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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

USAPA'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT

I) SUMMARY

The Supreme Court has cautioned district courts confronted with requests for declaratory relief to be "alert to avoid imposition upon their jurisdiction through obtaining futile or premature interventions." *Utah v. Wycoff Co.*, 344 U.S. 237, 243 (1952). The Company's complaint presents exactly this type of jurisdictional imposition. This matter arises in the context of ongoing collective bargaining under the RLA, yet the Company has failed to cite a single RLA collective bargaining case to support the propriety of its current declaratory suit. The lack of such relevant authority speaks volumes because, when this matter is analyzed in proper legal context, it is clear that there is no case or controversy presented – just an unripe disagreement between pilots over a contract proposal not yet bargained over.[1]

II) REPLY TO COMPANY'S MISREPRESENTATIONS

At the threshold, the Company misstates relevant facts, contradicts prior stipulations, and takes language out of context from the Ninth Circuit's decision in *Addington*, for the purpose of artificially bolstering the litigation threat for which it claims "real and reasonable apprehension." (Resp. 10:25).

The Company attempts yet again to mislead the Court into believing that 3,200 East pilots and 1,800 West pilots agreed to anything. (Resp. 6). USAPA has previously explained why this is factually incorrect and contrary to stipulations previously agreed to by the Company.[2] The Company also mischaracterizes USAPA's current seniority proposal as "strict date-of-hire." (Resp. 9:15). The USAPA seniority proposal is a date-of-hire based list, which erects a one-way fence that prohibits the exercise of East pilot seniority to bid into existing

[1] The Ninth Circuit also expressly cautioned against "premature" judicial intervention into the East-West "seniority dispute." 606 F.3d at 1180 n.1.

[2] *See* Doc. # 18 at 5-7; Doc. # 32 at 2-5; Doc. # 39 at ¶¶ 11-15; Doc. # 67-3.

West positions for a period of ten years, except to the extent that West pilots first successfully bid for East positions. (Doc. # 39 ¶ 22).[3] In fact, USAPA's proposal represents such a departure from "strict date-of-hire" that it has been subject to litigation threats from East pilots who assert that their seniority-based bidding rights will be unfairly diminished. (*Id*. ¶ 36-37). Additional Company misrepresentations will be addressed herein in the context in which they arise.

III) REPLY TO COMPANY'S ANALYSIS

1) There Is No Article III Jurisdiction Because The Company Merely Seeks An Advisory Opinion.

A) An Abstract "Seniority" Dispute Does Not Present A "Case Or Controversy."

Although lack of case or controversy is the first ground in support of the 12(b)(1) motion (doc. # 36:17), the Company's response dodges it by addressing only ripeness. Nevertheless, the Company seeks a legal opinion over a seniority disagreement between pilots, a dispute which falls well short of a "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941); *North American* (*see* Doc. 49-1, p. 10) ("in the context of ongoing labor negotiations it is inappropriate to have courts opine on the legality of certain proposals").

First, the Company describes the alleged controversy as "fundamentally a dispute between two groups of pilots, and not a dispute between pilots [and their union] and their employer." (Resp. 10:6).[4] Thus, the alleged controversy is the same abstract dispute that the

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[3] Reference to docket entries shall be by ECF page numbering, not internal page numbering.

[4] The Company's characterization of this as a dispute between pilots in which it is required to remain "neutral" is correct. (Doc. # 1, ¶ 1). The reference to ALPA Merger Policy in the Transition Agreement was not an invitation to the Employer to become involved in a Union's internal dispute resolution process, to submit to a federal court a request for interpretations thereof, or the means by which ratification should be conducted. Rather, it constituted the

Ninth Circuit specifically rejected as a basis for finding a justiciable claim:

> The dissent asserts that "nothing would be gained by postponing a decision, and the parties' interest would be well served by a prompt resolution of the West Pilots' claim." To be sure, the parties' interest would be served by a prompt resolution of the seniority dispute, but that is not the same as prompt resolution of the DFR claim. **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.** By deferring judicial intervention, we leave USAPA to bargain in good faith pursuant to its DFR, with the interest of all members – both East and West – in mind, under pain of an unquestionably ripe DFR suit, once a contract is ratified.

