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

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

24 Plaintiff,

25 v.

26 Don Addington, an individual; John
27 Bostic, an individual; Mark Burman,
28 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

**SEPARATE STATEMENT OF
UNDISPUTED FACTS FOR PURPOSES
OF PLAINTIFF US AIRWAYS, INC.'S
MEMORANDUM OF POINTS AND
AUTHORITIES PERTAINING TO
DEFENDANTS' SUMMARY
JUDGMENT BRIEFING**

1 Pursuant to Civil L.R. 56.1 and this Court's December 1, 2011 Order, Plaintiff US
 2 Airways, Inc. ("US Airways") submits the following Separate Statement of Undisputed
 3 Facts for purposes of Plaintiff US Airways' Memorandum of Points and Authorities
 4 Pertaining to Defendants' Summary Judgment Briefing.

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>7 1. The predecessor to the current US Airways merged 8 with America West Airlines, Inc. ("America West") 9 pursuant to an agreement executed in May 2005.</p>	<p>Hemenway Decl. ¶ 2.¹</p>
<p>10 2. At the time of the merger, the Air Line Pilots 11 Association ("ALPA," or the "Association") represented 12 the US Airways pilots, now known as "East Pilots" and 13 the America West pilots, now known as "West Pilots" in 14 two separate bargaining units, or "crafts or classes."</p>	<p><i>Addington v. US Airline</i> <i>Pilots Ass'n</i>, 606 F.3d 1174, 1177 (9th Cir. 2010);² East Pilot CBA;³ West Pilot CBA;⁴ Mowrey Decl. ¶ 11.⁵</p>

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 22 ¹ References to "Hemenway Decl." are to the Declaration of E. Allen Hemenway In
 Support of Plaintiff US Airways, Inc.'s Motion for Class Certification, dated August 15,
 2011, [Doc. No. 108].

23 ² A true and correct copy of the opinion in *Addington v. US Airline Pilots Ass'n*, 606 F.3d
 1174 (9th Cir. 2010) is attached to the Hollinger Decl. as Exhibit A.

24 ³ A true and correct copy of Section 1 of the 1998 East Pilot CBA is attached to the
 25 Hollinger Decl. as Exhibit B.

26 ⁴ References to the "West Pilot CBA" are to the 2004 Agreement between America West
 Airlines Inc. and the Pilots in service of America West Airlines Inc. as represented by the
 Air Line Pilots Association, International [Doc. No. 34-1].

27 ⁵ Reference to "Mowrey Decl." is to the Declaration of Randal E. Mowrey, dated
 28 September 5, 2010, [Doc. No. 39].

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>1 2 3 4 5 6 7</p> <p>3. US Airways employed approximately 5,000 East Pilots, more than 1,000 of whom were on furlough at the time of the merger, and America West employed approximately 1,900 West Pilots, none of whom were on furlough at the time of the merger.</p>	<p>Nicolau Award at pp. 4-5.⁶</p>
<p>8 9 10 11</p> <p>4. The pre-merger US Airways-ALPA Collective Bargaining Agreement (“CBA”), which remains in effect to this day for the East Pilots, mandated “a seniority integration governed by the Association Merger Policy, if applicable.”</p>	<p>East Pilot CBA § 1(C)(2).</p>
<p>12 13 14</p> <p>5. ALPA’s Merger Policy is applicable if the pilots of both pre-merger carriers are represented by ALPA.</p>	<p>ALPA Merger Policy, Part 1.B.1 at p. 2.⁷</p>
<p>15 16 17 18</p> <p>6. The pre-Merger America West-ALPA CBA, which remains in effect to this day for the West Pilots, mandated that “the Company will integrate the two Pilot groups in accordance with Association Merger Policy if both groups are represented by the Association.”</p>	<p>West Pilot CBA § 1(F)(2).</p>
<p>19 20 21 22 23 24</p> <p>7. The pre-Merger America West-ALPA CBA also specified that “the Company will meet promptly with the Association to negotiate a possible ‘Fence Agreement’ to be in effect during the period, if any, the two carriers are operated separately without integration of the pilot work force.”</p>	<p>West Pilot CBA § 1(F)(3).</p>

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⁶ References to the “Nicolau Award” are to the Opinion and Award of the ALPA Arbitration Board In the Matter of the Seniority Integration of The Pilots of US Airways, Inc. and The Pilots of America West Airlines, Inc., dated May 1, 2007, [Doc. No. 34-6].

