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21 **UNITED STATES DISTRICT COURT**
22 **DISTRICT OF ARIZONA**

23 US Airways, Inc., a Delaware
24 Corporation,

25 Plaintiff,

26 v.

27 Don Addington, an individual; John
28 Bostic, an individual; Mark Burman,
an individual; Afshin Iranpour, an
individual; Roger Velez, an individual;
and Steve Wargocki, an individual, on
behalf of themselves and all other
similarly-situated individuals,

and

US Airline Pilots Association, an
unincorporated association,

Defendants.

Case No. 2-10-cv-01570-PHX-ROS

JOINT PROPOSED CASE
MANAGEMENT PLAN PURSUANT TO
COURT'S OCTOBER 12, 2011, ORDER
SETTING SCHEDULING
CONFERENCE

Conf. Date: December 2, 2011
Conf. Time: 10:30 AM (Pacific)

1 Pursuant to the Court’s Order Setting Scheduling Conference at Case Management
2 Meeting, the parties hereby submit the following **Proposed Case Management Plan** and
3 accompanying **Proposed Scheduling Order**:

4 **1. The Nature Of The Case, Including The Factual And Legal Basis Of**
5 **Plaintiff’s Claims And Defendants’ Defenses.**

6 *(a) US Airways’ Statement:*

7 US Airways seeks declaratory judgment to define its potential liability stemming
8 from a dispute between (i) the named individual defendants, individually and as
9 representatives of a defendant class of former America West pilots (the “West Pilot
10 Class”), and (ii) the US Airline Pilots Association (“USAPA”), the labor union
11 representing all US Airways pilots. The underlying dispute between the West Pilot Class
12 and USAPA concerns the integration of two pilot seniority lists subsequent to an airline
13 merger that occurred in 2005.

14 The predecessor to the current US Airways, Inc. merged with America West
15 Airlines, Inc. (“America West”) in September 2005. At the time, both airlines’ pilot
16 groups were represented by the Air Line Pilots Association (“ALPA”). Approximately
17 5,000 pilots, known as “East Pilots,” were on the pre-merger US Airways seniority list.
18 Approximately 1,900 pilots, known as “West Pilots,” were on the pre-merger America
19 West seniority list. At the time of the merger in 2005, ALPA represented the East Pilots
20 and West Pilots in two separate bargaining units, or “crafts or classes.” Pursuant to
21 ALPA’s Merger Policy, if two ALPA-represented pilot groups in an airline merger could
22 not agree on an integrated seniority list through direct negotiations or mediation, the next
23 step was integration of the pre-merger seniority lists through final and binding arbitration.
24 The East Pilots and West Pilots could not agree on an integrated seniority list, so –
25 consistent with ALPA’s Merger Policy and a September 23, 2005 Transition Agreement
26 negotiated between ALPA, the East Pilots’ Master Executive Council, the West Pilots’
27 Master Executive Council, pre-merger US Airways, Inc., and America West Airlines, Inc.
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1 – the East Pilots and the West Pilots participated in a seniority-integration arbitration
2 before neutral arbitrator George Nicolau.

3 Arbitrator Nicolau rendered his decision in May 2007 (the “Nicolau Award”). The
4 East Pilots perceived the Nicolau Award to be far less favorable to them as a group than
5 the “date-of- hire” integrated seniority list they had sought from Arbitrator Nicolau.
6 Subsequently, the East Pilots formed defendant USAPA. The East Pilots significantly
7 outnumbered the West Pilots, and, following a representation election between USAPA
8 and ALPA, the National Mediation Board (“NMB”) certified USAPA as the new
9 collective bargaining representative for both the East Pilots and West Pilots. USAPA’s
10 constitution expressly mandates a “date-of-hire” seniority list and prohibits
11 implementation of the Nicolau Award. Thereafter, USAPA and US Airways engaged in
12 collective bargaining negotiations for a single labor contract, the predicate under the
13 Transition Agreement for implementation of an integrated seniority list, but no agreement
14 was (or has been) reached. During these negotiations – and consistent with its
15 constitutional mandate – USAPA insisted on a “date-of-hire” integrated seniority list that
16 is contrary to the Nicolau Award. US Airways notes that USAPA has incorrectly asserted
17 – in Item 1(c), *infra* – that “US Airways has refused to address” USAPA’s “current
18 bargaining proposal.” The proposal USAPA refers to is a date-of-hire seniority list that is
19 inconsistent with the Nicolau Award. USAPA presented it on September 30, 2008, and
20 the proposal has not changed since then – including during the period in which USAPA
21 was prohibited from maintaining that position by Judge Wake’s injunction in *Addington I.*

22 US Airways commenced this action to clarify a pending dispute. If US Airways
23 agrees to implement a non-Nicolau seniority list, the West Pilot Class intends to seek
24 injunctive relief and damages against US Airways on the theory that a collective
25 bargaining agreement incorporating such a list is a breach of USAPA’s duty of fair
26 representation and that US Airways assisted, facilitated, or colluded with this breach.
27 Alternatively, US Airways will face a work stoppage by USAPA if it refuses to
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1 implement to a Non-Nicolau seniority list. Accordingly, US Airways seeks one of three
2 alternative judicial declarations:

- 3
- 4 • Count I: USAPA’s continued insistence on a collective bargaining
5 agreement that does not incorporate a seniority list consistent with the
6 Nicolau Award as required by the Transition Agreement violates its duty
7 under Section 2, First, of the Railway Labor Act to “exert every reasonable
8 effort to make and maintain agreements concerning rates of pay, rules, and
9 working conditions..., in order to avoid any interruption to commerce or to
10 the operation of any carrier,” and entry into a collective bargaining
11 agreement that does not incorporate a seniority list consistent with the
12 Nicolau Award as required by the Transition Agreement constitutes a breach
13 of USAPA’s duty of fair representation to the West Pilots and therefore US
14 Airways is prohibited from accepting or implementing a non-Nicolau
15 seniority list; or, in the alternative,
 - 16 • Count II: USAPA’s continued insistence on and/or entry into a collective
17 bargaining agreement which does not incorporate a seniority list consistent
18 with the Nicolau Award would not constitute a breach of USAPA’s
19 obligations under Section 2, First, of the Railway Labor Act and/or its duty
20 of fair representation to the West Pilots and therefore US Airways is not
21 prohibited from accepting or implementing a non-Nicolau seniority list; or,
22 in the alternative,
 - 23 • Count III: Regardless of whether or not USAPA’s insistence on and/or entry
24 into a collective bargaining agreement which does not incorporate a
25 seniority list consistent with the Nicolau Award would constitute a breach of
26 USAPA’s obligations under Section 2, First, of the Railway Labor Act
27 and/or its duty of fair representation to the West Pilots, US Airways would
28 not be liable to the West Pilots under the Railway Labor Act or otherwise if

1 it were to enter into a collective bargaining agreement with USAPA that did
2 not incorporate a seniority list consistent with the Nicolau Award.

3 **(b) West Pilot Class's Statement:**

4 With regard to the factual recitation above, the West Pilot Class adds that the order
5 confirming US Airways' Chapter 11 reorganization plan directed the airline and its pilots
6 to enter into the Transition Agreement. The Class adds that the West Pilots (and Mr.
7 Nicolau) regard the date-of-hire seniority integration—advanced by the East Pilots at the
8 arbitration and later proposed by USAPA (indeed, required by USAPA's constitution)—to
9 be unfair and inequitable because it places more than a thousand pilots who were on
10 lengthy furloughs at the time of the merger ahead of West Pilots who were actively flying.
11 The West Pilots, therefore, have resisted attempts by the East Pilot majority to use the
12 device of a new union to dishonor the Nicolau Award, a fair and equitable seniority
13 integration created by arbitration that all had agreed would be final and binding.

14 USAPA has offered three reasons for rejecting the Nicolau Award: (1) strong East
15 Pilot preference to order seniority by date of hire; (2) intractable refusal of East pilots to
16 agree to implement Nicolau Award; and (3) a mandate in the USAPA constitution to order
17 seniority by date-of-hire. A union that dishonors a final and binding resolution to a
18 seniority integration dispute with no legitimate union purpose breaches its duty of fair
19 representation. USAPA will dishonor its DFR if it implements a collective bargaining
20 agreement with a non-Nicolau seniority list because none of the reasons enumerated
21 above nor any other conceivable reason it may have is a legitimate union purpose. The
22 West Pilot Class, therefore, supports Count I and opposes Counts II and III.

23 The legal elements of proof of the West Pilot Class' positions on the first two
24 Counts are as follows:

25 (i) A union must have a legitimate purpose to dishonor an outcome to a seniority
26 dispute arbitrated by its members. *Teamsters Loc. Union No. 42 v. NLRB*, 825 F.2d 608,
27 611 (1st Cir. 1987) (“[A] union may not, without a legitimate purpose, take action
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1 favoring some of its members at the expense of others.”); *Bernard v. Air Line Pilots*
2 *Ass’n, Int’l*, 873 F.2d 213, 216-17 (9th Cir. 1989) (actual union motive must be
3 legitimate).

4 (ii) Conforming to the seniority preferences of the majority to the detriment of a
5 minority is not a legitimate purpose. *Air Wisconsin Pilots Protection Committee v.*
6 *Sanderson*, 909 F.2d 213, 217 (7th Cir. 1990) (“[T]he duty of fair representation does not
7 run to the majority.”); *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 799 (7th Cir. 1976)
8 (prohibiting discrimination against the smaller of two merging workforces); *Truck*
9 *Drivers, Local Union 568 v. NLRB*, 379 F.2d 137, 143 (D.C. Cir. 1967) (“UTE has, in
10 sum, failed to come forward with any reason at all for preferring the Airport Drive
11 employees other than the purely political motive of winning an election by a promise of
12 preferential representation to the numerically larger number of voters.”).

13 (iii) Overcoming a union membership deadlock created in bad faith by the
14 majority to oppress the minority is not a legitimate union purpose. *Air Wisconsin*, 909
15 F.2d at 217 (“[T]he duty of fair representation does not run to the majority.”); *Barton*
16 *Brands*, 529 F.2d at 799; *White v. White Rose Food, a Div. of DiGiorgio Corp.*, 237 F.3d
17 174, 183 (2d Cir. 2001) (recognizing that a union “has a duty to explain” matters in good
18 faith to members).

19 (iv) Conforming to a self-imposed date-of-hire mandate is not a legitimate
20 purpose. See *Retana v. Apartment, Motel, Hotel & Elevator Operators Union, Local No.*
21 *14*, 453 F.2d 1018, 1024-25 (9th Cir. 1972) (holding that internal union policies are
22 subject to duty of fair representation where they have “substantial impact on members’
23 rights in relation to the negotiation and administration of the collective bargaining
24 agreement”).