606 F.3d 1180, fn. 1 (emphasis supplied). Despite this clear directive, the Company now seeks the same premature judicial resolution of the seniority dispute as did the *Addington* co-defendants with the same likely result – that, with the advent of judicial intervention, the impasse "could well be prolonged." *Id*.

Second, the Ninth Circuit's jurisdictional analysis rested, in part, on its determination that "USAPA is at least as free to abandon the Nicolau Award as was its predecessor" *Id*. at 1181 n. 3. Hence, for the Company to base its declaratory request on an alleged fear of future litigation founded merely on the non-inclusion of Nicolau, is not enough. Both ALPA and the Company had been actively promoting a compromise solution since the year 2007.

The Ninth Circuit specifically recognized that the inclusion of Nicolau in any CBA

Company's more generic agreement to let the Union resolve the seniority issue internally. The Company has *already* taken the position that it would accept something other than Nicolau when it encouraged the parties to "work something out to meet everyone's needs." (Doc. # 39-5). And, as the Ninth Circuit explained, ALPA itself was attempting to "broker a compromise." 606 F.3d at 1180. It is only now that the compromise may take a different form with a different Union that the Company resists. The intervention by either the Company or the courts in this internal union process must be considered "offensive." *NLRB v. Electra-Food Mach., Inc.*, 621 F.2d 956, 958 (9th Cir. 1980); *Motion Picture & Videotape Editors Guild v. Int'l Sound Technicians*, 800 F.2d 973, 975 (9th Cir. 1986).

would produce a tentative agreement that "would undoubtedly be rejected by [USAPA] membership." 606 F.3d 1180, fn. 1. The Ninth Circuit therefore left it to USAPA to negotiate a CBA that *could be ratified*, and noted that the final product "may yet be one that does not work the disadvantages Plaintiffs fear, even if that proposal is not the Nicolau Award." *Id*. at 1181.[5] As the Ninth Circuit recognized, a declaration about the inclusion or exclusion of Nicolau will not resolve the DFR issue over the terms of seniority integration. *Aetna Life Ins. v. Haworth*, 300 U.S. 227, 241 (1937) (the Act requires "a real and substantial controversy admitting of specific relief through a decree of a conclusive character …"); *S. Ry. Co. v. Bhd. of Loco. Firemen & Enginemen*, 223 F. Supp. 296, 307 (M.D. Ga. 1962) ("a declaratory judgment should settle the entire controversy; [because] that cannot be accomplished in the present action … the Court should dismiss it.").

Third, this pilot seniority dispute is hardly *imminent*; rather it is nebulous and utterly contingent. Not only does a DFR claim not turn on whether Nicolau is in or out, the seniority term to be negotiated *does not exist in a vacuum*. Instead, it is part of a complex CBA presently forming in a roiled sea of shifting bargaining positions. Consequently, any legal action over a future seniority term is uncertain on multiple levels. To the extent that the Company asserts that the issue of negotiating seniority has been definitively addressed under the terms of the Transition Agreement ("TA"), then the Company asserts an issue of contract interpretation

[5] The Ninth Circuit specifically recognized the absolute right of the pilots to exercise their democratic franchise and vote yes or no on any contract incorporating the seniority proposal. 606 F.3d at 1181 n.2. Given this ratification hurdle, it is *solely* the union's responsibility to balance the interests of the bargaining unit *as a whole* and negotiate a contract with a seniority list that *is capable of ratification*. Here again, the intrusion by the Company (or the Court for that matter) into an internal union process such as this has been described by the Ninth Circuit as "offensive." *Electra-Food Mach.,* 621 F.2d at 958; *Motion Picture*, 800 F.2d at 975.

within the exclusive jurisdiction of the System Board.[6] The Company has the undisputed right, under Section X.B and C of the TA, to submit any dispute to the System Board for resolution. (Doc. # 34-2 at 13).

