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

Stanley Lubin, Esq., State Bar No. 003076
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 REPLY IN SUPPORT OF ITS MOTION TO DISMISS CO-DEFENDANTS' CROSS-CLAIM

I) THE CROSS CLAIM IS UNRIPE UNDER *RES JUDICATA* AND THERE IS NO PRECLUSIVE EFFECT GOING FORWARD BECAUSE THERE IS NO RIPE CLAIM.

The cross-claim, as explained by co-defendants, is a virtual "carbon copy" of the *Addington* DFR claim dismissed by the Ninth Circuit as unripe. Because it is undisputed that the conditions to establish ripeness set forth by the Ninth Circuit – a completed contract and ratification – have yet to occur, USAPA moved to dismiss co-defendants' cross-claim on 12(b)(1) grounds. (Doc. # 50, p. 9).[1] In response, co-defendants make two arguments: one, that Rule 18(b) "allows" their claim; and two, that "merger and bar" would forever preclude them in the future.[2] Both arguments collide with established case law under the doctrine of *res judicata*, the Federal Rules, and applicable statutes. The present cross-claim is precluded on jurisdictional grounds until a final product of bargaining makes it ripe. *A fortiori*, an unripe claim is not barred by *res judicata* regardless of whether the company's action proceeds and the cross-claim is dismissed. Therefore, there is no future preclusive effect to fear. This is shown by the following:

First, the Ninth Circuit has ruled that, i) this DFR claim is not ripe, and ii) it will not be ripe unless and until there is a "final product of bargaining" evidenced by completed negotiations that result in a ratified CBA. No party has yet to even allege that these conditions for ripeness are satisfied at this point in time. Indeed, the company's complaint alleges the undisputed fact that contract negotiations are ongoing. Therefore, *res judicata*

[1] All citations to docket entries are according to ECF-generated pages, not internal page numbering.

[2] The "merger and bar" label should be jettisoned at the threshold. The Ninth Circuit has expressed its preference for the term "claim preclusion" and the correct application is the law of *res judicata*. *Robi v. Five Platters*, 838 F.2d 318, 322 n. 2 (9th Cir. 1988) (*citing Americana Fabrics, Inc. v. L & L Textiles, Inc.*, 754 F.2d 1524, 1529 (9th Cir. 1985)).

claim preclusion is a solid bar to any attempt to re-litigate the dismissed claim, be it through the mis-use of Rule 60(b) (doc. # 54-1), or in a newly filed, independent action. *Gould v. Mutual Life Ins. Co.*, 790 F.2d 769, 774-75 (9th Cir. 1986), *cert. denied*, 479 U.S. 987; Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4478.3. This follows the well-settled principle that *res judicata* applies to questions of jurisdiction. *American Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932)*; Matosantos Comm. Corp. v. Applebee's Int'l Inc.*, 245 F.3d 1203, 1209 (10th Cir. 2001); *Costner v. URS Consultants*, 153 F.3d 667, 673 (8th Cir. 1998); 18 Wright, Miller & Cooper § 4418 at 468. *See also Mirchandani v. United States*, 836 F.2d 1223, 1225 (9th Cir. 1988) ("trial courts" must "follow an appellate court's directives that establish the law of a particular case").

Here, there is no dispute that a final product has not yet been reached. Indeed, the company entangles this Court in its worries about a contract yet to be written, on a proposal it has yet to respond to, over a dispute it proclaims neutrality on. Now, co-defendants try, for a third time, to de-rail collective bargaining into the federal courts by pressing their still unripe claim over the mere *intention* of USAPA[3] to bargain substantively over seniority terms in a manner inconsistent with their dictates. And they do this when, according to the Ninth Circuit, there may *never be any injury*, let alone an actionable claim, based on the mere non-inclusion of the "undoubtedly" unratifiable Nicolau Award. *Addington*, 606 F.3d at 1180-81 n.1. Until a party can show satisfaction of the conditions set forth in *Addington*, there is no ripe claim despite how that claim is dressed up. Consequently, this court lacks subject matter jurisdiction. *See e.g., Park Lake Resources Ltd., v. U.S. Dept. of Agriculture*, 378 F.3d 1132,

[3] Doc. # 34 (cross-claim) at ¶ 76: "USAPA intends to ... not adopt the Nicolas award ..." ¶ 15 (b).

