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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

US AIRLINE PILOTS ASSOCIATION'S RESPONSE TO THE SEPARATE STATEMENT OF FACTS SUBMITTED BY US AIRWAYS

1 Pursuant to Fed. R. Civ. P. 56 and L.R. Civ. 56.1(b), Defendant US Airline Pilots
2 Association ("USAPA") submits its response to the Separate Statement of Facts
3 submitted by Plaintiff US Airways. (Doc. 156-1) This response is supported by
4 USAPA's Separate Statement of Facts in Support of USAPA's Motion for Summary
5 Judgment (Doc. 153, "USAPA SOF") and declarations and exhibits thereto, USAPA's
6 Response to the West Pilots' Statement of Facts in Support of Motion for Summary
7 Judgment and USAPA's Additional Controverting Facts ("USAPA ACF") and
8 declarations and exhibits thereto, including the Second Declaration of Randal E. Mowrey
9 ("Second Mowrey Decl."), the Second Declaration of Michael J. Cleary ("Second Cleary
10 Decl."), and the record before this Court.

11 USAPA objects to and moves to strike Plaintiff's statements of fact that relate to
12 the jury and court findings in *Addington v. USAPA,* ("*Addington I"*), in that the vacatur
13 by the Ninth Circuit results in the vacating *ab initio* of all substantive findings and rulings
14 in *Addington I*, as if it never occurred. As observed by Judge Wake, "the substantive
15 rulings in *Addington* have been vacated pursuant to mandate, and both cases would now
16 write on clean slates if there were anything to write in *Addington*, which there is not."
17 2010 WL 4117616, at *2 (D.Ariz. Oct. 19, 2010). The Ninth Circuit's reversal
18 "effectively annuls or sets aside the lower court's decision for *all purposes*.
19 Consequently, any issue implicated by the reversal must be readjudicated as if the
20 appealed judgment or order never occurred." C. Goelz & M. Watts, *Rutter's California*
21 *Practice Guide: Federal Ninth Circuit Civil Appellate Practice* § 10:231 (emphasis in
22 original), citing *State of Calif. Dept. of Social Services v. Thompson*, 321 F3d 835, 847
23 (9th Cir. 2003). *See also id*. § 10:260 ("with reversal on appeal, the Ninth Circuit's
24 vacatur of a district court judgment nullifies and renders the judgment inoperative"),
25 citing *United States v. Munsingwear*, 340 US 36, 40-41 (1950) (vacatur prevents
26 judgment from "spawning any legal consequences"); *Orff v. United States*, 358 F3d 1137,
27 1149 (9th Cir. 2004) (district court's rulings on merits of certain claims issued without
28

subject matter jurisdiction vacated as nullities).

USAPA responds to US Airways' Statement of Facts as follows:

1. The predecessor to the current US Airways merged with America West Airlines, Inc. ("America West") pursuant to an agreement executed in May 2005.

Response:

Undisputed.

2. At the time of the merger, the Air Line Pilots Association ("ALPA," or the "Association") represented the US Airways pilots, now known as "East Pilots" and the America West pilots, now known as "West Pilots" in two separate bargaining units, or "crafts or classes."

Response:

Disputed. The pilots employed by the current US Airways are included in a single bargaining unit. The terms "East Pilots" and "West Pilots" are descriptive and are used solely for the purposes of this litigation. USAPA notes this qualification to the terms "East Pilots" and "West Pilots" here and with respect to the use of these terms wherever they appear in the Separate Statement of Facts submitted by US Airways.

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.

Response:

Disputed. The numbers set forth above are approximations. The actual and accurate numbers are set forth in USAPA SOF ¶¶8-9. In addition, USAPA avers that the existence of furloughs at US Airways operations -- which are heavily concentrated on the East coast (Boston, New York, Washington, D.C., and international destinations) – resulted from, in significant part the September 11, 2001 terrorist attacks because US Airways operations were affected to a much greater extent than America West operations

and that conditions have changed substantially since that time. USAPA SOF ¶¶10, 44.

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."

Response:

USAPA objects and moves to strike pursuant to L.R. Civ. 7.2(b) and 56.1(a) the term "mandated" in Plaintiff's Statement of Fact ¶4 as argumentative and asserting a legal conclusion, not a statement of undisputed material fact. Subject to and without waiving USAPA's objections, USAPA disputes ¶4 in part. While ¶4 accurately quotes a portion of the cited collective bargaining agreement that was negotiated in 1997, it is objectionable to the extent Plaintiff omits the facts that the collective bargaining agreement referred to had an initial amendable date of January 2, 2003 and a subsequent amendable date of December 30, 2009, due to interim Letters of Agreement, and "remains in effect to this day for the East Pilots" pursuant to the status quo provisions of the Railway Labor Act, 45 U.S.C. §156. USAPA SOF ¶10.

