PATRICK J. SZYMANSKI
(*pro hac vice*)
PATRICK J. SZYMANSKI, PLLC
1900 L Street, NW, Ste 900
Washington, DC 20036
Telephone: (202) 721-6035
szymanskip@msn.com

SUSAN MARTIN (AZ#014226)
JENNIFER KROLL (AZ#019859)
MARTIN & BONNETT, P.L.L.C.
1850 N. Central Ave. Suite 2010
Phoenix, Arizona 85004
Telephone: (602) 240-6900
smartin@martinbonnett.com
jkroll@martinbonnett.com

BRIAN J. O'DWYER (*pro hac vice*)
GARY SILVERMAN (*pro hac vice*)
O'DWYER & BERNSTIEN, LLP
52 Duane Street, 5th Floor
New York, NY 10007
Telephone: (212) 571-7100
bodwyer@odblaw.com
gsilverman@odblaw.com

Attorneys for Defendant US Airline Pilots Association

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

US Airways, Inc., a Delaware Corporation, Plaintiff, v. Don Addington, an individual; John 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-ROS **RESPONSE OF DEFENDANT US AIRLINE PILOTS ASSOCIATION TO THE MOTION FOR SUMMARY JUDGMENT FILED BY THE WEST PILOT CLASS AND TO THE MEMORANDUM OF POINTS AND AUTHORITIES SUBMITTED BY US AIRWAYS**

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INTRODUCTION

USAPA submits this memorandum in response both to the Motion for Summary Judgment filed by the West Pilot Class and to the Memorandum of Points and Authorities submitted by US Airways. In Point I we show that nothing presented by either the West Pilot Class or US Airways in any way affects the applicability of the rule stated in *Association of Flight Attendants v. USAir, Inc.*, 24 F.3d 1432 (D.C. Cir. 1994), that a new bargaining representative is entitled to bargain a new collective bargaining agreement on a blank slate. As the court there explicitly held, a new bargaining representative "has full bargaining rights" and is not "in any way limited by the [previous] contract in pursuit of new terms of employment." *Id.* at 1440. In Point II, we show there is no merit to the suggestion by US Airways that the ability to deviate from the Transition Agreement flows from the Transition Agreement itself rather than from the duty to bargain imposed by the Railway Labor Act ("RLA") and that, in particular, the Nicolau Award, which never became effective, is not an "actual, objective working condition" and therefore forms no part of the existing conditions that constitute the RLA *status quo*. In Point III, we show that the fact that a majority of the consolidated pilot craft may have voted to replace ALPA with USAPA because of the Nicolau Award does not in any way suggest or establish a breach of the duty fair representation, even if such a claim could properly be considered in this case. To the contrary, *Air Wis. Pilots Prot. Comm. v. Sanderson*, 909 F.2d 213 (7th Cir. 1990), holds that this is exactly what a majority is free to do if it is dissatisfied with the actions of their exclusive bargaining representative. In Point IV, we show that the other arguments raised by the West Pilot Class are without merit. And, finally, in Points V and VI, we show that while the facts necessary to grant summary judgment on Count II of the Complaint as requested by USAPA are undisputed, the facts necessary to grant judgment on Count I as requested by the West Pilot Class are disputed and USAPA is entitled to discovery before any judgment can be rendered on Count I.

I. NOTHING PRESENTED BY THE OTHER PARTIES AFFECTS THE APPLICABILITY OF THE RULE STATED IN *AFA v. USAIR*

Nothing presented by either the West Pilot Class or US Airways in any way affects the applicability to this case of the rule in *Association of Flight Attendants v. USAir ("AFA")*, 24 F.3d 1432 (D.C. Cir. 1994). *AFA* involved the merger of USAir, Inc., and Shuttle, Inc., and the contracts covering their flight attendants. Prior to the merger, the flight attendants employed by USAir, Inc., were represented by the Association of Flight Attendants ("AFA") and covered by a collective bargaining agreement between AFA and USAir (the "AFA-USAir Agreement"), and the flight attendants employed by Shuttle, Inc., were represented by the Transport Workers Union ("TWU") and covered by a collective bargaining agreement originally negotiated between TWU and Eastern Airlines (the predecessor to Shuttle, Inc.) (the "TWU-Eastern Agreement"). After hearings, the National Mediation Board ("NMB") declared USAir and Shuttle a "single carrier" and certified AFA as the bargaining representative for the consolidated craft of flight attendants. AFA claimed that the existing AFA-USAir Agreement should be extended to cover the former Shuttle flight attendants. USAir claimed the former Shuttle flight attendants were still covered by the Eastern-TWU Agreement. The case was presented on cross-motions for summary judgment, each party seeking a declaratory judgment supporting its position.

Writing for a unanimous panel, Judge Edwards initially observed, "It is clear that the former Shuttle flight attendants are not covered by the terms of the existing collective bargaining agreement between USAir and AFA" and "It is also clear that neither USAir nor AFA is contractually bound by the Eastern-TWU Agreement for these parties have not assented to any of the terms of that agreement." *Id.* at 1433-34. Having found that the parties were not bound by the previous agreement, the court observed (*id.* at 1434):

> Nonetheless, insofar as the Eastern-TWU agreement establishes conditions of employment for Shuttle flight attendants, the agreement fixes the "status quo" (i.e., the starting point) in the bargaining relationship between USAir and AFA on behalf of Shuttle flight attendants. This means that, under the Railway Labor Act ("RLA" or "Act"), 45 U.S.C. Sec. 156 (1988), the terms

> of the Eastern-TWU agreement will continue to govern the rates of pay, rules, and working conditions of Shuttle flight attendants until USAir and AFA agree otherwise.

This rule, that an agreement entered into by a previous representative (TWU in *AFA*, ALPA here) is not "contractually" binding on the new representative (AFA in *AFA*, USAPA here), is directly applicable to the instant case, and the ALPA agreements (including the pre-merger ALPA-America West Agreement, the pre-merger ALPA-US Airways Agreement and the Transition Agreement) are not "contractually" binding on USAPA. Equally applicable is the second part of the holding in *AFA*, namely that, while not "contractually" binding, the previous agreements—to the extent they established "rates of pay, rules and working conditions"—"fix[] the 'status quo' (i.e., the starting point) in the bargaining relationship." *Id*. Thus, while not "contractually" binding, the ALPA agreements—to the extent they establish "rates of pay, rules and working conditions"—fix the *status quo* in this case "(i.e., the starting point)" under the RLA.