1136 (10th Cir. 2004) (once dismissed for lack of ripeness, until conditions are met showing ripeness, mere "theories" are not enough to overcome *res judicata*); *see also Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112 (9th Cir. 2009) (the burden of establishing ripeness rests with the party asserting the claim).[4]

Second, co-defendants contend that Rule 18(b) "allows" their otherwise unripe claim because it is "contingent" upon the outcome of Counts I and II of US Airways' complaint. This was never pled in the cross-claim, but even if it were, it fails as a matter of law. Rule 18(b) was intended for, and is used predominantly to, allow for the joinder of a claim to set aside a fraudulent conveyance with an underlying claim for money where the conveyance claim is truly contingent upon resolution of the claim for money. *Nowell v. Dick*, 413 F.2d 1204 (5th Cir. 1969); *Graff v. Nieberg*, 233 F.2d 860 (7th Cir. 1956); *Armour & Co. v. Bailey*, 132 F.2d 386, 387 (5th Cir. 1942). But here co-defendants do *not* seek, as Rule 18(b) provides, to "join two claims" where "one of them is contingent on the disposition of the other." In fact, *they bring only one claim* against USAPA and do not seek to join that claim – on a contingent basis – with anything that has been brought by the company. Rather, they merely argue that, "the company's new claim necessitates [their] DFR claim against

[4] The *Park Lake* case is particularly instructive. In that case, the district court ruled against plaintiffs on the merits. Plaintiffs appealed and the Tenth Circuit remanded with instructions to dismiss the case as unripe. In so doing, the Tenth Circuit outlined the conditions to be met for plaintiffs' claim to become ripe. Plaintiffs filed a second claim prior to satisfaction of these conditions. The district court dismissed the new action based on ripeness, and the Tenth Circuit affirmed on principles of *res judicata* noting that "Plaintiffs can overcome the previous dismissal only by showing satisfaction of the conditions for ripeness set forth [therein]." 378 F.3d at 1134.

USAPA." (Doc. # 55 at 11).[5] This unsupported contention fails to invoke any sort of contingent claim envisioned by Rule 18(b). Moreover, even if there *were* a resolution on the merits of Counts I or II of the company's claim, the *Addington* DFR claim still does not ripen "until the airline responds to the proposal, the parties complete negotiations, and the membership ratifies the CBA," because until then the "West Pilots [are not] actually … affected by USAPA's seniority proposal – whatever USAPA's final proposal ultimately is." *Addington*, 606 F.3d at 1180.

Even assuming *arguendo*, that co-defendants' purported "joinder" might properly fall under Rule 18(b), it is well settled that the Federal Rules "do not extend or limit the jurisdiction of the district courts." *See* Fed. R. Civ. P. 82. *Kontrick v. Ryan*, 540 U.S. 443 (2004); *Owens Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978) ("it is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction"); *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 70 (2d Cir. 1990); Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 1592, p. 737 ("The effect of Rule 18(b) is limited by the express provision in Rule 82 ... the mere fact that Rule 18(b) applies in a given situation is not sufficient to give the court jurisdiction..."). This prohibition is particularly relevant in the context of an attempted joinder of claims or remedies. *Greenway v. Thompson*, 368 F. Supp. 387, 388 (N.D. Ga. 1973) ("it is clear that Rules 18 and 20 ... encourage broad joinder … however, these rules cannot by themselves confer [subject matter] jurisdiction on the federal court if it is otherwise lacking"). Therefore, because the

[5] This exact argument was properly rejected by the district court in *Addington* when it recently denied these same pilots' request, pursuant to Rule 60(b), to reopen their unripe DFR claim in that matter. (*See* Doc. # 54-1).

Rules cannot create subject matter jurisdiction where it does not exist, it logically follows that Rule 18(b) cannot ripen what is otherwise an unripe claim – especially where the unripe claim is not contingent upon the resolution of any other claim. *See Herman Trust v. Teddy Bear*, 254 F.3d 802 (9th Cir. 2001) (if dismissed for subject matter jurisdiction court has no discretion to entertain claim under Rule 18 even as a supplemental claim); *Des Brisay v. Goldfield Corp*., 637 F.2d 680 (9th Cir. 1981).