25 The West Pilot Class will also demonstrate that important policy considerations are
26 offended by the device of using a new union to evade an existing union’s liability and
27 responsibilities. *Parker v. Metro. Transp. Auth.*, 97 F. Supp. 2d 437, 451 (S.D.N.Y. 2000)
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1 (“[S]uccessor labor organizations . . . may be held liable for the discriminatory acts of
2 their predecessors, according to the same factors used to determine successor liability of
3 corporations.”). The East Pilots’ agreement to use binding arbitration was: (1) part of the
4 bankruptcy order that allowed US Airways to exit bankruptcy at the time of the merger;
5 (2) part of the Transition Agreement; and (3) and an established policy of the union that
6 they had accepted as their representative. They simply cannot use their right (and
7 majority power) to elect a new union to evade that agreement.

8 (c) **USAPA’s Statement:**

9 With regard to the factual recitation in Section 1(a), *supra*, USAPA adds that the
10 East Pilots perceived the Nicolau Award to be grossly unfair because, among other things,
11 it would place probationary West Pilots with under two months seniority above East Pilots
12 who had more than sixteen years of credited length of service. Moreover, the West Pilots
13 Class’s Statement inaccurately states that “the date-of-hire seniority integration advanced
14 by the East Pilots at the arbitration [is] required by USAPA’s constitution.” USAPA’s
15 constitution in fact does not require strict “date-of-hire” but states that one of USAPA’s
16 objectives is “To maintain uniform principles of seniority based on date of hire and the
17 perpetuation thereof, *with reasonable conditions and restrictions to preserve each pilot’s*
18 *un-merged career expectations.*” (Emphasis added.) USAPA’s current bargaining
19 proposal, which US Airways has refused to address, includes significant “conditions and
20 restrictions” and is substantially different from the proposal advanced by the US Airways
21 MEC in the ALPA seniority integration proceeding.

22 Although the Court decided otherwise in denying USAPA’s motion to dismiss
23 (Doc. No. 85), USAPA continues to oppose all counts for the reasons stated by the Ninth
24 Circuit in *Addington v. US Airline Pilots Ass’n*, 606 F.3d 1174 (9th Cir. 2010), namely
25 that in the context of this bargaining dispute a duty of fair representation claim is not ripe
26 for decision until the collective agreement embodying a seniority system is ratified and
27 becomes effective.
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1 USAPA otherwise opposes Counts I and III and supports Count II. In general,
2 USAPA asserts that seniority is a mandatory subject of bargaining concerning which US
3 Airways is required to bargain in good faith under Section 2, Ninth, of the Railway Labor
4 Act, 45 U.S.C. §152, Ninth; that as a newly certified bargaining representative, USAPA
5 has the right to negotiate terms and conditions without regard to any pre-existing
6 collective or other agreement, *AFA v. USAir, Inc.*, 24 F.3d 1432, 1440 (D.C. Cir. 1994)
7 (Edwards, J.) (“newly certified union . . . has full bargaining rights with respect to covered
8 employees without regard to [any] previous[] collective bargaining agreement”) and
9 therefore is not required to advance the Nicolau Award as a bargaining proposal to the
10 exclusion of any other proposal concerning seniority; that, as the duly elected and certified
11 bargaining representative for all the US Airways pilots, USAPA enjoys a “wide range of
12 reasonableness” in bargaining, *Air Line Pilots Ass’n v. O’Neil*, 499 U.S. 65, 78 (1991),
13 quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953); that, particularly given
14 that the Nicolau Award places probationary West pilots with under two months seniority
15 above East pilots who had more than sixteen years of credited length of service and the
16 changed circumstances over the six years since the merger, USAPA’s decision to advance
17 a different proposal is reasonable, is not discriminatory and is made in good faith on
18 behalf of all of the pilots; and that this decision therefore does not violate its duty of fair
19 representation.

20 For these reasons, each of the assertions made by the West Pilot Class ((a) through
21 (d), above) is without merit. Contrary to the statement by the West Pilot Class in section
22 1(b) of this Case Management Plan, USAPA never agreed either to the Nicolau Award or
23 the procedure that led to it. In particular, USAPA is a newly certified bargaining
24 representative and is not bound by any prior agreement or arbitration decision (including
25 one such as the Nicolau Award which was the result of an internal union proceeding
26 mandated by the constitution of the previous and unrelated bargaining representative) and
27 is entitled to exercise its judgment within a “wide range of reasonableness” on behalf of
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1 the entire pilot group. Although the merits of USAPA's current proposal are not directly
2 at issue in this case,¹ the broad outlines of that proposal show that it is not a strict "date of
3 hire" proposal, but that it includes significant "restrictions and conditions" that protect the
4 pre-merger expectations of the West pilots. The evidence will show, among other things,
5 that over the last several years US Airways flight operations in the West have been
6 significantly reduced while flight operations in the East have remained steady,
7 undercutting one of the principal assumptions on which the Nicolau Award was based.
8 The evidence also will show that over the last two years USAPA has made several
9 attempts to engage the West pilots in discussions about the Union's seniority proposal, but
10 that the "Army of Leonidas" which funded the Addington action and which funds and
11 directs the current West Pilot Class representatives have opposed and frustrated every
12 effort.

13 USAPA asserts that it is wholly improper to give US Airways advance absolution
14 from any potential liability and that Count III is therefore without any merit.