The West Pilot Class attempts to distinguish *AFA* by saying that "when read in context" the court's statement that a new bargaining representative "is not 'in any way limited by the [predecessor's] contract in [its] pursuit of new terms of employment'" "merely recognized the general principle of freedom of contracting." West Pilots' Motion for Summary Judgment" (Doc. 151) (hereafter " WPCMSJ _"), at 7. US Airways admits that *AFA* applies to this case, and makes essentially the same argument by asserting that the Transition Agreement is subject to change, not because of the RLA, but because the Transition Agreement provides by its own terms that it "may be modified by the written agreement of the Association [i.e., ALPA] and the Airline Parties." Plaintiff US Airways, Inc.'s Memorandum Of Points And Authorities Pertaining To Defendants' Cross-Motions For Summary Judgment" (Doc. 156) (hereafter "USAMem _"), at 11.

The holding in *AFA* completely undercuts these arguments, which are based upon the contention that USAPA is somehow "contractually" bound by ALPA's agreements, the Transition Agreement included. As stated clearly and unequivocally by the court in

AFA, "It is . . . *clear* that *neither* USAir nor AFA is *contractually* bound by the [predecessor] Eastern-TWU Agreement *for these parties have not assented to any of the terms of that agreement*." *Id.* at 1433-34 (emphasis added).

Equally without merit is the claim by the West Pilot Class (WPCMSJ, at 7), that USAPA is bound to follow the ALPA agreements because of a statement in the First Annual Report of the National Mediation Board (1935), at pp. 23-24, quoted in *AFA*, 24 F.3d at 1438. First, as noted in *AFA*, courts "are not bound by the Board's policy statements on contractual issues." *Id*. Second, the contracts at issue here, unlike those referred to in the 1935 NMB Annual Report, are not "in effect", but are amendable. Third, *AFA* rejected the 1935 NMB position, stating "*We do not hold* . . . that the Shuttle flight attendants or their new bargaining agent, AFA, are in any way limited by the Eastern-TWU contract in their pursuit of new terms of employment, *or that they are locked into the old contract for any defined period of time, regardless of what that contract may provide*." *Id.* (emphasis added).

In sum, *AFA* applies, USAPA is not "contractually" bound by any of ALPA's agreements and USAPA is not "in any way limited by the [predecessor's] contract in pursuit of new terms of employment." *Id.* at 1440.

II. THE NICOLAU AWARD IS NOT PART OF THE RLA *STATUS QUO*

As *AFA* states and as we explained in our opening Memorandum (USAPAMSJ, at 7, 10-11),[1] the ALPA agreements, to the extent they establish "actual, objective working conditions," fix the *status quo* that must be maintained by the parties while they negotiate a new collective bargaining agreement. RLA, Section 6, 45 U.S.C. §156. Section 6 provides that while the parties are bargaining "rates of pay, rules, or working conditions shall not be altered . . . until the controversy has been finally acted upon . . . by the National Mediation Board . . . ." *See Detroit & Toledo Shore Line R.R. v. United Transp.*

[1] USAPA's Motion for Summary Judgment (Doc. 152) is referred as "USAPAMSJ."

Union, 396 U.S. 142, 150-53 (1969); *accord Air Cargo Inc. v. Local 851, Int'l Bhd. of Teamsters*, 733 F.2d 241, 246 (2d Cir. 1984).

In *Shore Line*, the Supreme Court held that the "rates of pay, rules and working conditions" that must be maintained as part of the RLA *status quo* consist of those "actual, objective working conditions and practices, broadly conceived, *which were in effect prior to the time the pending dispute arose*." 396 U.S. at 153 (emphasis added). As explained in *Air Cargo*, the "actual, objective working conditions" that constitute the RLA *status quo* are not necessarily those defined in a collective bargaining agreement but are the working conditions "in effect" at the time the dispute arises even if they are not in the agreement or differ from the agreement. *Id.* at 246 (and cases cited) ("If the parties have agreed to practices different than those specified in the collective bargaining agreement, or if actual behavior has been acquiesced to by the other party, *see Shore Line*, 396 U.S. at 154, the actual practices may constitute the status quo."). Thus, the Nicolau list is not part of the RLA *status quo* for the simple reason that is not an "actual working condition" and was not "in effect" at the time the Section 6 notice initiating the instant bargaining "dispute" was filed.[2]

For these reasons, there is absolutely no merit to the suggestion by US Airways that the ability of US Airways and USAPA to modify the Transition Agreement arises not from the RLA but from the provision of the Transition Agreement that provides it "may be modified by the written agreement of the Association [i.e., ALPA] and the Airline Parties." USAMem., at 11.

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[2] *Transport Workers Union v. Hawaiian Airlines, Inc.*, 2009 WL 972483 (D.Hawaii, April 8, 2009), *aff'd without opinion, 344 Fed. App'x 351* (9th Cir. 2009), demonstrates the application of *Shore Line* in a way directly relevant to the instant case, holding that an agreement between a union and an employer that never became effective (because it was subject to ratification and had not been ratified), is not part of the RLA *status quo*. Thus, by force of that reasoning, even if the Nicolau Award/List could be considered a tentative agreement between ALPA and US Airways, since it was an agreement subject to, but not ratified, could form no part of the RLA *status quo*.

With respect to seniority, it is clear that the system presently in effect is a system of two separate seniority lists and bidding systems, one for the former America West pilots and one for the former US Airways pilots. This seniority system, not the Nicolau Award, constitutes the "actual, objective working conditions" that are "in effect". This seniority system therefore constitutes the RLA *status quo* and fixes "the starting point" for bargaining. In short, USAPA is neither bound by the Nicolau Award nor required to justify any departure from the Nicolau Award. USAPA is free to negotiate seniority on a blank slate.[3]

III. THE MAJORITY WAS ENTITLED TO REPLACE ALPA

The West Pilot Class suggests that the pilots who voted for USAPA and against ALPA in the election conducted by the NMB did so for the sole purpose of avoiding the Nicolau Award (WPCMSJ, 13-14; WPCSOF, ¶¶48-53[4]). USAPA has objected to and moved to strike this contention because it is based upon pure speculation—no one knows why each pilot voted as she or he did in the secret ballot election conducted by the National Mediation Board,[5] particularly given that pilots had several other good and sufficient reasons for ousting ALPA, including, by way of example, the three concessionary contracts ALPA bargained without any snap-back provision to restore lost wages and benefits in the event that US Airways recovered and became profitable (as indeed it has), the fact that ALPA allowed US Airways to terminate the pilots' pension plan without any substitute or adequate compensation and that ALPA had changed the

[3] For this reason, there is no merit to any of the arguments asserted by the West Pilot Class that USAPA is in some way required to justify a "departure" from the Nicolau Award. WPCMSJ, Sections B.1, B.3 and C, at 9-11, 12-15.