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⁷ References to the “ALPA Merger Policy” are to the ALPA Administrative Manual, Section 45 - Merger and Fragmentation Policy, dated August 10, 2005, [Doc. No. 34-3].

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UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>8. Following the merger, US Airways, America West, their respective corporate parents, ALPA, the US Airways Master Executive Council (“MEC”), and the America West MEC entered into a Transition Agreement which governed, among other things, the integration of the East Pilots and West Pilots seniority lists.</p>	<p>Transition Agreement at pp. 1, 6-7.⁸</p>
<p>9. The Transition Agreement was signed by the chairpersons of the America West and US Airways MECs, and provided, under the heading “Continued Representation of the America West and US Airways Pilots,” that: “The Parties will continue to recognize each of the America West and US Airways MECs as to their authority and responsibility with respect to their respective collective bargaining agreements until the merger of the two MECs.”</p>	<p>Transition Agreement, § I.B at pp 2 & 16.</p>

⁸ A true and correct copy of the Transition Agreement, executed September 23, 2005, is attached to the Hollinger Decl. as Exhibit C.

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>10. The Transition Agreement mandated that “[t]he seniority lists of America West pilots and US Airways pilots will be integrated in accordance with ALPA Merger Policy and submitted to the Airline Parties for acceptance,” and further required that “[t]he Airline Parties will accept such integrated seniority list, including conditions and restrictions, if such list and the conditions and restrictions comply with” the following criteria: (i) no “system flush” (through which “an active pilot may displace any other active pilot from the latter’s Position”); (ii) furloughed pilots could not displace active pilots; (iii) no differential pay where a pilot is paid for a position not actually flown; (iv) ability of pilots who are in the process of being trained for a new position to be assigned to that position “regardless of their relative standing on the integrated seniority list;” and (v) no conditions and restrictions that “materially increase costs associated with training or company paid moves.”</p>	<p>Transition Agreement § IV.A at p. 6.</p>
<p>11. Pursuant to ALPA’s Merger Policy, if two pilot groups could not agree on an integrated seniority list through direct negotiations or mediation, the next step was to integrate the pre-merger seniority lists on a “fair and equitable” basis through arbitration award that “shall be final and binding on all parties to the arbitration.”</p>	<p>ALPA Merger Policy, Part 1.H.1.b at p. 6 and Part 1.H.5.b at p. 8.</p>

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>12. ALPA is not a party in any such seniority-list arbitration and its role is solely limited to “provid[ing] the process by which the affected pilot groups on ALPA airlines arrive at the merged seniority list for presentation to management, through their respective merger representatives, using arbitration if necessary. Responsibility for the merged seniority list falls upon the respective merger representatives with ALPA National in a neutral position on the merits.”</p>	<p>ALPA Merger Policy, Preamble at p. 1.</p>
<p>13. According to ALPA Merger Policy, “[t]he merger representatives of the affected airlines shall be charged with the preparation of their contentions regarding the merger and their subsequent presentation before the Arbitration Board.”</p>	<p>ALPA Merger Policy, Part 1.H.3.e at p. 7.</p>
<p>14. The East Pilots and West Pilots could not agree on an integrated seniority list, so they participated in a seniority-integration arbitration pursuant to ALPA’s Merger Policy as required by their pre-merger CBAs as well as the Transition Agreement.</p>	<p><i>Addington v. US Airline Pilots Ass’n</i>, 606 F.3d 1174, 1177-78 (9th Cir. 2010); Nicolau Award at pp. 1-2.</p>
<p>15. Arbitrator George Nicolau was chosen by the merger representatives of the East Pilots and the West Pilots to serve as Chairman of the Arbitration Board.</p>	<p>Nicolau Award at p. 2.</p>