15 **2. A List Of The Elements Of Proof Necessary For Each Count Of The**
16 **Complaint And Each Affirmative Defense And, If Applicable, Each**
17 **Counterclaim.**

18 **(a) US Airways' Statement:**

19 US Airways' Complaint articulates three Causes of Action, each stated in the
20 alternative. The First Cause of Action seeks a judgment that USAPA's insistence on a
21 non-Nicolau seniority list constitutes (i) a failure to exert every reasonable effort to make

22 ¹As noted above, USAPA continues to believe that none of the issues in this action are
23 ripe for decision or should be the subject of a declaratory judgment for the reasons stated
24 by the Ninth Circuit in *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174 (9th Cir.
25 2010). Given the denial of USAPA's motion to dismiss, however, the only issues arguably
26 appropriate for decision in this action are (1) whether USAPA is entitled to advance a
27 seniority proposal other than the Nicolau Award and (2) whether the decision to do so is
28 in some way "so far outside a wide range of reasonableness as to be irrational." *Air Line
Pilots Ass'n v. O'Neil*, 499 U.S. 65, 67 (1991). *Addington* precludes any direct judgment
on USAPA's current proposal because that proposal is only the Union's current proposal,
is subject to change through consultation with the West pilots and through negotiation
with US Airways, and therefore, as the Ninth Circuit noted, "neither the West Pilots nor
USAPA [nor US Airways] can be certain what seniority ultimately will be acceptable to
both USAPA and the airline as part of a final CBA." 606 F.3d at 1179

1 and maintain agreements concerning rates of pay, rules, and working conditions under
2 Section 2, First of the Railway Labor Act and/or (ii) a breach of USAPA's duty of fair
3 representation to the West Pilot Class. Conversely, the Second Cause of Action seeks a
4 judgment that USAPA's insistence on a non-Nicolau seniority list *does not* constitute (i) a
5 failure to exert every reasonable effort to make and maintain agreements concerning rates
6 of pay, rules, and working conditions or (ii) a breach of USAPA's duty of fair
7 representation ("DFR"). The relevant elements of proof for both causes of action are:
8 whether USAPA has a legitimate union interest in insisting on a non-Nicolau seniority
9 list. Under the facts and circumstances of this case, the elements of proof pertaining to a
10 Section 2, First claim are the same as the elements of proof pertaining to the DFR claim.
11 Since the West Pilot Class and USAPA are better situated to describe the elements of
12 proof of a DFR claim, US Airways defers to their formulation, *infra*.

13 US Airways' Third Cause of Action asks for a declaratory judgment that –
14 *regardless* of whether USAPA's insistence on a non-Nicolau seniority list is a violation of
15 the Railway Labor Act – US Airways cannot be liable for accepting such a non-Nicolau
16 seniority list. US Airways contends that this cause of action requires proof that US
17 Airways' acceptance of a non-Nicolau seniority list does not constitute collusion with
18 USAPA. *See Price v. S. Pac. Transp. Co.*, 586 F.2d 750, 752 (9th Cir. 1978); *Raus v.*
19 *Bhd. Ry. Carmen of the U.S. and Canada*, 663 F.2d 791, 798 (8th Cir. 1981); *Rakestraw v.*
20 *United Airlines, Inc.*, 765 F. Supp. 474, 493-94 (N.D. Ill. 1991), *aff'd in relevant part and*
21 *rev'd in part on other grounds*, 981 F.2d 1524 (7th Cir. 1992).

22 US Airways has not pleaded any affirmative defenses – the West Pilot Class has
23 not alleged any counterclaims against US Airways, and USAPA has decided to withdraw
24 its Counterclaim in light of this Court's November 2, 2011, Order. (Order dated Nov. 2,
25 2011 [Doc. No. 125], at p. 10.)

26 **(b) West Pilot Class' Statement:**

27 The West Pilot Class has not pleaded any affirmative defenses. (West Pilots
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1 Answer and Crossclaim, dated Sep. 7, 2010 [Doc. No. 34].) The West Pilot Class'
2 Crossclaim was dismissed by this Court. (Order dated June 1, 2011 [Doc. No. 85], at 9.)
3 The West Pilot Class' position in regard to Counts I-III of the complaint is set forth in
4 section 1(b), above. The underlying facts concerning the reasons for the formation of
5 USAPA and the reasons for USAPA rejecting the Nicolau Award are largely undisputed.
6 USAPA has indicated that it intends to make a collateral attack against the wisdom of the
7 Nicolau Award. If it does, that would neither be proper nor material to this litigation
8 because this Court does not sit to review an arbitration that was completed more than four
9 years ago. USAPA offers no explanation as to what it would discover from other parties
10 at this time. USAPA merely indicates that it intends to use an expert to justify the East
11 Pilots' strong preference for a strict date-of-hire seniority integration. Incredibly, more
12 than four years after adopting its date-of-hire constitutional mandate, USAPA is still
13 looking for an expert to help it explain its reasons for doing so. Because an expert's
14 opinion on the relative fairness of seniority proposals is immaterial to this litigation, that
15 is no reason to delay motions for summary judgment.

16 The West Pilots disagree with USAPA's positions on subject matter jurisdiction,
17 particularly its argument that this action is both un-ripe and untimely. Because those
18 issues have been fully briefed and decided by the Court, they are not addressed.