The Company has twice failed to pursue resolution of the alleged controversy before the System Board. First, when – having won dismissal of claims against it by the *Addington* plaintiffs – the Company acquiesced to the withdrawal of their grievance before the System Board and chose not to pursue the matter itself; a tacit admission that there is nothing about this matter that presents harm or any imminent crisis to the Company. Second, when the Company sought this Court's intervention instead of resorting to the System Board, which it knew from its own successful motion to dismiss, to have exclusive jurisdiction. To the extent that the *Addington* plaintiffs have not already waived their contract-based claims due to their prior grievance withdrawal, they could be given notice of the arbitral proceedings and allowed petition to be included as a party to the arbitral process. *See Steward v. Mann*, 351 F.3d 1338, 1346-47 (11th Cir. 2003).

Even more fundamentally, the TA, pursuant to section XII.B, is open for modification by USAPA and the Company. (Doc. # 34-2 at 15). Indeed, pursuant to section XII.E.1 of the TA, it is open for *termination*, hence it is no firm goal-post to hitch a case or controversy to. (*Id*. at 16).

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[6] The Company admits the dispute is contractual in nature by arguing that the West pilot litigation threat is viable because the "Transition Agreement … required ALPA to present and US Airways to accept the Nicolau Award [and that] such tendering and acceptance of the Nicolau Award has occurred in accordance with the terms of the Transition Agreement …" (Resp. 22:2). Of course, the ultimate goal under both the TA and Section 2, First of the RLA is to reach a ratifiable collective bargaining agreement – not to extend the multi-year impasse over a single non-ratifiable bargaining proposal.

Fourth, the context of ongoing collective bargaining confirms the non-justiciable nature of the alleged controversy.[7] Three cases illustrate this. In *North American* (doc. # 49-1), the purported case and controversy was whether the RLA would allow the employer to unilaterally impose contract terms. But that merely presented an "abstract question" that would have "reward[ed]" the employer for "abandoning the collective bargaining process prematurely and racing to the courthouse." *Id*. Here, the Company seeks an even more nebulous judgment: a blanket finding of non-liability based on a proposal not yet responded to, in a contract not yet finalized, not knowing the outcome of required ratification.

In *Federal Express*, 1994 U.S. Dist. LEXIS 20806 (D.D.C. Oct. 13, 1994), *aff'd*, 67 F.3d 961 (D.C. Cir. 1995), an RLA-employer claimed a controversy over the effect of "status quo" obligations under the RLA, but the case was dismissed on the principle that, "a party to a labor dispute cannot seek the court's determination as to the merits of possible but uncertain future actions." *Id*. at * 8. In *Southern Ry. Co.*, an RLA-employer claimed a controversy and sought declaratory judgment over the scope and order of bargaining, but the court rejected this when there was no showing that the union was "unwilling to bargain" 223 F. Supp. at 304, and where granting declaratory relief would "reach far beyond the particular case" and constitute "futile and immature intervention" in the collective bargaining process. *Id*. at 305. In *Southern*

[7] It is not surprising that the Company offers only non-labor decisions to support its contention that the alleged controversy is justiciable. These cases are distinguishable. Patent infringement cases are inapposite to the labor context because "declaratory relief is 'indisputably appropriate' to patent cases" *Societe v. Hunter,* 665 F.2d 938, 943 (9th Cir. 1981) (*citing Hanes v. Millard*, 531, F.2d 585, 592 (D.C. Cir. 1976)). Similarly, a commercial dispute arising in the context of the relocation of a professional sports franchise is equally irrelevant. (Resp. 14) (*Nat'l Basketball Ass'n v. SDC Basketball Club, Inc.*, 815 F.2d 562 (9th Cir. 1987)). In labor cases, judicial intervention is actively avoided and requests for such intervention considered with deep skepticism. *North American*, * 67.