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>16. Mr. Nicolau is a full-time arbitrator, mediator and attorney, with extensive experience in the airline industry; he is also a past President of the National Academy of Arbitrators, and has received the Distinguished Service Award of the American Arbitration Association.</p>	<p>Résumé of George Nicolau, Esq.⁹</p>
<p>17. The other two (non-voting) members of the Arbitration Board, selected by the merger representatives of the East Pilots and the West Pilots, were Captain Stephen Gillen and Captain James P. Brucia.</p>	<p>Nicolau Award at pp. 1-2.</p>
<p>18. Neither Captain Stephen Gillen nor Captain James P. Brucia was affiliated with US Airways or America West.</p>	<p>ALPA Merger Policy, Part 1.H.4.d at p. 8; Nicolau Award at p. 2; <i>Addington v. US Airline Pilots Ass’n</i>, No. CV 08-1633-PHX-NVW, 2009 WL 2169164, at *3 (D. Ariz. July 17, 2009).¹⁰</p>
<p>19. The East Pilots were represented in the arbitration by Katz & Ranzman, P.C., and the West Pilots were represented by Bredhoff & Kaiser, P.L.L.C.</p>	<p>Nicolau Award at p. 1.</p>
<p>20. The East Pilots and West Pilots, through their counsel, “agreed on the arbitration ground rules.”</p>	<p>Nicolau Award at p. 2.</p>

⁹ A true and correct copy of George Nicolau, Esq.’s résumé is attached to the Hollinger Decl. as Exhibit D.

¹⁰ A true and correct copy of the opinion in *Addington v. US Airline Pilots Ass’n*, No. CV 08-1633-PHX-NVW, 2009 WL 2169164 (D. Ariz. July 17, 2009) is attached to the Hollinger Decl. as Exhibit E.

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19</p> <p>21. “After receiving pre-hearing statements of position, the Arbitration Board held a hearing over eighteen days in Washington, D.C. in the months of December, 2006 and January and February, 2007, during which both Parties were afforded full opportunity to offer evidence and argument and to present, examine and cross-examine witnesses. A transcript, consisting of 3102 pages, was taken. There were 20 witnesses and 14 volumes of exhibits. Subsequent to the hearing, the Parties filed comprehensive post-hearing briefs, with the Record closed on March 23, 2007, the day of their receipt. Thereafter, the Board met in a number of executive sessions to weigh the arguments and reach its conclusions. In doing so and in the process of fashioning the Award, it called upon and received, with the express permission of the Parties, the assistance and comments of their technical experts, with no objection raised as to the fairness or regularity of the proceedings.”</p>	<p>Nicolau Award at p 3.</p>
<p>20 21 22 23 24</p> <p>22. This process – in which neither ALPA nor US Airways nor America West played any role – resulted in a 35-page arbitration award issued by Arbitrator Nicolau on May 1, 2007.</p>	<p>Nicolau Award.</p>

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>1 2 3 4 5 6 7 8</p> <p>23. “The US Airways initial proposal was “grounded on a pilot’s Date of Hire adjusted for Length of Service. That proposal placed the most senior America West pilots below some 900 US Airways pilots and integrated a number of furloughed US Airways pilots with active America West pilots.”</p>	<p>Nicolau Award at p. 8.</p>
<p>9 10 11 12 13 14</p> <p>24. The Nicolau Award did not integrate pilots based strictly on each pilot’s “date-of-hire” with their pre-merger airline but instead fashioned what Arbitrator Nicolau thought to be a “fair and equitable” seniority integration – attributing “considerable importance” to “career expectations” at each pre-merger airline, while also giving “consideration” to the “Date of Hire” factor.</p>	<p>Nicolau Award at pp. 24-28.</p>
<p>15 16 17 18 19 20 21 22 23 24 25 26</p> <p>25. ALPA Merger Policy provided that “The merger representatives shall carefully weigh all the equities inherent in their merger situation,” and that they “should attempt to match equities to various methods of integration until a fair and equitable agreement is reached, keeping in mind the following goals, in no particular order: a. Preserve jobs. b. Avoid windfalls to either group at the expense of the other. c. Maintain or improve pre-merger pay and standard of living. d. Maintain or improve pre-merger pilot status. e. Minimize detrimental changes to career expectations.”</p>	<p>ALPA Merger Policy, Part 1.G.5 at pp. 5-6; Nicolau Award at p. 2.</p>