19 *(c) USAPA's Statement:*

20 USAPA's position with respect to Counts I-III of the Complaint is set forth in
21 section 1(c), above. The underlying facts concerning the existence of the pre-existing
22 collective bargaining agreements, the issuance of the Nicolau Award, the certification of
23 USAPA and USAPA's current bargaining proposal on seniority are largely undisputed.
24 The West Pilot Class makes several allegations concerning the motives for the formation
25 of USAPA and concerning other alleged considerations underlying USAPA's current
26 proposal and asserts that these allegations are relevant to its claims. USAPA does not
27 agree that these matters are relevant to the legal issues necessary to decide this case, but,
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1 in any event, these matters are disputed. In particular, and contrary to statements made by
2 the West Pilot Class, the “underlying facts concerning the reasons for the formation of
3 USAPA” and the “reasons for USAPA rejecting the Nicolau Award” are very much in
4 dispute. Moreover, it is untrue that “USAPA . . . intends to make a collateral attack
5 against the wisdom of the Nicolau Award.” To be sure, USAPA strongly disagrees with
6 the Nicolau Award. But USAPA has no need to mount any “collateral attack” for the
7 simple reason that, as a newly certified bargaining representative, it is not in any way
8 bound by or required to apply the Nicolau Award as a bargaining proposal. USAPA has
9 entered a Notice of Dismissal withdrawing its Counterclaim in light of this Court’s
10 November 2, 2011, Order. (Order dated Nov. 2, 2011 [Doc. No. 125], at p. 10.) Although
11 USAPA believes that this case may be suitable for disposition on motions for summary
12 judgment after limited discovery, it continues to assert the following affirmative defenses:

13 (i) Subject matter jurisdiction. The Court lacks subject matter jurisdiction for the
14 reasons stated in USAPA’s previously filed (and overruled) motion to dismiss;

15 (ii) Ripeness. Other than the issues identified by USAPA in the last paragraph of
16 section 1, above, as held by the Ninth Circuit Court of Appeals in *Addington v. US Airline*
17 *Pilots Ass’n*, 606 F.3d 1174 (9th Cir. 2010), no other issues are ripe for decision by this
18 Court;

19 (iii) Exhaustion under the Railway Labor Act; exclusive jurisdiction of the system
20 board of adjustment; waiver and estoppel. To the extent that any claims in this case rest
21 on an alleged violation of either the previous collective bargaining agreements or the
22 Transition Agreement, those claims are “minor disputes” within the meaning of the RLA
23 and therefore subject to the exclusive jurisdiction of the system board of adjustment.
24 Moreover, any such claims have been waived (and the Addington parties are estopped
25 from presenting those claims) because the Addington parties failed to participate in a
26 system board proceeding involving those claims.

27 (iv) Laches and statute of limitations, US Airways was aware at the time the
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1 Addington case was filed (September 2008) that it faced the alleged “impossible
2 situation” which it asserts as the basis for this action and its claims, not asserted until this
3 action was filed, are barred by laches and the statute of limitations.

4 **3. The Factual And Legal Issues Genuinely In Dispute, And Whether They Can**
5 **Be Narrowed By Stipulation Or Motion.**

6 (a) *US Airways’ Position:*

7 US Airways believes that this entire matter can be resolved through cross motions
8 for summary judgment by USAPA and the West Pilot Class on the Complaint’s first and
9 second causes of action, and that a decision on either of the first two causes of action
10 would obviate the need for the parties to litigate – or this Court to decide – the third cause
11 of action. US Airways further believes that these summary judgment motions, and this
12 litigation generally, can rely on the documents, discovery responses, and deposition/trial
13 testimony from the *Addington I* proceeding. (*Addington v. U.S. Airline Pilots’*
14 *Association*, No. CV 08-1633-PHX-NVW (D. Ariz.) (“*Addington I*”); *Addington v. U.S.*
15 *Airline Pilots’ Association*, 606 F.3d 1174 (9th Cir. 2010).) US Airways contends that the
16 material underlying facts do not appear to be in dispute, and the material disagreements
17 mostly pertain to the construction and interpretation of legal authority. Accordingly, US
18 Airways suggests that this matter proceed in two phases.

- 19
- 20 • Phase I: Phase I would consist of cross motions for summary judgment
21 by the West Pilot Class and USAPA on the first two causes of action.
22 US Airways believes that if either of the defendants’ cross motions for
23 summary judgment is granted, the case will be resolved.
 - 24 • Phase II: In the event that this Court is not able to grant either motion
25 for summary judgment, then US Airways contends that a limited non-
26 jury trial or evidentiary hearing will be necessary. US Airways believes
27 that depending on the reasons for the Court’s inability to grant summary
28 judgment, limited discovery might be necessary. US Airways

1 understand that this Court's form case management plan indicates that
2 "[u]nder no circumstances will the final date for supplementation occur
3 after the date for filing dispositive motions," but it believes that under
4 the circumstances of this case, this phased approach is appropriate,
5 efficient, and will best conserve judicial resources. Accordingly, US
6 Airways respectfully suggests that in the event this Court denies both
7 cross summary judgment motions on the first and second causes of
8 action, a status conference should be held in advance of which the
9 parties could submit a proposed case management plan for Phase II.
10 This case management plan for Phase II, to the extent that it is
11 necessary, would identify any discovery the parties believe is necessary
12 and identify a date for trial.

13 **(b) *West Pilot Class' Position:***

14 The West Pilot Class concurs with US Airways' position on this subject because
15 none of the discovery proposed by USAPA can create an issue of fact material to the
16 summary judgment sought by the West Pilot Class.

17 The "Army of Leonidas" is merely an LLC that collects funds voluntarily
18 contributed by members of the West Pilot Class to fund this litigation. No aspect of
19 Leonidas and no communication made by its members or by any member of the West
20 Pilot Class is material to deciding whether USAPA would breach the duty of fair
21 representation if it dishonors the Nicolau arbitration. And no aspect of the Airline's
22 operations is material to this determination.