5. ALPA's Merger Policy is applicable if the pilots of both pre-merger carriers are represented by ALPA.

Response:

Disputed in part. USAPA objects to the use of the present tense. "The ALPA Merger Policy" means, in this context, the policy that was in effect at the time of the merger. It was amended by ALPA subsequent to the Nicolau Award. USAPA SOF ¶39. Notwithstanding the foregoing, USAPA does not dispute the ALPA Merger policy **was** applicable to both pilot groups because, prior to April 18, 2008, ALPA was the NMB certified representative of the pilots employed by both US Airways and America West.

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."

Response:

USAPA objects and moves to strike pursuant to L.R. Civ. 7.2(b) and 56.1(a) the term "mandated" in Plaintiff's Statement of Fact ¶6 as argumentative and asserting a legal conclusion, not a statement of material fact. Subject to and without waiving USAPA's objections, USAPA disputes ¶6 in part. Paragraph 6 accurately quotes a portion of the cited collective bargaining agreement that was effective in December 2003. USAPA objects to the extent US Airways omits facts, including the collective bargaining agreement referred to became amendable on December 31, 2006, and "remains in effect to this day for the West Pilots" pursuant to the status quo provisions of the Railway Labor Act, 45 U.S.C. §156. USAPA SOF ¶12. USAPA further disputes the statement on the grounds that neither pilot group is "represented by the Association" and therefore the Association Merger Policy is completely irrelevant to the rights and responsibilities of USAPA and US Airways, and neither US Airways nor USAPA are required to follow the "Association Merger Policy".

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."

Response:

Undisputed that ¶7 accurately quotes a portion of the cited collective bargaining agreement that was negotiated in 2003.

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.

Response:

Disputed in part. It is not disputed that the Transition Agreement contains provisions relating to the integration of the seniority lists of pilots employed by US Airways and America West and applied to both ALPA-represented pilot groups prior to April 18, 2008. However, the Transition Agreement was entered into by ALPA, not the respective MECs, as ALPA was the NMB certified bargaining representative of the pilots of both airlines. USAPA SOF ¶14. In addition, USAPA disputes the contention that the Transition Agreement "governed" or governs the integration of the pilot seniority lists. The integration of pilot seniority lists was "governed" by the ALPA Merger Policy and applied at the time to both pilots groups because ALPA was the NMB certified representative of both pilot groups.

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."

Response:

Disputed in part. Disputed to the extent that ¶9 suggests that the signatures of the MEC chairmen had any legal significance. Article XVIII, Section 1, of the ALPA Constitution in effect at the time of the merger explicitly provides that no agreement of any kind is effective unless signed by ALPA's President. USAPA ACF ¶5; Second Mowrey Decl., ¶11.

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."

Response:

USAPA objects and moves to strike pursuant to L.R. Civ. 7.2(b) and 56.1(a) the words "mandated" and "required" to the extent that US Airways means to convey anything other than the fact the quoted provision is contained in the Transition Agreement and because the terms "mandated" and "required" are argumentative and purport to assert conclusions of law rather than material facts. Additionally, USAPA objects and moves to strike pursuant to L.R. Civ. 7.2(b) and 56.1(a) the implicit legal conclusion contained in ¶10 that the "process" elements of the Transition Agreement, including the provisions relating to the process or procedures for effectuation of the integration of the bargaining lists, and the results of that process, are binding on USAPA, in that such conclusion is contrary to settled law (*e.g. Transport Workers Union v. Hawaiian Airlines, Inc.*, 2009 WL 972483 (D.Hawaii, April 8, 2009), *aff'd, 344 Fed. Appx. 351* (9th Cir. 2009)). Subject to and without waiving USAPA's objections, USAPA disputes ¶10 in part except that USAPA does not dispute ¶10 accurately quotes a portion of the Transition Agreement.

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."

Response:

Disputed in part. The contentions contained in ¶11 are objected to as argumentative in that it includes numerous disputed contentions and implications rather than a statement of fact. It is not disputed that the ALPA Merger Policy provided for arbitration in the event the parties (the two ALPA-represented pilot groups, acting by and through the Merger Committees appointed by the respective MECs) could not reach agreement on an integrated seniority list. That said, a number of points raised in ¶11 are disputed.