[4] The West Pilots' Statement of Facts in Support of Motion for Summary Judgment (Doc. 151) is referred to as "WPCSOF".

[5] Indeed, the NMB has ruled that it violates the RLA to ask employees how they intend to vote or why in a representation election. *Stillwater Cent. RR*, 33 N.M.B. 100, 1338 (2006) (carrier's interrogation and polling of employees on their view of the union "interfered with the employees' free choice of a representative and constitute[d] election interference"); *Laker Airways*, 8 N.M.B. 236, 252 (1981).

criteria applicable in seniority integration disputes without ratification by the pilots. USAPA nevertheless concedes that the Nicolau Award was a significant issue during the election, that USAPA clearly and publicly opposed the Award because, among other things, the Award violates ALPA Merger Policy, and that it is likely some pilots voted for USAPA and against ALPA for this reason either by itself or in conjunction with other reasons. But it is simply not possible to say that all the pilots who voted for ALPA did so because of the Nicolau Award, or what percentages of "East Pilots" or "West Pilots" voted either way.

Whatever the reasons, the pilots voted to oust ALPA and replace it with USAPA, which they were clearly entitled to do under the RLA. The fact that a majority of the pilots chose to exercise their rights guaranteed by the RLA to oust ALPA has nothing to do with the duty of fair representation claim the West Pilot Class attempts to assert in this case, even if such a claim could be maintained in the face of the *Addington* decision.

The pilots' right to oust ALPA was addressed by Judge Posner in *Air Wis. Pilots Prot. Comm. v. Sanderson*, 909 F.2d 213 (7th Cir. 1990). The dispute in *Air Wisconsin* began when Air Wisconsin acquired the smaller Mississippi Valley Airlines. Both pilot groups were represented by ALPA. The Air Wisconsin pilots argued that the seniority list should be merged based on date of hire. The Mississippi Valley pilots wanted credit for the fact that before the merger their airline had been growing more rapidly than Air Wisconsin. "The arbitrators split the difference," giving the Mississippi Valley pilots "greater seniority than they would have obtained if only length of service had been considered, but less than they had asked for." *Id.* at 215. Some of the pre-merger Air Wisconsin pilots twice tried to replace ALPA as the collective bargaining representative with a newly created union, but each time a majority of the pilots voted to retain ALPA. A group of dissatisfied pilots then sued, alleging that ALPA had breached its duty of fair representation. Holding that ALPA had not violated its DFR to the pre-merger Air Wisconsin pilots who constituted the majority of consolidated pilot craft, Judge Posner observed, "It cannot be said too often that the judicial remedies available to employees

unhappy with their collective bargaining representative are highly limited" and that "If the employees don't like the union that represents them, they can vote it out . . . , as in fact the plaintiffs in this case have twice tried to do." *Id.* at 217. As Judge Posner noted, "a majority is better protected by the electoral process." *Id.*

In short, the RLA guarantees employees the right to choose their representative by majority vote, and that is exactly what happened here. The individual pilots exercised their rights to select USAPA in an election conducted by the NMB. The election was by secret ballot. The fact that some pilots are unhappy with the results of that election process provides no basis for a claim against USAPA. There simply is nothing invidious or discriminatory about it, and the West Pilot Class cites nothing to the contrary.

IV. THE OTHER ARGUMENTS RAISED BY THE WEST PILOT CLASS ARE WITHOUT MERIT

A. USAPA is Not a "Successor" to ALPA or Otherwise "Bound By" the ALPA Arbitration Proceeding

The West Pilot Class argues that ALPA had a duty to implement the Nicolau Award, that because USAPA is a "successor" to ALPA it has the same duty, and that the failure by USAPA to defend the Nicolau Award therefore violates the DFR. This argument has no merit for several reasons.

First, USAPA was not a party to or otherwise bound by the ALPA Merger Policy. The ALPA Merger Policy specifically states that "[t]he Award of the Arbitration Board shall be final and binding on all parties to the arbitration . . . ." (USAPA Ex. 4, p. 8) The parties to the arbitration were the ALPA subordinate bodies—the US Airways Merger Committee and the America West Merger Committee. It is undisputed that neither US Airways nor ALPA directly participated in the arbitration. As a non-party, USAPA is not bound by the former ALPA Merger Policy and the result of that policy as it did not "assent[] to any of the terms of that agreement." *AFA*, 24 F.3d at 1434; *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("It goes without saying that a contract cannot bind a nonparty"); *Gulf Trading & Transp. Co. v. M/V Tento*, 694 F.2d 1191,

1196 n.8 (9th Cir. 1982) ("nonparties cannot be bound by an agreement").

Gvozdenovic v. United Air Lines, 933 F.2d 1100 (2d Cir. 1991), cited by the West Pilots Class (WPCMSJ, at 15-16), does not hold otherwise. In affirming the district court's dismissal of appellants' DFR claim and their petition to vacate the arbitration award, the Second Circuit held that "because appellants participated voluntarily and actively in the arbitration process, they are bound by its outcome . . . ." 933 F.2d at 1103. That holding has no application to the case at bar because in contrast to the appellants in *Gvozdenovic*, USAPA neither agreed to arbitrate nor "manifested a clear intent to arbitrate the dispute." *Id.*, at 1105.

The West Pilot Class argues that USAPA is bound by the arbitration because the "East Pilots" participated in the arbitration proceeding (WPCMSJ, at 9).[6] However, there is no identity between the ALPA subordinate bodies—the US Airways MEC and the US Airways Merger Committee—and USAPA. USAPA was and is a completely separate organization from both ALPA and the ALPA subordinate bodies that existed prior to USAPA's certification by the NMB. Moreover, it is incontrovertible that unlike the ALPA subordinate bodies, USAPA was not bound to the ALPA Merger Policy and never independently assented to any of the terms of that policy. As a stranger to the ALPA Merger Policy and arbitration, USAPA is not bound thereby. Accordingly, the fact the ALPA US Airways MEC and ALPA US Airways Merger Committee participated in the arbitration proceeding required by ALPA Merger Policy is of no legal consequence with respect to USAPA.

Second, the ALPA Merger Policy does not require USAPA to defend the Nicolau

[6] As set forth in USAPA's response to the 56.1 statements submitted by the West Pilots and US Airways, USAPA rejects the implicit claim the East Pilots are equivalent to the US Airways MEC and the West Pilots are equivalent to the America West MEC. The fact is that although the pre-merger America West pilots were represented by ALPA and the ALPA subordinate body known as the America West MEC, and although the pre-merger US Airways pilots were represented by ALPA and the ALPA subordinate body known as the US Airways MEC, this representation relationship was extinguished and forever changed when the NMB certified USAPA as the new representative.