23 Pilot pre-merger expectations and the reasonableness of such expectations were
24 directly at issue in the Nicolau arbitration and should not be revisited here. The West
25 Pilots, therefore, object to USAPA taking discovery on the "effect of the Nicolau Award
26 on the pre-merger expectations of the East and West Pilots," as stated below. This is
27 merely USAPA's use of semantic evasion to avoid admitting that it plans to make a
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1 collateral attack on the Nicolau Award. It must not be allowed.

2 USAPA sees this as a war of attrition. It has the advantage of being able to assess
3 dues against all pilots (East and West) to fund its litigation expenses that are incurred to
4 defend East Pilot interests. In contrast, the West Pilot Class funds its litigation expenses
5 only with voluntary contributions from members. USAPA's strategy is to exhaust the
6 Class' capacity to fund this litigation before final judgment. That was USAPA's strategy
7 when this dispute was before Judge Wake. And that is its strategy now. In furtherance of
8 this strategy, USAPA filed meritless RICO claims against a group of West Pilots in 2008,
9 in North Carolina. And, earlier this year, it compelled West Pilots to submit to pointless
10 but costly depositions in Texas and Alabama state courts.

11 In sum, USAPA has a history of abusive misuse of litigation and discovery. When
12 this dispute was before Judge Wake he put an end to it. USAPA must not be allowed to
13 do the same thing here.

14
15 **(c) USAPA's Position:**

16 USAPA believes that this matter may be suitable for resolution through cross
17 motions for summary judgment but only after appropriate limited discovery. USAPA also
18 believes that some factual issues can be narrowed by stipulation and motion. Although
19 some of the documents, discovery responses, and deposition/trial testimony from the
20 *Addington I* proceeding may be relevant, *Addington v. U.S. Airline Pilots' Association*,
21 No. CV 08-1633-PHX-NVW (D. Ariz.) ("*Addington I*"); *Addington v. U.S. Airline Pilots'*
22 *Association*, 606 F.3d 1174 (9th Cir. 2010), USAPA does not believe that any party to this
23 action can be limited to discovery or testimony that occurred in a separate suit that went to
24 trial 2½ years ago and which resulted in a judgment that was vacated by the Court of
25 Appeals and remanded with directions to dismiss. USAPA is entitled to conduct discovery
26 concerning relevant facts and events occurring over the last five years since the Nicolau
27 Award was issued and since the *Addington* trial was held. In addition, USAPA intends to
28 conduct discovery regarding communications and other actions by the "Army of

1 Leonidas” which were designed to frustrate attempts by USAPA to engage West Pilots in
2 discussions about USAPA’s seniority proposal. The “Army of Leonidas” is the
3 organization formed by several West pilots, including some of the West Pilot Class named
4 representatives, to fund and control litigation including the *Addington* case and the
5 position of the West pilots in the instant action. USAPA intends to conduct discovery
6 regarding these matters and to submit expert testimony analyzing the effect of the Nicolau
7 Award on the pre-merger expectations of the East and West Pilots, analyzing the principal
8 elements of the subsequent USAPA proposal and addressing the effect of subsequent
9 events on both. Until discovery is complete, it is not possible to state the extent to which
10 there will be factual issues in dispute regarding matters affecting the legal issues in this
11 case. USAPA believes the legal issues genuinely in dispute are:

12 (i) Whether USAPA is required to advance the Nicolau Award as a bargaining
13 proposal to the exclusion of any other proposal concerning seniority.

14 (ii) Whether USAPA may advance a different bargaining proposal on seniority
15 given that, among other things, the Nicolau Award places probationary West pilots with
16 under two months seniority above East pilots who have more than sixteen years of
17 credited length of service, and the changed circumstances over the last five years that
18 show, *inter alia*, a marked decrease in West flight operations compared to East flight
19 operations and whether the decision to advance a different bargaining proposal violates
20 USAPA’s duty fairly to represent all the pilots.

21 (iii) Whether US Airways is required is required to bargain in good faith under
22 Section 2, Ninth, of the Railway Labor Act. 45 U.S.C. §152, Ninth; *AFA v. USAir, Inc.*,
23 24 F.3d 1432, 1440 (D.C. Cir. 1994).

24 (iv) Whether any other issue suggested in this case, including Count III of the
25 Complaint, are ripe for decision. *Addington v. US Airline Pilots Ass’n*, 606 F.3d 1174
26 (9th Cir. 2010).

27 USAPA therefore believes that a reasonable period for discovery and for the
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1 submission of appropriate expert reports before filing of dispositive motions is
2 appropriate. The schedule suggested by USAPA is set forth below.

3 **4. The Jurisdictional Basis Of The Case, Citing Specific Statutes.**

4 *(a) Statement by All Parties Regarding Jurisdiction:*

5 This Court has federal question subject matter jurisdiction over US Airways'
6 claims under the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*, pursuant to 28 U.S.C. §
7 1331. US Airways' claims are brought under the Declaratory Judgment Act, 28 U.S.C. §§
8 2201 & 2202.

9 *(b) Additional Statement by USAPA Regarding Jurisdiction:*

10 Although the Court decided otherwise in denying USAPA's motion to dismiss
11 (Doc. No. 85), USAPA continues to oppose all counts for the reasons stated by the Ninth
12 Circuit in *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174 (9th Cir. 2010), namely
13 that in the context of this bargaining dispute, a duty of fair representation claim is not ripe
14 for decision until the collective agreement embodying a seniority system is ratified and
15 becomes effective.