First, the ALPA Merger Policy did not apply to any "two pilot groups", it applied only to pilot groups represented by ALPA. USAPA SOF ¶16.

Second, whereas it is correct the ALPA Merger Policy contained a provision that stated, "the purpose of the arbitration shall be to reach a fair and equitable resolution consistent with ALPA policy", this statement is not a guarantee the result of that process was or would be "fair and equitable" and, indeed, USAPA submits it failed to achieve that standard by a wide mark, as evidenced, *inter alia*, by the efforts by the US Airways MEC to set the award aside with the ALPA Executive Council and litigation. USAPA SOF ¶¶21, 23.

Third, Plaintiff's statement regarding a "fair and equitable" basis omits very significant qualifying language that is quoted above: the touchstone of being "fair and equitable" was consistency with ALPA policy. Among the reasons for the US Airways' MEC dispute with Nicolau Award was that the ALPA Merger Policy was, in itself, unfair and inequitable and the Nicolau award violated the letter and spirit of the ALPA Merger Policy. USAPA SOF ¶21.

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."

Response:

Disputed in part. It is not disputed that ALPA was not directly involved and did not appear as a participating party in the seniority-list integration arbitration and that ¶12 accurately quotes a portion of the ALPA Merger Policy as in effect at the time of the proceeding. That said, USAPA disputes the statement that ALPA's "role [was] solely limited" to providing the process for resolution of the dispute, in fact, its role was far more extensive. First, at the outset, any statement concerning the arbitration process begins with the fact that the entire process was ALPA's, and the only reason the process was in effect is because both pilot groups were represented by ALPA. USAPA SOF ¶16. Second, ALPA agreed to incorporate its Merger Policy into the Transition Agreement. Third, ALPA Merger Policy had been based on date of hire and was unilaterally amended without ratification by the membership of either airline. ACF ¶¶7-9; Second Mowrey Decl., ¶13-15.

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."

Response:

Undisputed that ¶13 accurately quotes a portion of ALPA Merger Policy that was in effect at the time of the proceedings.

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.

Response:

USAPA objects and moves to strike pursuant to L.R. Civ. 7.2(b) and 56.1(a) the portion of ¶14 that asserts the "seniority integration arbitration pursuant to ALPA's Merger Policy [was] required by their pre-merger CBAs as well as the Transition

Agreement" as argumentative and asserting a legal conclusion, not a statement of material fact and is not supported by the record. Subject to and without waiving USAPA's objections, USAPA disputes ¶14 in part. It is not disputed there was no agreement on an integrated seniority list and arbitration was held. USAPA disputes the statement the East Pilots and West Pilots could not agree and therefore proceeded to arbitration. The entities involved in the seniority list integration discussions – and the arbitration that followed – were the US Airways Merger Committee and America West Merger Committee, which were appointed by their respective MECs. USAPA SOF ¶16. Similarly, for two reasons, USAPA disputes the contention, "[t]he East Pilots and West Pilots . . . 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." The parties to that arbitration were the two Merger Committees and the sole reason those committees participated in the seniority-integration arbitration" is both pilot groups were represented by ALPA. USAPA SOF ¶16.

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.

Response:

Disputed in part. USAPA disputes the statement the merger representatives of the East Pilots and West Pilots chose Mr. Nicolau to serve. The entities involved in the arbitration process were the US Airways Merger Committee and America West Merger Committee, which were appointed by their respective MECs. USAPA SOF ¶16. In addition USAPA asserts that at the time the Merger Committees were required by ALPA Merger Policy to pick neutrals from a list that was established by ALPA. USAPA SOF ¶16. Notwithstanding and subject to the foregoing, it is not disputed Mr. Nicolau was chosen to serve as the Chairman of the Arbitration Board.

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.

Response:

USAPA objects and moves to strike contentions contained in ¶16 and the attached exhibit (resume of George Nicolau, annexed to the Hollinger Decl. as Ex. D) pursuant to L.R. Civ. 7.2(b) and 56.1(a) on the grounds such contentions are argumentative, without support in the record and irrelevant. The statement of Mr. Nicolau's qualifications is irrelevant and wholly objectionable to the extent his qualifications are offered to prove or suggest the seniority list that resulted from the arbitration was "fair and equitable". More to the point, the only reason that Mr. Nicolau was available to serve in this capacity is that he was on a list of ALPA approved arbitrators. Subject to and without waiving the foregoing objections, USAPA does not dispute that Mr. Nicolau was is a full-time arbitrator, mediator and attorney at the time of the arbitration hearings.

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.