Award because by its very terms it bound ALPA only.[7] The ALPA Merger Policy specifically states that the "Award of the Arbitration Board . . . shall be defended by ALPA." (USAPA Ex. 4.) The court in *Air Wis. Pilots Prot. Comm. v. Sanderson*, 909 F.2d 213, 216 (7th Cir. 1990), cited by the West Pilot Class, recognized that "ALPA's policy [Merger Policy] signifies only that if the award is valid, it is definitive so far as ALPA is concerned."

Moreover, the fact is that ALPA has abandoned the very policy upon which the West Pilot Class relies and has reinstated "Longevity" as one of three guiding principles governing the resolution of seniority integration disputes[8] and precedent shows that ALPA could ignore even the then existing merger policy without violating its DFR. *See Rakestraw v. United Airlines*, 981 F.2d 1524 (7th Cir. 1992); *Baker v. Newspaper and Graphic Communications Union, Local 6*, 628 F.2d 156 (D.C. Cir. 1980). The West Pilots gloss over the reasoning of the court in *Rakestraw* which found no DFR breach even though ALPA deviated from its own merger policy. Explaining why ALPA acted reasonably in refusing to follow its own merger policy, the *Rakestraw* court stated that "[c]ramming the 'merger policy' down the throats of an unwilling cadre at TWA could have been calamitous for Ozark's pilots . . ." 981 F.2d at 1533. The same reasoning applies here. It has been "calamitous" to cram the Nicolau Award down the throats of the pre-merger US Airways Pilots, as the Ninth Circuit certainly recognized when it noted that it was unlikely that the pilots would ever ratify a CBA incorporating the Award. *Addington v. U.S. Airline Pilots Ass'n*, 606 F.3d 1174, 1180 (9th Cir. 2010).

The West Pilot Class mistakenly relies on *Air Wis. Pilots Prot. Comm. v.*

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[7] It its response (WPCMSJ, at 9), the West Pilot Class argues, "Indeed, USAPA admits that USAPA had [sic] was 'bound to defend' the Nicolau Arbitration", citing WPCSOF, ¶53. In fact, the WPCSOF states USAPA concedes **ALPA** was "bound to defend" Nicolau, not that USAPA was so bound. (emphasis added)

[8] See ALPA Merger Policy effective April 30, 2009, at Section 45.C.4.e, listing as "Factors to be considered in constructing a fair and equitable seniority list": "Career expectations," "Longevity" and "Status and category." USAPA Ex. 11, at p. 14.

Sanderson, 909 F.2d 213 (7th Cir. 1990), and both the West Pilot Class and US Airways mistakenly rely on *Bernard v. Air Line Pilots Ass'n, Int'l*, 873 F.2d 213 (9th Cir. 1989), on this point. On this point, *Air Wisconsin* is distinguishable from the instant case in several respects in that unlike the majority pilots in *Air Wisconsin*, the ALPA US Airways MEC did challenge the Nicolau Award in court (USAPA Exs. 7-8) and, unlike here where there is no ratified collective bargaining agreement implementing the Nicolau list, in *Air Wisconsin* the challenged seniority system was already effective. Moreover, the US Airways pilots did exactly what the court in *Air Wisconsin* said was their right to do—they ousted ALPA as the bargaining representative. 909 F.2d at 217.

The facts in *Bernard* are very different. In *Bernard*, uncontested facts showed that ALPA breached its DFR when it deviated from its own merger policy in order to discriminate against the Jet America pilots because they were not unionized prior to the merger. 873 F.2d at 217. The Jet America pilots were excluded from the bargaining process despite the fact that ALPA was representing them. *Id.* at 215-16. No such motive is present in the instant case.

Third, the West Pilot Class cites a series of New York state court and other cases in an effort support its assertion that USAPA is in some way a "successor" to ALPA and therefore bound by what ALPA agreed to (WPCMSJ, Section A, at 5-9). Initially, we submit that none of these cases or the theory espoused by the West Pilot Class can survive *AFA*. Simply put, this is a collective bargaining matter, it is governed by the Railway Labor Act, *AFA* states the applicable RLA rule and neither the cases nor the West Pilot Class theory have anything to do with this case or the matter at hand.

In any event, both the theory and the cases cited by the West Pilot Class concern an entirely different question, namely whether an alleged "successor" can be held liable for a claim asserted against or a judgment imposed upon the predecessor. In *Parker v. Metro. Transp. Auth.*, 97 F. Supp. 2d 437 (S.D.N.Y. 2000), the plaintiff had filed a claim against the employer and the predecessor union for age and disability discrimination. *NLRB v. Laborers' Int'l Union*, 882 F.2d 949 (5th Cir. 1989), involved a judgment

against the predecessor union for compensatory backpay arising from a judgment in an unfair labor practice proceeding. In both cases, the courts found that the alleged successor organization could be held liable for the predecessor's unlawful actions only if it could be established that the alleged successor was a continuation or "alter ego" of the predecessor. *Parker*, 97 F. Supp.2d at 451-52; *NLRB v. Laborers' Int'l Union*, 882 F.2d at 951-52 (and cases cited). This determination depends on an assessment of all the facts including the nature of the relationship, if any, between the predecessor and the successor (for example, whether the predecessor merged into the successor), whether there is substantial continuity of assets and employees between the predecessor and the successor, whether the officers of the predecessor continued in some official capacity with the successor union, whether the successor uses the same office or facilities, and, in general, whether there has been such continuity of operations between the two organizations that it can be said that the alleged successor is essentially the same organization as the predecessor. *Parker*, 97 F. Supp.2d at 451-52; *NLRB v. Laborers' Int'l Union*, 882 F.2d at 952 n.1. The West Pilot Class has nowhere alleged or adduced facts sufficient to establish even a prima facie case that USAPA could be a "successor" under this standard. To the contrary, the facts currently before the Court entirely negate any notion that USAPA could somehow be a continuation or "alter ego" of ALPA. The two organizations—ALPA and USAPA—are entirely different and separate. ALPA ran and lost an election against USAPA to become the certified bargaining representative of the merged airlines' pilots. ALPA continues to exist and represents thousands of pilots of other airlines. To suggest that USAPA, which defeated ALPA in an election conducted by the NMB, is somehow a "continuation" or alter ego of ALPA is not only contrary to law but flies in the face of logic and the underlying RLA principle that employees are free to elect or refrain from electing their representative for purposes of collective bargaining. Such a conclusion would, in any event, require the resolution of disputed facts inappropriate on a motion for summary judgment.