Third, in the context of his recent denial of the co-defendants' Rule 60(b) motion, Judge Wake rejected co-defendants' argument that "changed circumstances" assessed "at the present moment" had ripened their claim. (Doc. # 54-1, p. 3); (Tr.13:4 - "that looks like a direct confrontation with the mandate").[6] And here claim preclusion bars the cross-claim. As the Supreme Court has held: "A party that has had an opportunity to litigate the question of subject matter jurisdiction may not ... reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that the principle of *res judicata* applies to jurisdictional determinations ..." *Ins. Corp of Ireland v. Compagnie des Bauxites*, 456 U.S. 694, 702 n. 9 (1982); *Kontrick v. Ryan*, 540 U.S. 443, 456 n. 9 (2007) ("even subject matter jurisdiction may not be attacked collaterally"). Even if the parties desired otherwise, the only changed circumstances that *could* matter are negotiation and ratification of a new contract, because it "is well settled that lack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties." *United Investors Life Ins. Co. v. Waddell & Reed, Inc.*, 360 F.3d 960, 967 (9th Cir. 2004); *Compagnie*, 456 U.S. at 702; *Days Inns Worldwide, Inc. v. Patel*, 445 F.3d 899, 904 (6th Cir. 2006) ("the parties cannot confer subject matter

[6] References to "Tr." are to the transcript of the hearing before Judge Wake on October 12, 2010; *see* Exhibit A to the supporting Declaration to this Reply.

jurisdiction where it does not exist"); *Smith v. Ashland, Inc.* 250 F.3d 1167 (8th Cir. 2001) (same). And this must be doubly so here because in their first suit co-defendants *waived* any argument that alleged harm to the company was a basis for ripeness, just as the district court in *Addington* recently noted and as co-defendants conceded:

> MR. [ANDREW S.] JACOB: what's most black and white to us is the Ninth Circuit did not consider the hardship to the Airline. Now we're seeing the hardship to the Airline.
>
> THE COURT: Well, on the other hand – well, if we go back, the hardship to the Airline was there when they asked to be dismissed out of this case. They, for whatever reasons, rather than counterclaiming for declaratory [relief], they decided they didn't want to be involved. But those facts, those circumstances were there … So that was there when you litigated your case. If you wanted to raise that as a grounds for ripeness for the West Pilots, why could you not have done it then in this case? But you made a decision not to ground your ripeness in that either, right?
>
> MR. JACOB: That's correct.

(Tr. 14:18 - 16:2). Thus, alleging, for the first time, facts that existed prior to a dismissal of the previous action, may not cure jurisdictional defects. *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1192 (D.C. Cir. 1983); *Park Lake Resources,* 378 F.3d at 1135-38. Moreover, the contention that the Ninth Circuit decision did not "fully address" ripeness in the "context" of harm to the company is plainly wrong. The issue of harm to the company was specifically before the Ninth Circuit on appeal in the form of the *Addington* district court's Findings and Conclusions. (08-1633 at Doc # 593, p. 37, lines 11-16); (Tr. 23:1-9), and there is no question that USAPA appealed this. Furthermore, the Ninth Circuit's ruling impliedly dealt with this issue as demonstrated by its recitation of the fact that bargaining was *ongoing* at US Airways.

Fourth, co-defendants' argument that their DFR claim will be precluded by litigation

in the company's case is wrong as a matter of law. Case law has long held that the doctrine of *res judicata* does not apply to claims in a subsequent suit that were not ripe at the time the first suit was filed. "It is axiomatic that a claim that has not yet accrued is not ripe for adjudication, and hence it is not a claim that 'could have been litigated' in a previous lawsuit ... thus [it cannot be] barred by *res judicata*." *Richardson v. Interenergy Resources, Ltd.*, 99 F.3d 746, 756 (5th Cir. 1996); *see also Pesnell v. Arsenault*, 490 F.3d 1158, 1160 (9th Cir 2007); *Rawe v. Liberty Mutual Fire Ins. Co.*, 462 F.3d 521, 529 (6th Cir. 2006); *Charchenko v. City of Sillwater*, 47 F.3d 981, 984 (8th Cir. 1995); *Feminist Women's Health Ctr. v. Codispoti*, 63 F.3d 863, 866 (9th Cir. 1995); *American Nat. Bank v. FDIC*, 710 F.2d 1528, 1535 (11th Cir. 1983); *Schiff v. Kennedy*, 691, F.2d 196, 97 (4th Cir. 1982).