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UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>1 2 3 4 5 6 7 8</p> <p>26. The Nicolau Award placed approximately 500 East Pilots at the top of the seniority list, 1,700 furloughed East Pilots at the bottom of the list, and blended the remainder of the East Pilots with the West Pilots generally according to their relative positions on their pre-merger seniority lists.</p>	<p>Nicolau Award at pp. 27-33; <i>Addington v. US Airline Pilots Ass’n</i>, No. CV 08-1633-PHX-NVW, 2009 WL 2169164, at *3 (D. Ariz. July 17, 2009).</p>
<p>9 10</p> <p>27. The integrated seniority list generated through the Nicolau Award satisfied the specified criteria set out in the Transition Agreement.</p>	<p>Hemenway Decl. ¶ 4.</p>
<p>11 12 13 14</p> <p>28. ALPA presented this integrated seniority list to post-merger US Airways in late 2007, as required by the Transition Agreement.</p>	<p>Hemenway Decl. ¶ 4; <i>Addington v. US Airline Pilots Ass’n</i>, 606 F.3d 1174, 1178 (9th Cir. 2010).</p>
<p>15 16 17 18</p> <p>29. As required by the Transition Agreement, US Airways accepted the integrated seniority list on December 20, 2007.</p>	<p>Hemenway Decl. ¶ 4; <i>Addington v. US Airline Pilots Ass’n</i>, 606 F.3d 1174, 1178 (9th Cir. 2010).</p>
<p>19 20 21 22 23 24 25 26 27 28</p> <p>30. However, the integrated seniority list has never taken effect because the Transition Agreement prohibits post-merger US Airways from using an integrated seniority list prior to “Operational Pilot Integration,” and because “Operational Pilot Integration” cannot occur under the Transition Agreement until after the negotiation of a single collective bargaining agreement applicable to the integrated pilot groups – which, largely because of the unresolved seniority dispute, has not happened to this day.</p>	<p>Transition Agreement, §§ IV.C at p. 6 & VI.A at p. 8; Hemenway Decl. ¶ 5.</p>

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>1 31. The East Pilots perceived the Nicolau Award to be 2 far less favorable to them as a group than the “date-of- 3 hire” integrated seniority list they had sought from 4 Arbitrator Nicolau.</p>	<p><i>Addington v. US Airline Pilots Ass’n</i>, 606 F.3d 1174, 1176-78 (9th Cir. 2010).</p>
<p>6 32. In response, the East Pilots formed a new labor 7 union, defendant US Airline Pilots Association 8 (“USAPA”), whose constitutional “objectives” include 9 “maintain[ing] uniform principles of seniority based on 10 date of hire and the perpetuation thereof, with reasonable 11 conditions and restrictions to preserve each pilot’s un- 12 merged career expectations.”</p>	<p>USAPA Constitution, § 8.D at p. 5.¹¹</p>
<p>13 33. The East Pilots outnumbered the West Pilots, and, 14 following a representation election between USAPA and 15 ALPA, the National Mediation Board (“NMB”) certified 16 USAPA as the new collective bargaining representative 17 for both the East Pilots and West Pilots on April 18, 2008.</p>	<p><i>Addington v. US Airline Pilots Ass’n</i>, No. CV 08- 1633-PHX-NVW, 2009 WL 2169164, at *5 (D. Ariz. July 17, 2009); Stipulated Statement of Facts ¶¶ 49-51.¹²</p>
<p>21 34. USAPA and US Airways engaged in collective 22 bargaining negotiations for a single labor contract but no 23 agreement has been reached.</p>	<p>Hemenway Decl. ¶ 5.</p>

25 ¹¹ A true and correct copy of the Constitution And Bylaws Of U.S. Airline Pilots
26 Association is attached to the Hollinger Decl. as Exhibit F.