The two New York state cases cited by the West Pilot Class are equally inapposite. Decided in 1941, *Matter of Triboro Coach Corp. v. N.Y. State Labor Relations Bd.*, 36 N.E. 2d 315 (N.Y. 1941), involves a public employer and the then New York state law governing labor relations for public employers in the State of New York. Decided in 1949, *Barbein v. Superior Meter Co.*, 90 N.Y.S.2d 615 (N.Y. Sup. Ct. 1949), was reversed on appeal, 275 A.D. 962 (2d Dep't 1949), a fact not noted by the West Pilot Class. In any event that case does not address a collective bargaining agreement between an employer and a union but the contract between a member and a union that requires the member to pay dues. Neither case involves the RLA, which governs here, nor involves a collective bargaining agreement.

For all of these reasons, the assertion that USAPA could in some way be a successor to ALPA under this theory and these cases is without merit, and should, we submit, be rejected.

B. The Nicolau Award is Not *Res Judicata*

Nor is there any merit to the argument of West Pilot Class that the Nicolau Award is binding under the doctrine of *res judicata.* WPCMSJ, Section B.2, at 11-12. The initial obstacle to this claim is, once again, *AFA* which states the applicable RLA rule.

In any event, *res judicata* does not apply by its own terms. "The doctrine of *res judicata* provides that a final judgment on the merits bars further claims by parties or their privies based on the same cause of action," and "is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdiction." *Headwaters Inc. v. U.S. Forest Serv.*, 399 F.3d 1047, 1051-52 (9th Cir. 2005) (internal quotation marks omitted). The elements necessary to establish *res judicata* are: "(1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties." *Tahoe-Sierra Pres. Council. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003) (quotation marks and citation omitted); *W. Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997). The Nicolau Award satisfies none of these requirements.

First, there is no identity of claims because the dispute here is whether USAPA could breach its duty of fair representation under the Railway Labor Act merely by not incorporating in a new collective bargaining agreement the terms of an arbitration decision promulgated under a decertified union's merger policy. This is an entirely different issue from that presented in the ALPA proceeding and one which, in any event, could not be presented in an internal arbitration between two groups of employees represented by ALPA. The duty of fair representation and the effect, if any, of an internal arbitration award and decertified union's merger policy on a newly certified bargaining representative was not and could not have been determined in the arbitration. *See, e.g., In re Schimmels*, 127 F.3d 875, 881 (9th Cir. 1997).

Second, the Nicolau Award is not a "final judgment" on the merits because (a) it was never confirmed, *Caldeira v. County of Kauai*, 866 F.2d 1175, 1178 (9th Cir. 1989), *cert. denied*, 493 U.S. 817 (1989); *Donnell v. City of Cedar Rapids*, 437 F. Supp. 2d 904, 921-22 (N.D. Iowa 2006) citing *McDonald v. City of W. Branch*, 466 U.S. 284, 104 S. Ct. 1799 (1984)) and (b) the "common law rule of preclusion . . . has not been extended to arbitration hearings." *Caldeira*, 866 F.2d at 1178 & n.2 (the Supreme Court "has consistently held that an unreviewed arbitration decision does not preclude a federal court action").

In particular, the Nicolau Award is certainly not final on the duty of USAPA to negotiate with respect to a new collective bargaining agreement. As the Ninth Circuit recognized, any agreement between USAPA and the airline is subject to member ratification. *Addington*, 606 F.3d at 1177. The Ninth Circuit stated it was:

> at best, speculative that a single CBA incorporating the Nicolau Award would be ratified if presented to the union's membership. ALPA had been unable to broker a compromise between the two pilot groups, and the East Pilots had expressed their intentions not to ratify a CBA containing the Nicolau Award. Thus, even under the district court's injunction mandating

> USAPA to pursue the Nicolau Award, it is uncertain that the West Pilots' preferred seniority system ever would be effectuated.

Addington, 606 F.3d at 1180. Even under ALPA's own policy and the Transition Agreement, there could have been no "finality" to the arbitration award unless ratified by the membership. Even if ALPA was still the bargaining representative, it is clear that the Nicolau Award would not and could not have finally resolved the seniority issue.[9]

Third, there is no privity between USAPA and any of the ALPA parties (ALPA itself, the MECs and the Merger Committees). The West Pilots Class has completely failed to meet its burden to present any facts that would show privity. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1082 (9th Cir. 2003); *In re Schimmels*, 127 F.3d at 881. Privity between parties "is a legal conclusion 'designating a person so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved.'" *In re Schimmels*, 127 F.3d at 881 (quoting *Sw. Airlines v. Tex. Int'l Airlines*, 546 F.2d 84, 94 (5th Cir. 1977), *cert. denied*, 434 U.S. 832 (1977)); *see also FTC v. Garvey*, 383 F.3d 891, 897 (9th Cir. 2004) (quoting *In re Schimmels*). USAPA's interests were not represented adequately (or for that matter at all since it was not in existence at the time of the arbitration), by either party to the arbitration. Nor is there any "substantial identity" between USAPA and either party to the arbitration (the ALPA America West Merger Committee and the ALPA US Airways Merger Committee) as USAPA had no "significant interest," did not participate in the arbitration and was not "so closely aligned as to be virtually representative." *Tahoe-Sierra Pres. Council.*, 322 F.3d at 1082. Privity cannot exist where there is a "substantial divergence of interest" between the parties with respect to

[9] See *US Airways MEC v. America West MEC*, 525 F. Supp. 2d 127, 131 (D.D.C. 2007), where the court observed as follows with respect to the ALPA Merger Policy and seniority lists resulting therefrom, "Ultimately, the ALPA Merger Policy generates a proposed seniority list which ALPA promises to present to the merged airlines in an effort to persuade the merged airlines to adopt the list. See, Defs.' Opp'n 3-4."

the matters as to which the judgment is subsequently invoked. Restatement (Second) of Judgments § 42(1)(3), comment c. There is no dispute here that the interests of USAPA, as, for example, expressed in its constitution, diverge dramatically with the interests of ALPA, as evidenced by its merger policy that formed the basis for the arbitration proceeding. In addition, the relationships that the courts have deemed "sufficiently close" to justify a finding of "privity" do not apply. *Tahoe-Sierra Pres. Council v. Tahoe Regional Planning Agency*, 322 F.3d 1064, 1082 (9th Cir. 2003); *In re Schimmels*, 127 F.3d 875, 881 (9th Cir. 1997). USAPA is also not a non-party that has succeeded to either the US Airways MEC or the America West MEC's interest exclusively. [10] While the US Airways MEC and the America West MEC had their separate interests, USAPA's interest is on behalf of the entire post-merger bargaining unit.