Hence, a claim directed to the substance of a contract proposal that has yet to be finalized, negotiated, or ratified cannot be precluded by current litigation that *does not have that future term before it*, regardless of how that litigation is postured.[7] Thus, as the Ninth Circuit has already held, once a contact has been negotiated and ratified and assuming they can show injury (not merely the absence of Nicolau), these co-defendants are perfectly free to make any non-frivolous DFR claim they want to challenge the substance of a seniority term contained within the ratified CBA. 606 F.3d at 1180 n. 1.

II) CO-DEFENDANTS HAVE FAILED TO ADEQUATELY RESPOND TO THE 12(B)(6) MOTION.

Co-defendants argue that their cross-claim is not subject to dismissal pursuant to Rule

[7] The co-defendants' future-preclusion argument is also belied by their decision not to file a counterclaim against the company, even though the company bases its request for declaratory judgment, in part, on the "inevitable lawsuit" (doc. # 61 at 5) that will allegedly be filed by the West pilots against the company if a future CBA does not contain the Nicolau list.

12(b)(6) because "Judge Wake rejected [USAPA's arguments] in the *Addington* case." (Doc. # 55 at 13). However, Judge Wake recently explained that, "the substantive rulings in *Addington* have been vacated pursuant to the mandate, and both cases would now write on clean slates, if there were anything to write in *Addington*, which there is not." (Doc. # 56-1 at 4); (Tr. 6:18-7:12, 31:5-24). That is correct under settled law that renders the *Addington* trial judgment and all its rulings a legal nullity. *See Butler v. Eaton*, 141 U.S. 240, 244 (1891) (judgment reversed by higher court "without any validity, force or effect, and ought never to have existed"); *Pedigo v. PAM Transport, Inc.*, 98 F.3d 396, 398 (8th Cir. 1998); *Wheeler v. John Deere Co.*, 935 F.2d 1090, 1096 (10th Cir. 1991). Therefore, it constitutes no response to USAPA's 12(b)(6) arguments to point to the vacated decisions issued in the dismissed *Addington* litigation.

What little argument co-defendants actually offered in response to USAPA's 12(b)(6) motion fails to explain why their pleading should not be dismissed for failure to state a claim.[8] 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" *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Co-defendants

[8] The response makes clear that co-defendants' claim is one based in contract. (Doc. # 55 at 10). This bolsters USAPA's 12(b)(1) argument that the System Board had exclusive jurisdiction over these contractual claims, but co-defendants voluntarily elected to withdraw and waive that grievance. (Doc. # 50 at 16-18). Co-defendants argue that their grievance waiver does not bar them from pursuing the claim again. They are mistaken, because "the most basic principle of fair representation law is that a member may not boycott the grievance procedure, and then complain that the union has failed to vindicate her rights." *Conkle v. Jeong*, 853 F. Supp. 1160, 1167 (N.D. Cal. 1994), *aff'd*, 73 F.3d 909 (9th Cir. 1995).

chose not to respond to USAPA's argument that they failed to plead an arbitrary DFR claim.[9] Therefore, that prong has been waived. Co-defendants also failed to explain how their pleading satisfies either the bad faith or discriminatory prongs of a valid DFR claim. Rather, they merely argue that union "liability for discrimination or bad faith requires a subjective examination of the union's actual motives and purposes." (Doc. # 55 at 14). However, "[t]o 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 & Comm. Workers*, 506 F.3d 874, 880 (9th Cir. 2007). Co-defendants point to nothing in their cross-claim that alleges the requisite fraud, deceitful action or dishonest conduct needed to adequately plead a bad faith DFR claim. Finally, in order to adequately plead a discrimination-based DFR, "the Supreme Court … [has] held that the duty 'carries with it the need to adduce substantial evidence of discrimination that is intentional, severe and unrelated to legitimate union objectives'" *Merritt v. IAM*, 613 F.3d 609, 619 (6th Cir. 2010) (*quoting Amalgamated v. Lockridge*, 403 U.S. 274, 301 (1971)). Here, however, co-defendants explain that their allegations "show" only that "USAPA is motivated solely to favor the interests of the East Pilots at the expense of the West Pilots." (Doc. # 55 at 17). This is insufficient to plead a valid claim. As recently explained by the Sixth Circuit, in the specific context of seniority, "merely alleging that a union's conduct favored one group over another does not constitute a breach of the duty of fair representation." 613 F.3d at 619-620.