Railway, the employer had vowed not to respond to the Union's proposals, and the NMB had discontinued mediation and proffered arbitration to both parties. *Id*. at 303. Here, however, the Company has not responded to the proposal and the NMB has only recently invoked its mediatory jurisdiction. These cases illustrate the hostility with which the federal judiciary has treated solicitations to opine on the legality of proposals during the course of collective bargaining.[8]

B) The Company Cannot Show Harm, And There Is No Ripe DFR Claim Until There Is A Ratified Contract.

The response claims that whether this case is ripe has nothing to do with the *Addington* decision because the Ninth Circuit did not address the Company's harm, which it claims now hangs over its head like the Sword of Damocles. The Company relies on the non-labor *Medimmune* and *NBA* cases to support the proposition that ripeness does not necessarily require the target to wait for the sword to fall. (Resp. 14-15). A creative argument, but not one the Court should accept in the context of this case:

First, contrary to its claim, harm to the Company as a basis for ripeness *was* addressed in *Addington* via the district court's findings that:

> Without an injunction, USAPA's seniority proposal inevitably impairs the collective bargaining process. For this same reason, denying judicial review would work a substantial hardship upon the parties, including the Airline. … In addition to depriving West Pilots of legitimate representation, USAPA's bargaining position leaves the Airline to decide between a lack of a single CBA and an unlawful single CBA.

Addington v. US Airline Pilots Ass'n, 186 L.R.R.M. 3087, at *70 (D. Ariz. 2009). These

[8] *See also Gen. Comm. of Adjustment, GO-386 v. Burlington N. and Santa Fe Ry. Co*., 295 F.3d 1337, 1341 (D.C. Cir. 2002) (*quoting Atlas Air, Inc. v. Air Line Pilots, Ass'n*, 232 F.3d 218, 227 (D.C. Cir. 2000)) ("in actions for declaratory judgment invoking the RLA ... a dispute ... 'must not be nebulous or contingent").

findings were before the Ninth Circuit when it dismissed and vacated the district court decision.

In addition, the Ninth Circuit found that the dispute arose in the context of unfinished, post-merger bargaining with the Company. 606 F.3d at 1177. In addressing the fact that, due to the unratifiable nature of the Nicolau Award, the judiciary could not "fashion a remedy that alleviates Plaintiffs' harm" *id.* at 1180, the Ninth Circuit necessarily addressed the harm to the Company arising from a futile bargaining process. Neither USAPA nor the Company can be expected to interminably bang their head against the wall by negotiating over an unratifiable contract – which is precisely why the Company previously encouraged ALPA's efforts at compromise. (*See* Doc. # 39-5).

Significantly, in his recent rejection of the *Addington* plaintiffs' 60(b) motion, Judge Wake greeted with great skepticism the Company's current allegations of harm in view of the Company's successful effort to remove itself from the prior *Addington* litigation:

> [T]he 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 venue, they decided they didn't want to be involved. But those facts, those circumstances were there …

(Doc. # 67-1 at 14).

Second, the problem with allowing the Company to bootstrap the DFR claim into its supposedly ripe declaratory judgment action is that it requires this Court to go beyond the confines of its jurisdiction as set forth in the binding precedent of the *Addington* ruling. Nevertheless, the use of the declaratory judgment process as a means to expand jurisdiction has been rejected by the federal courts. *Aetna Life Ins. Co. of Harford v. Haworth*, 300 U.S. 227, 240 (1937); *Corr. Servs. Corp. v. First Equities Corp.*, 442 F.3d 767 (2d Cir. 2006); *Ybarra v. Town of Los Alto Hills*, 500 F.2d 250 (9th Cir. 1974). If litigants or trial courts could end-run

jurisdictional dismissals simply by re-packaging them in declaratory actions, then the flood gates to every unripe claim would be sprung wide open.