Response :

Disputed in part. It is not disputed the two non-voting members of the Arbitration Board were Captain Stephen Gillen and Captain James P. Brucia. USAPA disputes the statement the non-voting members of the Arbitration Board were selected by merger representatives of the East Pilots and West Pilots; the entities involved in the arbitration process were the US Airways Merger Committee and America West Merger Committee.

18. Neither Captain Stephen Gillen nor Captain James P. Brucia was affiliated with US Airways or America West.

Response:

Undisputed.

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.

Response:

USAPA objects to ¶19 on the grounds that this is a matter of law for the Court and, in any event, is irrelevant to any issue properly before the Court in this case. Subject to and without waiving the foregoing objections USAPA disputes ¶19 in part. The "East Pilots" and "West Pilots" were not parties to the arbitration. , It is not disputed that the US Airways Merger Committee was represented by Katz & Ranzman, P.C., and that the America West Merger Committee was represented by Bredhoff & Kaiser, P.L.L.C.

20. The East Pilots and West Pilots, through their counsel, "agreed on the arbitration ground rules."

Response:

USAPA objects to the characterization that the ground rules were adopted by the "East Pilots" and the "West Pilots" on the grounds that this is a matter of law for the Court and, in any event, is irrelevant to any issue properly before the Court in this case. USAPA disputes ¶20 in part. The "East Pilots" and "West Pilots" were not parties to the arbitration. Subject to and without waiving USAPA's objections, it is not disputed that the US Airways Merger Committee and the America West Merger Committee adopted certain "ground rules" for the conduct of the arbitration. USAPA SOF ¶¶16-17.

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."

Response:

USAPA does not dispute that this is an accurate quote from the decision of the ALPA Board of Arbitration.

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.

Response:

Disputed in part. USAPA disputes the contention that "neither ALPA nor US Airways nor America West played any role" in "this process". USAPA asserts that both ALPA and US Airways were significantly involved in the overall seniority integration process. In particular, ALPA determined the entire process without any input from the affected pilots and determined whether to propose the results of the process to the airline involved. The Airline (here US Airways) negotiated a transition agreement, provided funding and information to the Merger Committees, decided whether to accept the result of the process and must negotiate a consolidated collective bargaining agreement, which is a necessary precondition for any merged seniority list to go into effect. USAPA SOF ¶¶17-18. , It is not disputed that there was a 35-page decision and that neither US Airways nor America West were directly involved in the arbitration proceeding.

23. "The US Airways initial proposal was "[sic] 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."

Response:

Disputed in part. USAPA disputes ¶23 contains an accurate description of the

position taken by the US Airways MEC and notes, in particular, that this description ignores a series of conditions and restrictions that were part of the proposal. USAPA Ex. 5 to USAPA SOF (Nicolau Award), pp. 8-13. Iit is not disputed that ¶23 accurately quotes a portion of the Nicolau Award (except there is no open quote before "grounded" in the original).

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.

Response:

Disputed. The out of context and chopped-up quotations from the Nicolau Award results in a mischaracterization of the award. USAPA objects and moves to strike pursuant to L.R. Civ. 7.2(b) and 56.1(a) the characterization of what Arbitrator Nicolau "thought" as not supported by record citations, speculative and argumentative. In addition, USAPA disputes as inconsequential Mr. Nicolau's belief the list he created was "fair and equitable", noting, *inter alia*, Mr. Nicolau was constrained by the ALPA Merger Policy, which as stated in response to ¶12 above, contained systemic biases against the interests of the former US Airways pilots. USAPA disputes the contention that the list was in fact "fair and equitable" and that it was consistent with ALPA Merger Policy. USAPA further notes that the US Airways MEC objected to the list on this ground, demanded that ALPA reject the list and filed suit in the Superior Court for the District of Columbia to vacate the decision, *inter alia*, because it violated ALPA Merger Policy. USAPA SOF ¶¶23.

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 premerger pay and standard of living. d. Maintain or improve pre-merger pilot status. e. Minimize detrimental changes to career expectations."

Response:

USAPA does not dispute that ¶25 accurately quotes a portion of ALPA Merger Policy that was in effect at times prior to April 18, 2008 and the time of the seniority integration proceeding between the US Airways Merger Committee and the America West Merger Committee.

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.

Response:

Disputed because this is an approximation and the actual and accurate facts are as stated in the decision itself and as in USAPA SOF ¶19. USAPA alleges that at the time the decision was issued approximately 300 US Airways pilots had been recalled from furlough. USAPA SOF ¶19.