[9] Furthermore, co-defendants failed to respond to USAPA's 12(b)(6) arguments directed towards the cross-claim's legally flawed damage-liability theory (doc. # 50 at 22) and the pleading's failure to allege a direct nexus between the alleged DFR breach and resultant damages. (Doc. # 50 at 22-23).

Finally, the cases co-defendants cite are beside the point or even support dismissal. In *Bernard v. Air Line Pilots Ass'n*, 873 F.2d 213 (9th Cir. 1989), the union proceeded as if it did not even represent the plaintiffs, but no such allegation was pled here. In *Simo v. Union Needletrades*, 322 F.3d 602 (9th Cir. 2003), the union threatened dissident union members with deportation and told them that their economic lives would be degraded to the point where they would be obliged to "eat shit." *Id*. at 618. Even accepting the cross-claim's allegations as true, the total lack of alleged animus toward the West pilot group stands in stark contrast to the *Simo* decision, which actually dismissed DFR claims despite outright hostility. Moreover, co-defendants' discussion of *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1542 (7th Cir. 1992), is inaccurate and misleading; that case entirely supports *dismissal*. In the TWA-Ozark portion of *Rakestraw*, the claim alleged was that it constituted a DFR violation for ALPA to circumvent its own merger policy to please a majority by pursuing seniority integration based on date-of-hire. The Seventh Circuit set this policy-departure argument aside saying that following the policy "insulates" a union against a claim but "it does not follow that deviation exposes the union to liability." *Id*. at 1533. The court then rejected the DFR claim by holding that the pursuit of the legitimate union objective of date-of-hire seniority integration "does not become forbidden because the majority prefers" it. *Id.* In the UAL portion of the *Rakestraw* decision, the court found ALPA was partially motivated by a desire to punish "detested" strike-breakers by retroactively reducing their seniority as established by a "final" agreement with UAL. *Id.* at 1534. There can be no reasonable comparison between USAPA's defensive motive to prevent the annihilation of accrued seniority with the hostility inherent in retaliating against "detested" strikebreakers.

III) CO-DEFENDANTS PERSIST IN MISSTATING STIPULATED FACTS FOUND BY THE NINTH CIRCUIT.

"The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process." *Religious Tech. v. Scott*, 869 F.2d 1306, 1311 (9th Cir. 1989). Judicial estoppel protects the dignity of judicial proceedings. *Ariz. v. Shamrock Foods Co.*, 729 F.2d 1208, 1215 (9th Cir. 1984). Here, it operates to bar co-defendants from claiming that "the two pilots groups" submitted the seniority issue to arbitration. That claim is false, contrary to binding stipulations, and adverse because it wrongly suggests that there is an enforceable contractual entitlement to the Nicolau list against individuals or USAPA, neither of who were parties to the Nicolau arbitration. In prior litigation co-defendants expressly stipulated that, "[t]he parties to the Nicolau Arbitration were stated to be 'the US Airways Pilot Merger Representatives and the America West Pilot Merger Representatives'" as noted in the final pretrial order (Decl., Ex. B, ¶ 14) and in a pre-trial stipulation that elaborated on the same (Decl. Ex. C, ¶ 14). That this admission was made in the course of a claim now dismissed is no bar to its application. *Hamilton v. State Farm*, 270 F.3d 778, 783 (9th Cir. 2001) (doctrine applies between "two different cases").[10] Co-defendants are barred, by application of judicial estoppel, from asserting facts inconsistent with those stipulated to and accepted by the district court in *Addington* through adoption of the final pretrial order.

[10] Another factual mis-representation is that USAPA's seniority proposal is *strict* date of hire. From the beginning of this court's entanglement with collective bargaining it has been undisputed that USAPA has proposed ameliorating conditions and restrictions calculated specifically to mitigate the effect of strict date of hire on the West pilots.

Respectfully submitted:

Dated: October 28, 2010 By: ***/s/ Nicholas 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

LUBIN & ENOCH, PC
Stanley Lubin (AZ State Bar No. 003076)
Nicholas J. Enoch (AZ State Bar No. 016473)
349 North 4th Avenue
Phoenix, AZ 85003-1505
Tel: 602 234-0008
Fax: 602 626 3586
Email: stan@lubinandenoch.com

CERTIFICATE OF SERVICE

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

I hereby certify that on this day of October 28, 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.***