Third, the problem with the Sword of Damocles argument is that there is *no sword*. The point to which the Company clings is that ripeness does not necessarily require the injury to have occurred when it is clear one is impending. This is generic to *any* ripeness analysis. It is not unique, although perhaps more common, to declaratory judgment actions. But here the sword is mere speculation and hand wringing of the type typically rejected in relevant collective bargaining case law. *S. Ry. Co.*, 223 F. Supp. at 305 ("speculative anticipation of a future course of action or mere forecasts and predictions of irreparable injury will not suffice").

Fourth, injury from the litigation 'sword' by the West does not exist as a matter of law, either generally or particularly. Only an objectively real and reasonable apprehension of litigation matters. *Md. Cas. Co.,* 312 U.S. at 273. The *particular* threat claimed here is a hybrid DFR suit. That could only be one of two things, a claim the Company breaches the contract, here the TA, or that the Company colludes with USAPA in a DFR breach.

A breach of contract claim constitutes no threat. After the district court's dismissal of Count I in favor of the exclusive jurisdiction of the System Board, it was determined by a System Board arbitrator that the Company's decision to disregard the Nicolau Award in its furlough of West pilots in 2008 was in accordance with the contract. (Granath Decl., Ex. A).[9] Count II, which accused the Company of negotiating toward an end result other than Nicolau, was voluntarily abandoned and waived by the West pilots. (Doc. # 33). There is no *collusion*

[9] The Company falsely represents that West pilots "would not have been subject to furlough if a single collective bargaining agreement incorporating the Nicolau Award were in place" in 2008. (Resp. 7:23). The Ninth Circuit, however, described this alleged basis for injury as "at best, speculative." 606 F.3d 1180.

threat, either, because the Company is not participating in making the seniority proposal. Furthermore, there is no evidence of any Company participation, plan, or scheme to commit a *joint* DFR. Its mere acceptance of a ratifiable seniority proposal will not create liability.[10] Indeed, since the Company *itself* has alleged that it cannot be liable on a collusion theory (Doc. 1, ¶ 58), it should be estopped from making this inconsistent assertion.

Even if the Company were deemed to have "colluded" by accepting USAPA's seniority integration proposal, date of hire has a long history of being *affirmed* in DFR challenges.[11] And even then, where an agreed-to arbitration process has purportedly resolved a seniority integration dispute, a union still retains the right to negotiate an alternative outcome. *Associated Transp., Inc.,* 185 NLRB 631, 635 (1970).

Irrespective of the potential merits of future claims by the co-defendants, mere threats of future litigation – or mere history of past litigation – are not sufficient to create a justiciable controversy. *Md. Cas. Co.*, 312 U.S. at 273. The Company points to the vacated jury verdict in *Addington* to support its contention that the "risk of such a lawsuit is not idle speculation." (Resp. 12:4). But the jury's verdict in *Addington* does not substantiate any *future* litigation threat against the Company, since the Company was dismissed from that case six months prior to trial, and the *Addington* plaintiffs pointedly declined to pursue any claims against the Company. Furthermore, the vacated verdict is not even a reliable indicator of a viable suit

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[10] There is no legal authority for the proposition that merely signing a contract knowing some union members might sue over it makes the employer subject to a hybrid DFR claim. Rather, what the courts *have* recognized are a species of DFR hybrid suits based on active, intentional "collusion" between union and employer. *See e.g.*, *Hodges. v. Atchison, Topeka & Santa Fe Ry. Co.*, 728 F.2d 414 (10th Cir.), *cert. denied*, 469 U.S. 822 (1984); *Steffens v BRAC*, 797 F.2d 442, 445 (7th Cir. 1986); *Masy v. N.J. Transit Rail, Inc.*, 790 F.2d 322 (3d Cir. 1986).

[11] *See* Doc. 49 at 26 (citing cases).

against USAPA, since during trial the district court improperly barred USAPA from presenting:[12]

- 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. *Associated Transp.*, 185 N.L.R.B. 631;
- 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.

