim. "When a valid and final personal judgment is rendered in favor of the defendant, the judgment is generally a bar to a subsequent action on the claim." *Id.* at § 17, comment (b).

Because the Addington Pilots would be barred from asserting their DFR claim in a subsequent action, they must obtain all relief available to them in this action. That relief includes an injunction and damages. *See Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192, 207 (1944) (approving "resort to the usual judicial remedies of injunction and award of damages when appropriate" in DFR claims).

E. USAPA's 12(b)(6) arguments were properly rejected in the *Addington* case.

USAPA makes the same flawed Rule 12(b)(6) arguments that Judge Wake rejected in the *Addington* case. It wrongly tries to extract support for its argument from the Ninth Circuit's decision on ripeness. Failure to state a claim, however, is a matter of merits and the Ninth Circuit could not, as a matter of law, rule on the merits of an action that was not ripe. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (rejecting "such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers"). That prudential factors weighed against ripeness of the *Addington* claim in December 2009, therefore, has no effect on its substantive merits.

1. Improper union motive supports a DFR claim.

"The duty of fair representation is the *quid pro quo* for the union's right to exclusive representation; it protects employees in the minority from arbitrary discrimination by the majority union." *Laborers & Hod Carriers, Loc. No. 341 v. NLRB*, 564 F.2d 834, 839-40 (9th Cir. 1977). "So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft." *Steele*, 323 U.S. at 204. As well as in enforcing contract terms, "[a] union must discharge its duty . . . in bargaining with the employer." *Chauffeurs, Teamsters & Helpers Loc. No. 391 v. Terry*, 494 U.S. 558, 563 (1990). It logically follows, therefore, that a union can breach the duty of fair representation at all stages of representation, including while it is bargaining with the employer over contract terms.

Union liability for discrimination or bad faith requires a subjective examination of the union's actual motives and purposes. *Simo v. Union Needletrades, Indus. & Textile Employees*, 322 F.3d 602, 618 (9th Cir. 2003). Breach depends on the actual reasons the union had for choosing its course of action. *See Bernard v. Air Line Pilots Ass'n*, 873 F.2d 213, 216-17 (9th Cir.1989) (looking at actual union motivation for favoring one group of pilots in airline merger seniority dispute).

Rakestraw v. United Airlines, Inc., 981 F.2d 1542 (7th Cir. 1992), proves the point. It took up two fact situations addressing the issue of union motive. In the first situation, a larger airline acquired a smaller airline. *Id.* at 1526. ALPA disregarded its Merger Policy in the process of integrating the seniority lists, and the smaller pilot group acquiesced in the result-a date-of-hire list favoring the majority. *Id.* at 1527. Later, the minority brought suit against the union. *Id.* The union was in pursuit of a legitimate objective and not liable for DFR breach because, the court held, the larger, acquiring airline did not need the smaller group of pilots and was unlikely to agree to any arrangement disfavoring its own pilots. *Id.* at 1533.

In the second *Rakestraw* situation, ALPA was in the process of negotiating a post-merger CBA, including a date-of-hire seniority list. *Id.* at 1527. Negotiations broke down and the pilots went on strike. *Id.* at 1528. In response, the airline employer hired replacement pilots. *Id.* At the same time, striking pilots honored the picket line. *Id.* After the strike, no CBA was in place, and ALPA had no alternative but to accept the airline's proposed seniority list with strike-breakers at the top of the list. *Id.* at 1528-29. The striking pilots, constituting a majority in the union, made aggressive protest. *Id.* at 1529. Ultimately, management and the union agreed to put the striking pilots above the strikebreakers who then brought a DFR claim. *Id.* The Seventh Circuit held that there was no DFR breach because the union had a legitimate union

objective -- to harm strike-breakers, and reward pilots who supported the strike. This was legitimate because it would "strengthen the hand of organized labor in future conflicts with management." *Id.*