16 **5. Parties, If Any, Which Have Not Been Served, As Well As Parties Which Have**
17 **Not Filed An Answer Or Other Appearance.**

18 All parties have been served and appeared.

19 **6. The Names Of Parties Not Subject To The Court's Jurisdiction.**

20 All parties are subject to the Court's jurisdiction.

21 **7. Whether There Are Dispositive Issues To Be Decided By Pretrial Motions And**
22 **Hearings Including Evidentiary Hearings Pursuant To *Daubert* And/Or Fed. R.**
23 **Evid. 702.**

24 As explained above in Item 3, *supra*, USAPA believes that summary judgment
25 motions after limited discovery and expert disclosures may be appropriate. US Airways
26 and the West Pilot Class believe this entire matter should be resolved by early summary
27 judgment motion, as explained in Item 3, *supra*.

1 **8. Whether The Case Is Suitable For Reference To Arbitration, To A Master,**
2 **And/Or To A United States Magistrate Judge For All Further Proceedings.**

3 This case is not suitable for reference to arbitration, special master, or Magistrate
4 Judge.

5 **9. The Status Of Related Cases Pending Before Other Judges Of This Court Or**
6 **Before Other Courts.**

7 No currently pending cases are related to this litigation within the meaning of
8 Local Civil Rule 42.1.

9 **10. Suggested Changes In The Timing, Form, Or Requirement For Disclosure**
10 **Under Rule 26(A), Fed. R. Civ. P., Including A Statement Of When Initial**
11 **Disclosures Were Made Or Will Be Made.**

12 The parties will serve Initial Disclosures via electronic mail on December 15, 2011.

13 **11. Suggested Changes, If Any, On The Limitations Imposed By Fed. Rs. Civ. P.**
14 **30, 31 And 33.**

15 *(a) US Airways' Position:*

16 For the reasons discussed in Item 3, *supra*, US Airways believes no discovery is
17 necessary for Phase I and that if Phase II is necessary, narrow discovery may or may not
18 be appropriate, depending on the nature of this Court's disposition of the cross motions
19 for summary judgment.

20 *(b) West Pilot Class' Position:*

21 The West Pilot Class concurs with US Airways' position on this subject.

22 *(c) USAPA's Position:*

23 USAPA believes that no changes to the discovery limitations are necessary at this
24 time. If USAPA feels that any changes are necessary in the future, USAPA will attempt
25 to resolve these issues with the other parties and bring them to the attention of the Court if
26 necessary.
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1 **12. The Scope Of Discovery, The Date Discovery Should Be Completed, And**
2 **Whether Discovery Should Be Conducted In Phases Or Should Be Limited To**
3 **Or Focused Upon Particular Issues.**

4 (a) *US Airways' Position:*

5 US Airways believes that for the reasons discussed in Items 3 and 11, *supra*, no
6 discovery is necessary for Phase I of this case.

7 (b) *West Pilot Class' Position:*

8 The West Pilot Class concurs with US Airways' position on this subject.

9 (c) *USAPA's Position:*

10 USAPA does not believe discovery should be limited or conducted in phases and
11 believes discovery can be completed by July 27, 2012.

12 **13. The Final Date For Supplementation Of Discovery, That Shall Be Scheduled**
13 **Two To Three Weeks After The Close Of Discovery.**

14 (a) *US Airways' Position:*

15 US Airways believes that for the reasons discussed in Items 3 and II, *supra*, no
16 discovery is necessary for Phase I of this case.

17 (b) *West Pilot Class' Position:*

18 The West Pilot Class concurs with US Airways' position on this subject.

19 (c) *USAPA's Position:*

20 USAPA believes that the final supplementation of discovery should be August 17.,
21 2012.

22 **14. The Proposed Deadlines For:**

23 (a) *Disclosure of experts and testimony under Rule 26(a)(2) of the Fed. R. Civ.*
24 *P.:*

25 **USAPA proposes the following schedule:**

- 26 • Initial expert disclosures: April 30, 2012
- 27 • Rebuttal expert disclosures: June 1, 2012
- 28 • Reply expert disclosures: June 29, 2012

1 USAPA submits that US Airways' proposed schedule does not provide a
2 reasonable time to permit USAPA to engage in document discovery, allow for follow-up
3 depositions, including a 30(b)(6) deposition and permit a reasonable time to evaluate the
4 discovery and serve an expert disclosure. USAPA plans to move expeditiously to serve
5 document discovery and following receipt of documents, will move expeditiously to
6 schedule depositions but given the intervening holidays and the time permitted for
7 Plaintiff and Defendant West Pilots to comply with written discovery, there is simply
8 insufficient time built in to US Airways' schedule. If US Airways and the West Pilots do
9 not intend to conduct any discovery or serve expert disclosures, then USAPA has no
10 problem with making the dispositive motion deadline April 30, 2012.

11 **The West Pilot Class proposes the following schedule:**

- 12 • The West Pilots have already provided US Airways and USAPA with the
13 exhibits and transcripts they would use to support their summary judgment
14 motion.
- 15 • US Airways and USAPA will serve any objections to foundation or
16 authenticity for any of these exhibits or transcripts by 5:00 PM (Pacific) on
17 December 9, 2011.
- 18 • The West Pilots will file their motion for summary judgment by 5:00 PM
19 (Pacific) on December 23, 2011.
- 20 • US Airways and USAPA will file responses, including any motions
21 pursuant to Rule 56(d), by 5:00 PM (Pacific) on January 23, 2012.
- 22 • The West Pilots will file their replies by 5:00 PM (Pacific) on February 10,
23 2012.