"[A]ny time parties are in negotiation ... the possibility of lawsuits looms in the background." *EMC v. Norand Corp*, 89 F.3d 807, 811 (Fed. Cir. 1996). This holds true in collective bargaining as well. *Fed. Express*, 67 F.3d at 964. Litigation threats in the course of RLA bargaining are particularly suspect, therefore "courts should think hard and long before under-taking to pass upon all differences of opinion which arise in bargaining ..." *Southern Ry.*, 223 F. Supp. at 307.

Fifth, injury from the 'sword' of union self-help cannot be supported on the facts or on the law because the claims of injury by union self-help supposedly triggered over the seniority issue are purely speculative and legally insufficient. It is *undisputed* that no strike has been called, authorized, or scheduled. Hence, there is no certain harm let alone an imminent one. *See, e.g.*, *Central Ga. Ry. Co.*, 191 F. Supp. 666, 669 (M.D. Ga. 1960) (no ripe declaratory action when the facts did not show an authorization to strike or a scheduled, planned strike); *S. Ry.*, 223 F. Supp. at 305 (finding no case or controversy based, in part, on fact that "there has

[12] All of which were appealed and on any remand over the merits would be open issues.

been no strike vote; [and] no strike date has been set …"). Moreover, the mere announcement that a union reserves its right to engage in legal self-help when the time comes is not actionable rather it is just a "form of advocacy." *North American*, at * 56 (*citing Norfolk v. Bhd. of R.R. Signalmen,* 164 F.3d 847, 856 (4th Cir. 1998)); *Atlas Air v. ALPA,* 232 F.3d 218, 227 (D.C. Cir. 2000) ("that a union may posture in labor negotiations or otherwise threaten to respond to future changes is insufficient to create the reasonable apprehension of litigation necessary for an RLA claim to be justiciable").

C) The Company Does Not Have Standing To Seek A DFR Remedy On Behalf Of The West Pilots, Now Or Ever.

An "interested party" referred to in section 2201 of the Declaratory Judgment Act is the one seeking the declaration of rights, i.e. the plaintiff, and not one who may be joined as party defendant to such an action. *Reardon v. Pa. Ry*. Co., 323 F. Supp. 598 (N.D. Ohio 1971). Here, the Company effectively seeks a declaration of the rights of union members of USAPA over a dispute that the Company pledged in contract (the TA) would be left to the union and concerning which the Company continues to proclaim its "neutrality." Hence, the Company lacks standing, at least insofar as Counts I and II go. "Even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Sea Star Line v. Emerald Equip. Inc*., 578 F. Supp. 2d 679 (D. Del. 2008).

4) <u>The Potential For Future East Pilot Litigation Is Just As Risky As "Potential" West Pilot Litigation.</u>

The Company claims a case and controversy that is "fundamentally a dispute between two groups of pilots" – East versus West – and not with "their employer." Yet they

inconsistently maintain that only one group of individual pilots, the West, is necessary. This is not credible on any level. First, the Company is not seeking to confine its remedy to the "validity of the West pilots' " claims or interests: Count I would force on the East a proposal the Ninth Circuit has already determined "would undoubtedly be rejected by [USAPA] membership." 606 F.3d at 1180 n.1. Moreover, it is not plausible that an East pilot suit would confine itself to USAPA especially when it is the Company's action that seeks to cram down the very proposal the Ninth Circuit determined was unratifiable. It is also misleading to suggest that the West pilots "can pursue their claims without suing the East pilots" when, in fact, co-defendants DFR causation theory is based entirely on alleged wrongful conduct by individual East pilots, which occurred prior to USAPA's certification.[13] Finally, excluding the *Naugler* plaintiffs will not allow for a final resolution of the seniority dispute because their claim is that Nicolau is fatally flawed as a result of ALPA's deliberate submission of an erroneous East pilot list prior to arbitration.[14]

5) <u>Venue Is Improper Because USAPA's Alleged Section 2 RLA Violation Did Not "Substantially" Occur In this District, Nor Is That Even Alleged.</u>

Because USAPA's improper venue grounds do not *rely* on the suggestion that the D.C. district would be a better venue but rather that this venue is improper, the Company defends on but one point. That is the claim that a substantial part of the events occurred here because it is here that the unripe claim was litigated and presumably where a new DFR claim would be brought. But this does not satisfy 28 U.S.C. § 1391(b). First, past or future DFR claims are not the basis for a declaration of the *Company's* rights, rather the material allegations are that

[13] *See* Doc. # 34, pp. 25-29, ¶¶ 90-119.