27. The integrated seniority list generated through the Nicolau Award satisfied the specified criteria set out in the Transition Agreement.

Response:

USAPA objects and moves to strike pursuant to L.R. Civ. 7.2(b) and 56.1(a) Plaintiff's Statement of Fact ¶27 as argumentative and asserting a legal conclusion, not a statement of material fact. Subject to and without waiving USAPA's objections, USAPA disputes ¶ 27 in part. It is not disputed the Airline Parties accepted the seniority list generated through the arbitration before Chairman Nicolau, supporting the inference they concluded that the list satisfied the limited criteria set out in the Transition Agreement.

USAPA disputes this statement to the extent it contains the inference that the Airline Parties' conclusion the Nicolau seniority list satisfied the Transition Agreement criteria has any bearing on the issues herein as USAPA was not a party to the Transition Agreement or the arbitration and is not bound thereby. As stated in ¶29 of USAPA's Statement of Facts, ALPA sent the list to US Airways and US Airways accepted the list even though litigation seeking to vacate the decision of the ALPA Board of Arbitration was then pending and USAPA had filed an application with the National Mediation Board to be certified as the collective bargaining representative of a consolidated craft of the pilots employed by the post-merger US Airways that resulted in decertification of ALPA. USAPA SOF ¶29.

28. ALPA presented this integrated seniority list to post-merger US Airways in late 2007, as required by the Transition Agreement.

Response :

USAPA objects and moves to strike pursuant to L.R. Civ. 7.2(b) and 56.1(a) the language "as required by the Transition Agreement" as offering a legal conclusion and not a statement of material fact. Subject to and without waiving USAPA's objections, USAPA disputes ¶ 27 in part. USAPA submits that the timing of ALPA's presentation of the list to US Airways was unreasonable in light of pending litigation and a petition to certify USAPA and that it was motivated, at least in part, by bad faith and an effort to punish some US Airways pilots that were seeking to displace ALPA as the certified collective bargaining representative. Nothing in the Transition Agreement dictated the timing of presentation of the integrated seniority list to US Airways. ALPA's decision to submit that list on December 19, 2007 while challenges to the arbitration decision and to ALPA's status as collective bargaining representative were pending was not necessary and was unreasonable. USAPA does not dispute that the Transition Agreement states that the list would be "submitted to the Airline parties for acceptance" and that ALPA submitted the list to US Airways on December 19, 2007. USAPA SOF ¶28.

1 29. As required by the Transition Agreement, US Airways accepted the integrated
2 seniority list on December 20, 2007.
3 Response:
4 USAPA objects and moves to strike pursuant to L.R. Civ. 7.2(b) and 56.1(a) the
5 language "as required by the Transition Agreement" and the term "the integrated
6 seniority list" argumentative, offering a legal conclusion and not a statement of material
7 fact. USAPA also objects to the extent Plaintiff refers to the Nicolau list as "the
8 integrated seniority list" rather than the list created by Nicolau. Subject to and without
9 waiving USAPA's objections, USAPA disputes ¶ 29 in part. It is not disputed that US
10 Airways accepted the integrated seniority list on December, 20, 2007. USAPA disputes
11 the introductory clause of ¶29, in that irrespective of provisions of the Transition
12 Agreement, the Airline Parties' acceptance of the Nicolau seniority list was the result of
13 their independent judgment that it met the criteria specified in the Transition Agreement
14 and that it was otherwise proper to do so, despite the fact that the US Airways MEC had
15 requested that ALPA not release the list to the airlines and despite the fact that a petition
16 to certify USAPA as the bargaining representative was pending. Moreover, USAPA
17 disputes the implication the Transition Agreement required the Airline Parties to accept
18 the list on December 20, 2007, one day after it was submitted to it by ALPA and in the
19 context of a legal challenge to the Nicolau Award by the US Airways MEC and the
20 pendency of a representation petition before the NMB.
21 30. However, the integrated seniority list has never taken effect because the
22 Transition Agreement prohibits post-merger US Airways from using an integrated
23 seniority list prior to "Operational Pilot Integration," and because "Operational Pilot
24 Integration" cannot occur under the Transition Agreement until after the negotiation
25 of a single collective bargaining agreement applicable to the integrated pilot groups –
26 which, largely because of the unresolved seniority dispute, has not happened to this day.
27 Response:
28