C. Any Policy Favoring the "Finality" of Arbitration Awards Is Inapplicable

The argument of the West Pilot Class that USAPA's decision to propose something other than the Nicolau Award somehow violates the policy favoring the finality of arbitration awards (WPCMSJ, Section D, at 15-16) ignores the rule established by *AFA* , and the fact that the decision of the ALPA Board of Arbitration (aka, "the Nicolau Award") was binding, if at all, only on ALPA and not on USAPA which did not participate in the proceeding, was not even in existence at the time of the proceeding or when the decision issued and never assented to or agreed to be bound by the decision. The argument is wholly without merit. See USAPAMSJ, at 9.

[10] Both ALPA MECs were constrained by ALPA's Merger Policy and USAPA certainly did not succeed to the interests of that policy, which governed the arbitration. Further, once USAPA became the certified exclusive bargaining representative of the US Airways pilots on April 18, 2008, the America West MEC and US Airways MEC ceased to exist. (USAPA SOF, ¶34; Mowrey Decl., at ¶25.)

V. THE WEST PILOT CLASS FAILS TO SHOW THAT USAPA VIOLATED RLA SECTION 2, FIRST, AS ALLEGED BY COUNT I

The motion filed by the West Pilot Class is for summary judgment on Count I of the complaint which alleges that USAPA violates its duty under the RLA "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions" by pursuing a seniority proposal other than the Nicolau Award. But the memorandum filed by the West Pilot Class of law is devoid of a single word explaining, let alone establishing, how USAPA violates its duty under the RLA "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions." Instead, the West Pilot Class simply repeats the same DFR arguments it made in *Addington* and in its cross-claim against USAPA in this case, both of which have been dismissed.

Initially, as explained in USAPA's opening memorandum (USAPAMSJ, at 14 n.7), this claim and these arguments must be dismissed for the same reason the Ninth Circuit ruled in *Addington* that this claim is not ripe and this Court dismissed the cross-claim asserted by the West Pilot Class in this case. As the Ninth Circuit recognized:

> At this point, neither the West Pilots nor USAPA can be certain what seniority proposal ultimately will be acceptable to both USAPA and the airline as part of a final CBA. Likewise, it is not certain whether that proposal will be ratified by the USAPA membership as part of a new, single CBA. Not until the airline responds to the proposal, the parties complete negotiations, and the membership ratifies the CBA will the West Pilots actually be affected by USAPA's seniority proposal—whatever USAPA's final proposal ultimately is. Because these contingencies make the claim speculative, the issues are not yet fit for judicial decision.

Addington, 606 F.3d at 1179-80.

Second, because the West Pilot Class is not the certified bargaining representative but simply a group of individual employees, it has no standing to assert a breach of the duty to bargain. "The RLA does not expressly grant a private right of action to enforce its provisions." *Bensel v. Allied Pilots Ass'n*, 387 F.3d 298, 318 (3d Cir. 2004), *cert. denied*, 544 U.S. 1018 (2005); *see also Cooper v. TWA Airlines,*, 349 F. Supp. 2d 495,

503 (E.D.N.Y. 2004) ("Plaintiffs do not suggest any right of action available to the individual plaintiffs" citing *Bensel*); *Marcoux v. American Airlines*, 645 F. Supp. 2d 68 (E.D.N.Y. 2008) (airline employees have no private right of action to bring a Section 2, First claim against the airline or a union), *aff'd*, 581 F.3d 47 (2d Cir. 2009), *cert. denied*, 130 S.Ct. 3513 (2010); *Starke v. N.Y. Chicago & St.Louis R.R.*, 180 F.2d 569 (7th Cir. 1950) (holding that the court did not have jurisdiction to hear individual plaintiff's claim against the company premised on Section 152, First of the RLA seeking restoration of seniority rights.).

Third, and in any event, the West Pilot Class has not presented any facts to show that USAPA has violated its RLA Section 2, First, duty to bargain. The standard is high. "[G]reat circumspection should be used in going beyond cases involving 'desire not to reach an agreement,' for doing so risks infringement of the strong federal labor policy against governmental interference with the substantive terms of collective-bargaining agreements." *Chicago & Nw. Ry. Co. v. United Transp. Union*, 402 U.S. 570, n.11, 91 S.Ct. 1731 (1971); *Ass'n of Flight Attendants v. Horizon Air Indus.*, 976 F.2d 541, 545 (9th Cir. 1992) ("Courts must resist finding violations of the RLA based solely on evidence of hard bargaining, inability to reach agreement, or intransigent positions."). The West Pilot Class has neither alleged nor shown any facts that would demonstrate a desire on the part of USAPA not to reach agreement by refusing to meet and confer, exchange bargaining proposals, or otherwise comply with the RLA formal procedures. *See Horizon Air*, 976 F.2d at 545 ("[T]he initial inquiry is whether the parties have complied 'with the formal procedures' of the RLA by meeting and exchanging proposals."); *Int'l Ass'n of Machinists v. Varig Brazilian Airlines,.*, 855 F. Supp. 1335, 1350 (E.D.N.Y. 1994), *vacated by consent*, 889 F. Supp. 90 (E.D.N.Y. 1995) (listing examples quoting *Virginian Ry. Co. v. System Fed'n No. 40*, 300 U.S. 515, 548, 57 S.Ct. 592, 599, 81 L.Ed. 789 (1937)).