[14] A complete discussion of *Naugler* and related issues is contained in USAPA's Reply to the Company's Response in opposition to the Rule 21 motion.

USAPA is *bargaining* in violation of the RLA; but that bargaining is not substantially occurring in this district, nor is there any allegation that it is. Second, this unjustifiably ignores the claims by the *East* pilots that will arise if USAPA is forced to accept the unratifiable Nicolau list; East pilots who are not domiciled here would not sue in this district.

6) Prudential Concerns Strongly Favor Dismissal.

The Company's response to USAPA's prudential grounds for dismissal misses the mark. It is based upon the false legal premise that because "none of the *Brillhart* factors justifies dismissal, the Court should retain jurisdiction over this case." (Resp. 24). In fact, the case cited by the Company to support their flawed *Brillhart* reasoning specifically explains that the, "*Brillhart* factors are not exhaustive." *Gov't Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 n.5 (9th Cir. 1998); *Nat'l Chiropractic Mut. Ins. Co. v. Doe*, 23 F. Supp. 2d 1109, 1115 n.9 (D. Alaska 1998) ("in the Ninth Circuit, however, these three factors are not exhaustive"). Apart from the legal misconstruction, the Company offers little by way of a cogent response to the prudential issues raised by USAPA. Thus, only a few of the Company's arguments warrant a reply:

First, the Company misses the point with respect to the pending petition for certiorari filed in the *Addington* matter. It matters not that the Company was not a party in *Addington* or that the case will not specifically "determine US Airways' right and obligations." (Resp. 25). What matters is that the Supreme Court could grant certiorari, disagree with the Ninth Circuit's ripeness determination, and remand the matter back to the Ninth Circuit for a decision on the merits. The Ninth Circuit would then have to decide whether or not it was a breach of USAPA's DFR not to bargain for Nicolau. This is the exact question presented by Counts I and

II of the Company's complaint. It is the potential for inconsistent decisions between this Court and its *superior* appellate tribunals that militates in favor of dismissing this action on prudential grounds.

Second, the Company misconstrues USAPA's "useful purpose" argument. It matters not that, according to the Company, the "Ninth Circuit did not consider US Airways' rights…" *per se* (Resp. 25). What matters is that the Ninth Circuit *did* consider and comment on Nicolau and its relation to ongoing bargaining. The Company makes no further cogent response to the "useful purpose" issue and, therefore, USAPA respectfully refers the Court to the arguments in USAPA's original motion (Doc. # 49 at 21-22), except to point out that the Company fails to respond to the actual "useful purpose" argument set forth therein. Instead, it limits its response to a regurgitation of the allegations in its Complaint. But that is no answer.

What *should* guide this Court in exercising its prudential discretion is that the purpose of the RLA is "the well recognized interest in encouraging non-judicial remedies to disputes" *North American*, * 67, and that union governance, and, in particular, the procedures for union membership ratification, are left to a union's internal processes – not to the courts. Therefore, when it comes to bargaining on behalf of its members, it is the union that is charged with the task of striking a balance between competing, internal interests. That is indeed what the Ninth Circuit has left the parties to do here. After two years of unnecessary and costly entanglement, immediate dismissal by this Court is amply justified.

Respectfully submitted:

Dated: November 1, 2010 By: ***/s/ Nick Granath***

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CERTIFICATE OF SERVICE

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

I hereby certify that on this day of November 1, 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.***