USAPA objects and moves to strike pursuant to L.R. Civ. 7.2(b) and 56.1(a) Plaintiff's conclusions regarding the purported requirements and prohibitions of the Transition Agreement as argumentative, offering a legal conclusion and not a statement of material fact. USAPA also objects as argumentative Plaintiff's reference to the Nicolau list as "the integrated seniority list" rather than the list created by Nicolau. Subject to and without waiving USAPA's objections, USAPA disputes ¶30 in part. It is not disputed that the Nicolau list accepted by US Airways has not gone into effect or that the Transition Agreement provides that the list accepted by US Airways would not go into effect until "negotiation of a Single Agreement" (Section VI.A). USAPA disputes the statement that a single collective bargaining agreement has not been negotiated "largely because of the unresolved seniority dispute". USAPA contends the principal reason there is no single collective bargaining agreement is the failure of US Airways to bargain in good faith with USAPA as required by the Railway Labor Act. USAPA SOF ¶55; Second Cleary Decl. ¶7.

31. The East Pilots perceived the Nicolau Award to be far less favorable to them as a group than the "date-of hire" integrated seniority list they had sought from Arbitrator Nicolau.

Response:

Disputed in part. It is not disputed the US Airways MEC objected to the Nicolau Award, as evidenced, *inter alia*, by its demand that the Nicolau Award be set aside (USAPA SOF ¶21) and the lawsuit it commenced against the America West MEC in June 2007 (USAPA SOF ¶23). In response to ¶31, USAPA disputes and objects to:

(a) the reference to "East Pilots" in that the entity involved at that time was the US Airways MEC;

(b) the description of the seniority proposal made by the US Airways MEC during the ALPA merger process as simply a "date-of-hire" proposal because this description ignores the conditions and restrictions that were part of that proposal; and

(c) US Airways' speculation about the reasons pilots previously employed by US Airways objected to the Nicolau Award as offered without foundation or personal knowledge.

32. In response, the East Pilots formed a new labor union, defendant US Airline Pilots Association ("USAPA"), whose constitutional "objectives" include "maintain[ing] uniform principles of seniority based on date of hire and the perpetuation thereof, with reasonable conditions and restrictions to preserve each pilot's unmerged career expectations."

Response:

Disputed in part. USAPA disputes the contention the "East Pilots formed a new labor union" and that a new labor union was formed "in response" to the contentions in ¶31. Iit is not disputed that a new labor union was formed, that dissatisfaction with the ALPA merger process was a significant reason for the formation of a new union and that ¶32 accurately quotes a portion of one provision in the USAPA Constitution.

33. The East Pilots outnumbered the West Pilots, and, following a representation election between USAPA and ALPA, the National Mediation Board ("NMB") certified USAPA as the new collective bargaining representative for both the East Pilots and West Pilots on April 18, 2008.

Response:.

USAPA objects and moves to strike pursuant to L.R. Civ. 7.2(b) and 56.1(a) contentions contained in ¶33 as argumentative and speculative to the extent that it speculates how so-called "East" and "West" pilots voted and the reasons pilots voted one way or another in the secret ballot election conducted by the NMB. Moreover, USAPA disputes the implicit contention the representation election was a thumbs up or down on the Nicolau Award. The bottom line is that while there were many causes of discontent with ALPA (including dissatisfaction with the ALPA merger policy), no one knows why pilots voted as they did and US Airways' implicit contention as to cause and effect is

mere speculation. Notwithstanding the foregoing, it is not disputed that USAPA was certified as the bargaining representative of a combined pilot craft by decision of the NMB issued on April 18, 2008. USAPA SOF ¶33.

34. USAPA and US Airways engaged in collective bargaining negotiations for a single labor contract but no agreement has been reached.

Response:

Disputed. USAPA and US Airways continue to engage in bargaining for an integrated collective bargaining agreement. Second Cleary Decl., ¶8. USAPA alleges, as it has in the action filed in the Eastern District of New York, that the principal reason no agreement has been reached is the failure of US Airways to bargain in good faith with USAPA as required by the Railway Labor Act. USAPA SOF ¶55.

35. In June 2008, US Airways announced that it intended to furlough approximately 300 pilots, 140 of whom would be West Pilots.

Response:

Disputed because this is an approximation and is misleading for the reasons stated in USAPA SOF ¶35.

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.

Response:

USAPA objects and moves to strike ¶ 36 pursuant to L.R. Civ. 7.2(b) and 56.1(a) as argumentative, asserting a legal conclusion and not a statement of fact, and is pure speculation and not supported by an admissible portion of the record. Plaintiff cites paragraph 3 of the Hemenway Declaration (Doc. 108) but that declaration does not even support this speculative statement. USAPA further objects on the grounds that no particular seniority list, including the Nicolau list, is mandated and that no integrated

seniority list can be implemented until the ratification of a single integrated collective bargaining agreement. It is pure speculation that such an agreement would have been ratified as of June 2008 or that furloughs would have been required at that time if a ratified agreement was in effect. As set forth in USAPA's Rule 56(d) motion for discovery, USAPA cannot present facts essential to oppose Plaintiff's ¶36 without discovery.