2. The CrossClaim allegations support a DFR claim based on improper union motive.

The Addington Pilots make the following allegations to show USAPA is acting from illegitimate motivation:

> 68. ... East Pilots formed USAPA, for the purposes of:
>
> a) Becoming the certified labor representative of West and East Pilots in place of the Airline Pilots Association, International;
>
> b) Evading East Pilots' personal and group obligations to treat the Nicolau Award as final, binding, fair and equitable;
>
> c) Impeding US Airways' implementation of the Nicolau Award; and
>
> d) Impeding US Airways' institution of Integrated Operations.
>
> 69. In the course of this campaign, USAPA formulated a date-of-hire based seniority policy ("USAPA Seniority Policy") that was inconsistent with the rationale of the Nicolau Award.
>
> 70. USAPA knew and intended that USAPA Seniority Policy:
>
> a) Was inconsistent with the rationale of the Nicolau Award;
>
> b) Would require a date-of-hire integrated seniority list that would be substantially more favorable to the East Pilots than the Nicolau Award;
>
> c) Would require a date-of-hire integrated seniority list that would be substantially less favorable to the West Pilots than the Nicolau Award; and

d) Was contrary to and inconsistent with its members' personal obligations to treat the Nicolau Award and Nicolau Award as final, binding, fair and equitable.

* * *

73. With the knowledge set out in ¶ 70(a)-(d), and the knowledge that it could win the representation contest just with the votes of East Pilots, USAPA promised the East Pilots that if it were elected the labor representative it would follow USAPA Seniority Policy.

* * *

77. Since becoming the certified labor representative, USAPA has knowingly and intentionally done the following to the Addington Pilots' detriment:

a) Re-affirmed USAPA Seniority Policy without making any effort to give due consideration to West Pilot interests;

b) Taken steps to implement USAPA Seniority Policy;

c) Promoted, encouraged and aided East Pilots to breach duties owed to and established for the benefit of West Pilots;

d) Stated that any contract it would negotiate with US Airways: "will not contain any reference to recent Nicolau document [the Nicolau Award]"; and

e) Stated: "When the majority of member pilots in good standing vote yes on our new agreement, then this document [the Nicolau Award] dies on the shelf."

* * *

82. Since April 18, 2008, Defendant USAPA has owed the Addington Pilots and all other West Pilots a duty of fair representation.

83. The duty of fair representation requires that USAPA give due consideration to West Pilot interests and to not harm those interests through conduct that is arbitrary, improper, or undertaken in bad faith.

84. The duty of fair representation required USAPA to give due consideration to the interests of the West Pilots when deciding USAPA Seniority Policy.

85. The duty of fair representation precluded USAPA from casting aside the Nicolau Award solely to benefit East Pilots at the expense of West Pilots.

86. The duty of fair representation precluded USAPA from casting aside the Nicolau Award without having a legitimate union objective motivating its actions.

87. USAPA adopted and promoted its date-of-hire seniority list for no reason other than to favor the East Pilots at the expense of the West Pilots.

88. USAPA adopted and promoted its date-of-hire seniority list without holding any sort of hearing or procedure that afforded the Addington Pilots and other West Pilots an opportunity to present arguments and evidence in favor of their interests.

89. USAPA, therefore, breached its duty of fair representation.

Doc. # 34 (Cross-claim) at ¶¶ 68-70, 73, 77, 82-89.

These allegations show that USAPA is motivated solely to favor the interests of the East Pilots at the expense of the West Pilots. This motive is illegitimate and supports finding USAPA in breach of its DFR. The Addington Pilots therefore have a valid DFR claim.

III. CONCLUSION

The Addington Pilots are proper defendants in the declaratory judgment claim. They properly make a DFR cross-claim pursuant to Rule 19(a). That claim is properly pled by US Airways as a Rule 18(b) contingent claim. This Court should therefore deny relief on USAPA's motion.

Dated this 18th day of October, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October 2010, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the ECF System for filing and transmittal.

By */s/ Kelly J. Flood*