24 At this time, the West Pilot Class plans to file a motion for summary judgment on
25 Counts I and II before conducting discovery. If the Court grants this motion, there will be
26 no need for discovery by any party. But the West Pilot Class does not waive its right to
27 conduct discovery in the event that there are outstanding issues after the Court rules on
28

1 that motion. In that event, the West Pilot Class intends to conduct discovery appropriate
2 to that ruling.

3 **US Airways proposes the following schedule:**

4 As previously stated on the record during the hearing on USAPA's Motion to
5 Dismiss, US Airways believes that this matter should be resolved through an expedited
6 summary judgment process that will resolve the underlying legal issues. US Airways
7 further believes that this process may involve the use of exhibits and testimony from the
8 *Addington I* litigation. US Airways does not object, however, to limited expedited
9 discovery to the extent that either defendant has a legitimate need for discovery prior to
10 the submission of the summary judgment motions. US Airways and the West Pilot Class
11 recognize that USAPA has indicated that, in the absence of discovery or expert
12 disclosures by US Airways or the West Pilot Class, it does not object to a dispositive
13 motion deadline of April 30, 2012. Although there is no reason to delay motion practice
14 until that date, US Airways and the West Pilot Class confirm that they are not going to
15 serve discovery in advance of the defendants' expedited cross motions for summary
16 judgment on Counts I and II. As discussed in Item 3(a), *supra*, if this case proceeds to
17 Phase II US Airways and the West Pilot Class suggest a subsequent status conference to
18 set trial dates and determine whether any discovery by the parties as to Count III is
19 warranted at that time.

20 For these reasons, US Airways (but not the West Pilot Class) proposes the
21 following schedule:

- 22 • The West Pilot Class and USAPA will file their motions for summary
23 judgment no later than January 20, 2012.
 - 24 • Oppositions will be filed no later than February 20, 2012.
 - 25 • Replies will be filed no later than March 9, 2012.
- 26
27
28

1 (c) ***USAPA's Position:***

2 Sixty days after the ruling on dispositive motions. Should a trial be necessary,
3 USAPA believes it will not exceed three (3) court days.

4 **16. Whether A Jury Trial Has Been Requested.**

5 No party has demanded a jury trial.

6 **17. The Prospects For Settlement.**

7 (a) ***US Airways' Position:***

8 US Airways does not believe there is any prospect for successful settlement.

9 (b) ***West Pilot Class' Position:***

10 There is no point to mediating enforcement of an arbitration award. If this
11 seniority dispute was not resolved by binding arbitration it surely is not going to be
12 resolved by non-binding mediation. Rather, there must be a definitive ruling from the
13 Court that USAPA cannot enter into any new CBA unless that contract incorporates the
14 Nicolau Award. Moreover, USAPA proposes a mediation where its hands would be tied
15 by a constitution that precludes any seniority scheme other than strict date-of-hire.

16 (c) ***USAPA's Position:***

17 USAPA urges the Court to strongly encourage the parties to mediate the seniority
18 dispute underlying this case through the services of a mediator with a national reputation
19 (for example, George Mitchell or Abner Mikva). As the Ninth Circuit's decision in
20 *Addington* suggests, an agreement among the interested parties is the only realistic way of
21 avoiding continued litigation. The interests of achieving a final resolution of the
22 underlying issues in this case and the interests of preserving judicial resources all favor a
23 good faith effort by all of the parties to reach agreement outside the judicial forum.
24 USAPA believes that a nationally recognized mediator is necessary and appropriate to
25 encourage all the parties to engage in the kind of open and realistic process necessary to
26 fashion such an agreement.

1 **18. In Class Actions, The Proposed Dates For Class Certification Proceedings**
2 **And Other Class Management Issues. Such Certification Will Result In The**
3 **Case Being Reassigned To The Complex Track For Case Management**
4 **Purposes.**

5 Both the West Pilot Class and US Airways have filed motions for class
6 certification which have been fully briefed, and on November 2, 2011, this Court granted
7 US Airways' motion and denied the West Pilot Class' motion as moot. (Order dated Nov.
8 2, 2011 [Doc. No. 125], at p. 10.) US Airways and the West Pilot Class filed a proposed
9 class notice pursuant to this Court's instructions on November 18, 2011. USAPA will file
10 objections to the proposed class notice, if any, on or before December 1, 2011.

11 **19. Whether Any Unusual, Difficult, Or Complex Problems Or Issues Exist Which**
12 **Would Require That This Case Be Placed On The Complex Track For Case**
13 **Management Purposes.**

14 Other than class certification, there is no reason to place this matter on the complex
15 track for case management purposes.

16 **20. The E-Mail Address Of Respective Counsel Or Parties.**

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27 *(c) USAPA:*

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21. Any Other Matters That Counsel Believe Will Aid The Court In Resolving This Dispute In A Just, Speedy, And Inexpensive Manner.

The parties refer the Court to Item 3, *supra*.
Respectfully submitted this 22nd day of November, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2011, the foregoing document and the attachment thereto was electronically transmitted to the United States District Court Clerk’s Office using the CM/ECF System for filing and transmittal.

/s/ Robert A. Siegel
Robert A. Siegel

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