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.

Response:

Disputed in part. It is not disputed that ¶37 generally describes the allegations made in the lawsuit. USAPA disputes, however, the description of its seniority proposal as simply a "date-of-hire" proposal for the reasons stated in USAPA SOF ¶38; USAPA Exs. 13-15. Moreover, USAPA objects to any consideration of the substance of *Addington* case, other than its procedural details, on the grounds that it was vacated by the United States Court of Appeals for the Ninth Circuit. The vacatur by the Ninth Circuit results in the vacating *ab initio* of all substantive findings and rulings in *Addington I*, as if it never occurred. As observed by Judge Wake, "the substantive rulings in *Addington* have been vacated pursuant to mandate, and both cases would now write on clean slates if there were anything to write in *Addington*, which there is not." 2010 WL 4117616, at *2 (D. Ariz. Oct. 19, 2010).

38. In September 2008, while the litigation was pending, USAPA made its first and only seniority list proposal in the collective bargaining negotiations with US

Airways. That proposal consisted of a non-Nicolau seniority list that was "based on the integration of the pre-merger US Airways . . . and former pre-merger America West . . . certified pilot seniority lists . . . on a date-of-hire basis."

Response:

Disputed in part. It is not disputed USAPA made a seniority list bargaining proposal in September 2008. That said, USAPA objects to any description of its seniority proposal as simply a "date-of-hire" proposal for the reasons set forth in USAPA SOF, ¶38 and as shown in USAPA Exhibit 15. USAPA further objects that, under the Ninth Circuit's decision in *Addington v. USAPA*, consideration of USAPA's current seniority proposal is not properly before the Court in this case. USAPA further objects that, in any event, it is entitled to discovery before any decision can be issued that depends on the substance of its current seniority proposal. See USAPA's Rule 56(d) motion. USAPA further objects to the statement that its 2008 seniority proposal was its "first and only seniority list proposal" to the extent that by this statement US Airways attempts to suggest that somehow USAPA has been derelict in its duty to bargain. To the contrary, as alleged in the action filed in the Eastern District of New York and as stated in USAPA Statement of Facts in this case, US Airways has never addressed and continues to refuse to address USAPA's proposal. USAPA SOF ¶38.

39. Although the USAPA proposal provided, for a stated period of time in some specific circumstances, that strict date-of-hire principles would not be applied in a manner detrimental to the West Pilots, the proposal would have specifically mandated that "Furlough and recall shall be accomplished on an integrated seniority list basis and shall supersede protected position provisions."

Response:

Disputed. Paragraph 39 mischaracterizes USAPA's bargaining proposal regarding seniority. For the reasons stated in USAPA SOF ¶¶46-48, USAPA asserts that the proposal made in 2008, which US Airways has never discussed or negotiated, is open to

discussion with the West pilots and to modification, change and amendment to address legitimate concerns that it does not sufficiently protect their interests and further asserts that The Army of Leonidas, including several individual West pilots, have deliberately frustrated USAPA's efforts to engage West pilots in discussing the proposal. USAPA objects that, under the Ninth Circuit's decision in *Addington*, consideration of USAPA's current seniority proposal is not properly before the Court in this case. USAPA further objects that, in any event, it is entitled to discovery before any decision can be issued that depends on the substance of its current seniority proposal. See USAPA's Rule 56(d) motion.

40. The claims against US Airways were dismissed for lack of jurisdiction and the claims against USAPA went to trial.

Response:

USAPA objects to any consideration of the substance of *Addington* case, other than its procedural details, on the grounds that it was vacated by the Ninth Circuit Court of Appeals. Subject to and without waiving the foregoing objection, USAPA does not dispute ¶40.

41. At trial, the jury found that USAPA had violated its DFR to the West Pilot class because it "cast aside the result of an internal seniority arbitration solely to benefit East Pilots at the expense of West Pilots," and "failed to prove that any legitimate union objective motivated its acts."