27 ¹² References to the “Stipulated Statement of Facts” are to the Stipulated Statement of
28 Facts Re: Plaintiff’s Application for Preliminary Injunction filed in *Addington v. US
Airline Pilots Association* (“*Addington I*”), Case No. 2:08-cv-01633-NVW [Doc. No. 77]
(D. Az.), dated November 3, 2008, [Doc No. 67-3].

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>1 2 3 4 5 6</p> <p>35. In June 2008, US Airways announced that it intended to furlough approximately 300 pilots, 140 of whom would be West Pilots.</p>	<p><i>Addington v. US Airline Pilots Ass’n</i>, 606 F.3d 1174, 1178 (9th Cir. 2010); Stipulated Statement of Facts ¶¶ 35-36.</p>
<p>7 8 9 10 11</p> <p>36. If the integrated seniority list mandated by the Nicolau Award had been in effect, none of the West Pilots would have been furloughed because their relative seniority positions on the integrated list were higher than on the pre-merger America West seniority list.</p>	<p><i>Addington v. US Airline Pilots Ass’n</i>, 606 F.3d 1174, 1178 (9th Cir. 2010); Hemenway Decl. ¶ 3.</p>
<p>12 13 14 15 16 17 18 19 20 21 22</p> <p>37. Six (West) pilots filed a class-action lawsuit on September 4, 2008 against USAPA and US Airways, contending that: (i) USAPA had breached its duty of fair representation (“DFR”) to the West Pilots through its insistence on a “date-of-hire” integrated seniority list and its refusal to seek implementation of the Nicolau Award in its negotiations with US Airways for a single collective bargaining agreement; and (ii) US Airways had breached its obligation under the Transition Agreement to negotiate in good faith with USAPA for a single collective bargaining agreement.</p>	<p><i>Addington v. US Airline Pilots Ass’n</i>, No. CV 08-1633-PHX-NVW, 2009 WL 2169164, at *7 (D. Ariz. July 17, 2009).</p>

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>1 38. In September 2008, while the litigation was 2 pending, USAPA made its first and only seniority list 3 proposal in the collective bargaining negotiations with US 4 Airways. That proposal consisted of a non-Nicolau 5 seniority list that was “based on the integration of the pre- 6 merger US Airways . . . and former pre-merger America 7 West . . . certified pilot seniority lists . . . on a date-of-hire 8 basis.”</p>	<p>USAPA Seniority Integration Proposal, § I at p. 1.¹³</p>
<p>10 39. Although the USAPA proposal provided, for a 11 stated period of time in some specific circumstances, that 12 strict date-of-hire principles would not be applied in a 13 manner detrimental to the West Pilots, the proposal would 14 have specifically mandated that “Furlough and recall shall 15 be accomplished on an integrated seniority list basis and 16 shall supersede protected position provisions.”</p>	<p>USAPA Seniority Integration Proposal, § VII at p. 6.</p>
<p>17 40. The claims against US Airways were dismissed for 18 lack of jurisdiction and the claims against USAPA went to 19 trial. 20 21</p>	<p><i>Addington v. US Airline Pilots Ass’n</i>, No. CV 08- 1633-PHX-NVW, 2009 WL 2169164, at *7 (D. Ariz. July 17, 2009).</p>

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28 ¹³ References to the “USAPA Seniority Integration Proposal” are to the US Airways Seniority Integration (USAPA) [Doc. No. 151-2 at p. 27].