The mere fact that USAPA makes a proposal that deviates from ALPA's does not demonstrate a desire not to reach agreement. "In establishing seniority systems, there are

a variety of legitimate options, and the courts are careful not to substitute their judgments for those of the authorized labor organization." *Ratkosky v. United Transp. Union*, 843 F.2d 869, 876 (6th Cir. 1988). While USAPA is not proposing seniority based on strict date-of-hire (*see* USAPASOF, ¶38), a long line of authority establishes that dovetailing, the practice of merging seniority lists by seniority date, date-of-hire, or length of service, is "an equitable and feasible solution" for merging seniority rosters.[11] *See Truck Drivers & Helpers, Local Union 568 v. NLRB*, 379 F.2d 137, 143 n.10 (D.C. Cir. 1967) ("most employees have come to accept dovetailing as the preferred procedure when mergers occur") (cited by US Airways, USAMem, at 12); *Ratkosky*, 843 F.2d 869 (refusing to re-negotiate an agreement establishing seniority rights based on a two-tiered system that included dovetailing was not a breach of the union's duty of fair representation); *Rakestraw* , 981 F.2d 1524 (recognizing the wide range of reasonableness unions have in negotiating agreements following mergers, and refusing to find a breach of the duty of fair representation when the union implements endtailing or dovetailing); *Laturner v. Burlington N.*, 501 F.2d 593, 599 (9th Cir. 1974) (utilizing date-of-hire "to integrate seniority rosters is an equitable arrangement for resolving the inevitable conflicts which arise whenever a merger occurs" (citing *Humphrey v. Moore*, 375 U.S. 335, 347, 84 S.Ct. 363 (1964), *cert. denied*, 419 U.S. 1109 (1975)); *Deboles v. Trans World Airlines*, 552 F.2d 1005 (3d Cir. 1977) (upholding an agreement applying both dovetailing and endtailing).

To the contrary, as alleged in the action filed in the Eastern District of New York,

[11] The reliance by the West Pilot Class (WPCMSJ, at 10-12, 14) on *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793 (7th Cir. 1976), is misplaced The union in *Barton Brands* changed an already implemented seniority provision based on date of hire to an endtailing provision without any legitimate basis at the expense of the minority. Contrary to *Barton Brands*, the instant case does not present the situation where USAPA has abolished already implemented seniority provisions or where it lacks a non-discriminatory or reasoned basis for supporting its seniority proposal. Moreover, as explained above (Point II), the starting point for negotiating seniority is not the Nicolau Award but the existing system of two separate seniority lists and bidding systems, each generally based on date of hire.

US Airways, not USAPA, is violating Section 2, First, *inter alia*, by refusing to negotiate with USAPA regarding seniority. *AFA*, 24 F.3d at 1440 (carrier "cannot refuse to bargain over new terms based on a claim that bargaining has been settled under the pre-existing contract. Instead, we hold that a newly certified union in situations such as this one has full bargaining rights with respect to covered employees without regard to whether the employees previously have been covered by a collective bargaining agreement."). In this respect, the facts show that USAPA submitted its seniority proposal in September 2008 and that US Airways has refused since that time to negotiate concerning that proposal. Indeed, while repeatedly asserting that it is "neutral" in this dispute, the fact that US Airways has refused to negotiate over USAPA's proposal shows the contrary. These facts utterly fail to show that USAPA has violated its RLA duty to bargain.

USAPA submits the West Pilot Class has failed to adduce any evidence that USAPA has violated its RLA Section 2, First, duty to bargain and that the motion for summary judgment filed by the West Pilot Class should be dismissed.

VI. THE FACTS NECESSARY TO SUPPORT THE JUDGMENT SOUGHT BY THE WEST PILOT CLASS ARE DISPUTED

As shown above and in USAPA's opening Memorandum, the facts necessary to support USAPA's motion are undisputed. In contrast, the motion filed by the West Pilot Class depends on the intensely factual determination necessary to prove an alleged breach of the duty of fair representation and those facts are disputed.[12]

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[12] USAPA also moves to strike the references in the Memorandum of Points and Authorities submitted by US Airways (USAMem., Doc. 156, at 9:2-5, pp. 11:20–12:9 and references to the record thereto) and corresponding statement of facts, to the findings made by the District Court in the *Addington* case. The Ninth Circuit's reversal "effectively annuls or sets aside the lower court's decision for *all purposes*. Consequently, any issue implicated by the reversal must be readjudicated as if the appealed judgment or order never occurred." C. Goelz & M. Watts, *Rutter's California Practice Guide: Federal Ninth Circuit Civil Appellate Practice* (The Rutter Group 2008)§ 10:231 (emphasis in original), citing *State of Calif. Dept. of Social Services v. Thompson*, 321 F.3d 835, 847 (9th Cir. 2003). *See also id*. § 10:260 ("with reversal on

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). "The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact." *In re Barboza*, 545 F.3d 702, 707 (9th Cir. 2008) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57, 106 S.Ct. 2505, 2514-15 (1986)). In deciding a motion for summary judgment, "[t]he court must view all the evidence in the light most favorable to the nonmoving party." *Id.*, citing *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001). The judge's function is not to assess the credibility of the evidence or weigh the evidence, but is instead to "determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249, 106 S.Ct. 2505, 2511.

The facts relevant to the DFR claim are disputed. In order to establish a breach of duty of fair representation in the context of collective bargaining, a plaintiff must show that the union's conduct is "so far outside a 'wide range of reasonableness' . . . as to be irrational." *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991) (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)). This is an intensely factual determination and depends on "the factual and legal landscape at the time of the union's actions." *Id.* As set forth in our opening memorandum (USAPAMSJ, at 14 n.7), and above (Point IV), we submit that no duty of fair representation claim can properly be before the Court in this case. In any event, however, the facts concerning the DFR claim asserted by the West Pilot Class are disputed. Among the disputed facts are the following: (1) Whether USAPA's Conditions and Restrictions Proposal is "arbitrary," that is, without any reasonable or rational basis. The West Pilot Class claims there is no reason for the

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appeal, the Ninth Circuit's vacatur of a district court judgment nullifies and renders the judgment inoperative"), citing *United States v. Munsingwear*, 340 US 36, 40-41 (1950) (vacatur prevents judgment from "spawning any legal consequences"); *Orff v. United States*, 358 F.3d 1137, 1149 (9th Cir. 2004) (district court's rulings on merits of certain claims issued without subject matter jurisdiction vacated as nullities).

proposal other than to retaliate against the former America West pilots and to favor former US Airways pilots. USAPA asserts the proposal is fair and reasonable given the legitimate pre-merger career expectations of the America West pilots and the US Airways pilots and the financial and operational viability of the two operations both at the time of the merger and through the present. (2) Whether USAPA's proposal discriminates against former America West pilots. USAPA maintains that the proposal treats all pilots equally by according each a position on the merged seniority list based on his or her original date of hire, and further that the proposal in fact protects former America West pilots from having their normal domicile and work assignments taken away by former US Airways pilots through a series of conditions and restrictions. USAPA notes, moreover, that its proposal in fact allows former America West pilots with sufficient seniority to bid international wide body flying, a right they did not have with America West which had no international wide body flights. (3) Whether USAPA's proposal is "in bad faith," that is, that USAPA has some sort of invidious motive or hostility for the proposal. The West Pilot Class claims that the proposal is motivated by hostility against individual America West pilots. USAPA asserts that there is no such motive, that the proposal is simply aimed at treating each pilot fairly, respecting their legitimate pre-merger career expectations, and avoiding any windfall at the expense of other pilots. These are disputed factual determinations and, we submit, are wholly inappropriate for determination against USAPA without trial.