Response:

USAPA objects and moves to strike ¶41 pursuant to L.R. Civ. 7.2(b) and 56.1(a) as not supported by any admissible evidence. Any and all jury and judicial findings from and determinations in *Addington I* have been vacated by the Ninth Circuit as if they never existed. As Judge Wake observed, as a result of the Ninth Circuit's vacatur, it is as if the case never happened. In denying US Airways' motion to have the instant case transferred to him, he stated that "the substantive rulings in *Addington* have been vacated

pursuant to mandate, and both cases would now write on clean slates if there were anything to write in *Addington*, which there is not." 2010 WL 4117616, at *2 (D.Ariz. Oct. 19, 2010). Subject to and without waiving USAPA's objections, USAPA disputes ¶41. No one, including Judge Wake, knows why the jury reached its verdict and any statement otherwise is wholly speculative.

42. On appeal, the Ninth Circuit did not reach the merits of the West Pilots' DFR claim against USAPA, but instead held that their claim was not ripe.

Response:

Disputed in part. USAPA does not dispute the Ninth Circuit held the DFR claim was not ripe. The Ninth Circuit found it did not have jurisdiction and did not reach the merits of numerous issues that were argued by the parties. *See* USAPA SOF ¶42.

43. If US Airways accepts USAPA's seniority demand, the West Pilots have made clear that they will sue US Airways for "facilitat[ing]" or "assist[ing]" USAPA's breach of DFR, and US Airways will thus be exposed to tens of millions of dollars in damages and invalidation of any CBA that is reached with USAPA.

Response:

Disputed in part. USAPA does not dispute that counsel for certain pilots on the America West seniority list sent a letter to US Airways threatening to sue US Airways if it agreed to a seniority provision other than the Nicolau Award. USAPA disputes US Airways' contention it will be exposed to tens of millions of dollars in damages and invalidation of any CBA that is reached with USAPA as contrary to law and asserted by US Airways to bolster this spurious claim of potential exposure, in aid of the object of delaying negotiations with USAPA. As set forth in USAPA's Rule 56(d) motion for discovery, USAPA cannot present facts essential to oppose Plaintiff's ¶43 without discovery.

44. If US Airways rejects USAPA's demand, USAPA has made clear that it will initiate a work stoppage at its "earliest opportunity," exposing US Airways to hundreds

of millions of dollars in lost revenue and customer goodwill.

Response:

Disputed in part. USAPA does not dispute that it has threatened a work stoppage, at the "earliest opportunity" allowed by the Railway Labor Act, if US Airways fails to agree to an "industry standard" collective bargaining agreement. USAPA otherwise disputes ¶44 and, in particular, denies that it has ever threatened US Airways with a work stoppage tied directly to US Airways' position on seniority. Moreover, as set forth in USAPA's Rule 56(d) motion for discovery, USAPA cannot present facts essential to oppose Plaintiff's ¶44 without discovery.

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).

Response:

Disputed in part. See USAPA response to Plaintiff's ¶44. It is not disputed that this is the purported reason stated by US Airways for filing the instant action. USAPA disputes, however, that this is the real reason for the action and, in particular, asserts that the action was filed to further delay negotiations (and thereby to benefit US Airways economically by the continued payment of substandard wages and benefits). USAPA further asserts that this lawsuit is the product of collusion between Plaintiff and counsel for certain pilots and The Army of Leonidas to circumvent the decision of the United States Court of Appeals in *Addington*. USAPA SOF, ¶46. As set forth in USAPA's Rule 56(d) motion for discovery, USAPA cannot present facts essential to oppose Plaintiff's ¶45 without discovery.

46. This Court has ruled that US Airways' claims are ripe.

Response:

Not disputed that the Court denied USAPA's Rule 12(b)(1) motion to dismiss pursuant to which the Court stated it "must accept the allegations in the complaint and draw all reasonable inferences in US Airways' favor." (Doc. 85 at p. 4) USAPA nevertheless continues to assert that the Ninth Circuit *Addington* decision precludes consideration of any duty of fair representation claim in this case and, in particular, precludes consideration of the claims asserted by US Airways because they are directly related to and entirely derivative of the DFR claim by certain former America West pilots against USAPA with respect to the Nicolau Award. As set forth in response to ¶44, USAPA denies that it threatened to "initiate a work stoppage at its "earliest opportunity."

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.

Response:

Not disputed that ¶47 generally describes Counts I and II of the Complaint in this civil action. USAPA continues to assert that the *Addington* decision precludes consideration of any duty of fair representation claim in this case and, in particular, precludes consideration of the claims asserted by US Airways because they are directly related to and entirely derivative of the DFR claim by certain former America West pilots against USAPA with respect to the Nicolau Award.

Respectfully submitted this 21st day of February 2012.

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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:

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