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>1 41. At trial, the jury found that USAPA had violated 2 its DFR to the West Pilot class because it “cast aside the 3 result of an internal seniority arbitration solely to benefit 4 East Pilots at the expense of West Pilots,” and “failed to 5 prove that any legitimate union objective motivated its 6 acts.”</p>	<p><i>Addington v. US Airline Pilots Ass’n</i>, No. CV 08- 1633-PHX-NVW, 2009 WL 2169164, at *8 (D. Ariz. July 17, 2009).</p>
<p>8 42. On appeal, the Ninth Circuit did not reach the 9 merits of the West Pilots’ DFR claim against USAPA, but 10 instead held that their claim was not ripe.</p>	<p><i>Addington v. US Airline Pilots Ass’n</i>, 606 F.3d 1174, 1177 (9th Cir. 2010).</p>
<p>11 43. If US Airways accepts USAPA’s seniority 12 demand, the West Pilots have made clear that they will sue 13 US Airways for “facilitat[ing]” or “assist[ing]” USAPA’s 14 breach of DFR, and US Airways will thus be exposed to 15 tens of millions of dollars in damages and invalidation of 16 any CBA that is reached with USAPA.</p>	<p>Pltff.’s Opp. to Def.’s Mot. to Dismiss at pp. 5, 9;¹⁴ West Pilots’ Correspondence at pp. 2, 4.¹⁵</p>
<p>17 44. If US Airways rejects USAPA’s demand, USAPA 18 has made clear that it will initiate a work stoppage at its 19 “earliest opportunity,” exposing US Airways to hundreds 20 of millions of dollars in lost revenue and customer 21 goodwill.</p>	<p>Pltff.’s Opp. to Def.’s Mot. to Dismiss at pp. 5, 9; USAPA Correspondence at p. 2.¹⁶</p>

23 ¹⁴ References to the “Pltff.’s Opp. to Def.’s Mot. to Dismiss” are to Plaintiff US Airways,
24 Inc.’s Opposition to Defendant USAPA’s Rule 12(b) Motion to Dismiss, filed October 21,
2010 [Doc. No. 61].

25 ¹⁵ Reference to the “West Pilots’ Correspondence” is to the letters dated June 10, 2010,
26 and July 14, 2010, from Marty Harper, attorney representing the West Pilots in *Addington*
I, to Robert Siegel, attorney representing US Airways in *Addington I* [Doc. No. 61-2].

27 ¹⁶ Reference to the “USAPA Correspondence” is to the letter dated September 6, 2010,
28 from Captain Mike Cleary, President of USAPA, to Doug Parker, Chairman and CEO of
US Airways [Doc No. 61-4].

UNDISPUTED FACTS	SUPPORTING EVIDENCE
<p>1 2 3 4 5 6 7</p> <p>45. Given the continuing legal uncertainty surrounding USAPA’s seniority demands as well as the express threats by the West Pilots and USAPA, US Airways brought this action seeking alternative declaratory judgments in accordance with Federal Rule of Civil Procedure 8(d).</p>	<p>Compl. ¶¶ 3-5.¹⁷</p>
<p>8 9</p> <p>46. This Court has ruled that US Airways’ claims are ripe.</p>	<p>Order at pp. 4-8.¹⁸</p>
<p>10 11 12 13 14 15 16 17 18</p> <p>47. The first two counts in US Airways’ Complaint seek a judicial declaration that: (i) entry into a CBA with a non-Nicolau seniority list would constitute a violation of USAPA’s DFR and US Airways is therefore prohibited from implementing a non-Nicolau seniority list; or (ii) entry into a CBA with a non-Nicolau seniority list would not constitute a violation of USAPA’s DFR and US Airways is therefore not prohibited from implementing a non-Nicolau seniority list.</p>	<p>Compl. ¶¶ 5 & 35.</p>

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27 ¹⁷ References to the “Compl.” are to Complaint for Declaratory Relief, filed July 26, 2010 [Doc. No. 1].

28 ¹⁸ Reference to the “Order” is to Order filed June 1, 2011 [Doc. No. 85].

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Dated: January 27, 2012.

O'Melveny & Myers LLP

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