In particular, the West Pilot Class has failed to present any evidence showing "discrimination that is intentional, severe, and unrelated to legitimate union objectives," *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274, 301 (1971), *reh'g denied*, 404 U.S. 874, 91 S.Ct. 1909 (1971), "fraud, deceitful action or dishonest conduct" by USAPA, *id.* at 299, 91 S.Ct. at 1924, or arbitrary conduct that is "wholly irrational, inexplicable, or unintentional," *Beck v. United Food & Commercial Workers Union, Local 99*, 506 F.3d 874, 880 (9th Cir. 2007).

On the other hand, USAPA has produced specific evidence showing the "reasoned basis" for its rejection of the Nicolau Award and in support of its own seniority proposal. *Herring v. Delta Air Lines,*, 894 F.2d 1020, 1023 (9th Cir. 1990) (in affirming district court's finding of no DFR, stating that "[i]n these circumstances, a union does not breach the duty of fair representation to others so long as it proceeds on some reasoned basis"), *cert. denied,* 494 U.S. 1016 (1990); *see also* USAPA SOF, ¶¶38, 46; Mowrey Decl., ¶26; USAPA Exs. 13-15).

Given that the material facts are genuinely in dispute, USAPA submits that summary judgment on Count I is not appropriate and the motion by the West Pilot Class should be denied.

VII. USAPA IS ENTITLED TO DISCOVERY BEFORE ANY JUDGMENT CAN BE RENDERED AGAINST IT ON THE DFR CLAIM ASSERTED BY THE WEST PILOT CLASS

As explained at the Case Management Conference, footnotes to the Statement of Facts submitted in support of USAPA's motion for Summary Judgment, and in more detail in the Rule 56(d) motion filed herewith, USAPA submits that, before judgment can be entered against USAPA on the DFR claim asserted by the West Pilot Class, USAPA is entitled to discovery with respect to (1) US Airways' operational changes and financial status and (2) efforts by members of the West Pilot Class and The Army of Leonidas to prevent USAPA from engaging former America West pilots in substantive discussions concerning USAPA's seniority proposal. As USAPA also explained, it should be allowed to present expert testimony concerning the effect of the operational changes and financial developments on what would have been the pre-merger career expectations of the former America West pilots.

USAPA submits that the discovery will show (1) that at the time of the merger America West was in dire financial straits and was about to declare bankruptcy, (2) that at the time of the merger US Airways had recovered from its bankruptcy reorganization and was profitable and stable, (3) that the volume of flying on the routes America West

brought to the merger has steadily decreased, (4) that the volume of flying on the routes US Airways brought to the merger has remained steady or has slightly increased, (5) that no additional aircraft have been added to the fleet flown by the former America West pilots, (6) that additional wide body aircraft have been added to the fleet flown by former US Airways pilots, (7) that a substantial portion (24 percent or more) of the routes that US Airways brought to the merger are being flown by former America West pilots, that, as a result, as many as 355 former America West pilots would be furloughed but for the merger, (8) that US Airways has hired and intends to hire additional pilots to fly former US Airways routes, (9) that the "East" operation (the former US Airways routes) have produced significant profits for US Airways since the merger, and (10) that since the merger the "West" operation (the former America West routes) have not been profitable and in fact have shown losses over several quarters.

USAPA believes that these facts will establish that the objective pre-merger career expectations of the America West pilots were in fact no better and in many ways significantly worse that the objective pre-merger career expectations of the US Airways pilots and that the volume of future flying that came to the merger from US Airways was significantly more than that brought to the merger by America West. In short, we believe that these facts will firmly demonstrate that there was and is no legitimate basis to give less senior America West pilots any premium or "bonus" at the expense of more senior US Airways pilots in constructing a merged pilot seniority list and therefore that USAPA's date of hire proposal is fair and reasonable.

USAPA further submits that discovery will support USAPA's facts, showing that several former America West pilots and The Army of Leonidas, which funded the plaintiffs in the *Addington* case and the *Addington* Defendants in this case, have deliberately obstructed, interfered with, and frustrated the efforts of USAPA, as the certified bargaining representative of all of the pilots, to work with and communicate with former America West pilots to explain to them the details of the current USAPA Conditions and Restrictions Proposal on seniority and to engage former America West

Pilots in legitimate discussions to improve that proposal. USAPA has tried to engage in substantive discussions with former America West pilots as part of its function as their bargaining representative. The fact that USAPA's seniority proposal has not changed since it was submitted to US Airways in September 2008 results from the refusal of US Airways to address the proposal in negotiations and from the fact that USAPA has not been able to engage former America West pilots in legitimate substantive discussions about the proposal because of this obstruction.

For these reasons, USAPA submits that the motion of the West Pilot Class for summary judgment on their DFR claim should be denied because the relevant facts are disputed and USAPA is entitled to discovery and to present expert testimony based on that discovery before those disputed facts can be resolved against USAPA and in favor of the claim asserted by the West Pilot Class.

CONCLUSION

For the reasons stated here and in our opening Memorandum, the Court should enter judgment dismissing Counts I and III and granting USAPA's motion for summary judgment on Count II.

Respectfully submitted this 21st day of February 2012.

Martin & Bonnett, P.L.L.C.

By: s/Susan Martin
Susan Martin
Jennifer L. Kroll
Martin & Bonnett
1850 N. Central Ave. Suite 2010
Phoenix, AZ 85004

Patrick J. Szymanski (*pro hac vice*)
Patrick J. Szymanski, PLLC
1900 L Street, NW, Ste 900
Washington, DC 20036

Brian J. O'Dwyer (*pro hac vice*)

Gary Silverman (*pro hac vice*)
O'Dwyer & Bernstien, LLP
52 Duane Street, 5th Floor
New York, NY 10007

Attorneys for US Airline Pilots Association

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2012, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

US Airways, Inc.
Karen Gillen
111 West Rio Salado Parkway
Tempe, AZ 85281

Robert A. Siegel
Chris A. Hollinger
Ryan W. Rutledge
400 South Hope Street, Suite 1500
Los Angeles, CA 90071-2899

Attorneys for Plaintiff

Marty Harper
Kelly J. Flood
Andrew S. Jacob
Katherine V. Brown
Polsinelli & Shughart, PC
CityScape
One East Washington St., Ste. 1200
Phoenix, AZ 85004

Attorneys for West Pilot Class

s/J.Kroll