Karen Gillen
US Airways, Inc.
111 West Rio Salado Parkway
Tempe, AZ 85281
State Bar No. 018008
Facsimile: (480) 693-5932
karen.gillen@usairways.com
Telephone: (480) 693-0800

Robert A. Siegel (admitted *pro hac vice*)
Chris A. Hollinger (admitted *pro hac vice*)
Ryan W. Rutledge (admitted *pro hac vice*)
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071-2899
Facsimile: (213) 430-6407
rsiegel@omm.com
Telephone: (213) 430-6000

Attorneys for Plaintiff
US Airways, Inc.

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-PHX-ROS

PLAINTIFF US AIRWAYS, INC.'S OPPOSITION TO US AIRLINE PILOTS ASSOCIATION'S MOTION TO STRIKE STATEMENTS AND EVIDENCE OFFERED BY US AIRWAYS, AND REPLY TO US AIRLINE PILOTS ASSOCIATION'S RESPONSE TO THE SEPARATE STATEMENT OF FACTS SUBMITTED BY US AIRWAYS [DOC. 162]

US Airways does not take a position on the defendants' cross-motions for summary judgment on Counts 1 and 2 of the Complaint, and has not itself filed a motion for summary judgment. Instead, at the suggestion of this Court during the December 1, 2011 Scheduling Conference, US Airways filed a memorandum of law, with a supporting separate statement of facts, in order to provide the Court with US Airways' understanding of the applicable legal standard and background facts.

In response, USAPA has filed objections and a motion to strike certain of US Airways' statement of facts—even though USAPA does not generally dispute the accuracy of the evidence US Airways cites. In doing so, USAPA re-argues at length its legal position. USAPA misses the point. US Airways was not purporting to present facts in opposition to or in support of either defendant's summary judgment cross-motion, and in many instances the facts cited were merely for the assistance of the Court and not material to the current motions. Accordingly, if the facts cited are legitimately in dispute, they can be ignored by this Court for purposes of resolving the defendants' summary judgment motions. But in substantial part, as we show below, they are not legitimately disputed.

US Airways' Statement of Fact ¶ 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."

USAPA's 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.

US Airways' Reply. US Airways agrees that the terms "East Pilots" and "West Pilots" are descriptive. The East Pilots and West Pilots are now a single bargaining unit, as USAPA notes, but it is undisputed that they were separate bargaining units at the time of the merger.

US Airways' Statement of Fact ¶ 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.

USAPA's 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.

US Airways' Reply. As US Airways noted, its figures were approximations. Nothing in USAPA's response undermines the accuracy of US Airways' figures as approximations. US Airways has not confirmed, but does not dispute for purposes of this motion, that the exact figures, as USAPA asserts, are 5,098 East Pilots, 1,691 of whom were on furlough, and a total of 1,894 West Pilots.

US Airways' Statement of Fact ¶ 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."

USAPA's 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 endable 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.

US Airways' Reply. The text of the CBA states: "If the Successor is an air carrier (or a corporate parent or subsidiary of an air carrier), US Airways Group and the Company ***shall*** require the Successor to provide the Company's pilots with a seniority integration governed by the Association Merger Policy, if applicable . . ." (Doc. 156-3 at 19, emphasis added.) The use of the word "shall" indicates the requirement is mandatory. US Airways' statement that the CBA "mandated" a "seniority integration governed by the Association Merger Policy, if applicable" is not argument; it is an accurate description of the CBA. The contractual language speaks for itself. USAPA does not dispute that the terms and conditions of the CBA remain in effect, and it is immaterial whether that is because of the RLA's status quo provisions.

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

USAPA's 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.

US Airways' Reply. USAPA does not dispute the relevant fact, which relates to the application of the Merger Policy in effect at the time of the merger. US Airways has no objection to the use of the past tense.

US Airways' Statement of Fact ¶ 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."

USAPA's 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".

US Airways' Reply. The text of the CBA states: "the Company will integrate the two Pilot groups in accordance with Association Merger Policy if both groups are represented by the Association." (Doc. 34-1 at 13.) The use of the word "will" indicates the requirement is mandatory. US Airways' statement that the CBA "mandated" that the Company "integrate the two Pilot groups in accordance with Association Merger

Policy" is not argument; it is an accurate description of the CBA. The contractual language speaks for itself. USAPA does not dispute that the terms and conditions of the CBA remain in effect, and it is immaterial whether that is because of the RLA's status quo provisions.

US Airways' Statement of Fact ¶ 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.

USAPA's 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.

US Airways' Reply. The Transition Agreement states that the parties thereto include "the AIR LINE PILOTS in the service of AMERICA WEST and US AIRWAYS, respectively, as represented by the AIR LINE PILOTS ASSOCIATION (hereinafter referred to as 'the Association') by and through the Master Executive Councils of the America West and US Airways pilots ('America West MEC' and "US Airways MEC' respectively)." (Doc. 156-3 at 25.) It was signed by the Chairmen and Vice-Chairmen of the two MECs. (Doc. 156-3 at 40-41.) The parties to the Transition Agreement are apparent on its face.

The Transition Agreement further states: "The 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. The Airline Parties will accept such integrated seniority list, including conditions and restrictions, if such list and the conditions and restrictions comply with" specified criteria. (Doc. 156-3 at 30.) The Transition Agreement's terms with respect to seniority integration cannot reasonably be disputed.

US Airways' Statement of Fact ¶ 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."

USAPA's 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.

US Airways' Reply. The identities of the parties that signed the Transition Agreement are apparent on the face of the agreement. (Doc. 156-3 at 40-41.) USAPA's arguments regarding the legal significance of the facts do not affect their undisputed nature.

US Airways' Statement of Fact ¶ 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."

USAPA's 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.

US Airways' Reply. USAPA's motion to strike an "implicit legal conclusion" is not a proper motion to strike the evidence submitted by US Airways, which is undisputed. The text of the Transition Agreement states that the seniority lists "will be integrated in accordance with ALPA Merger Policy" and that "[t]he Airline Parties will accept" them if they satisfy certain criteria. (Doc. 156-3 at 30.) The use of the word "will" indicates the requirement is mandatory. US Airways' statement that the Transition

Agreement "mandated" integration of the lists in accordance with ALPA Merger Policy and "required" the Company to accept them if they satisfy certain criteria is not argument; it is an accurate description of the Transition Agreement. The contractual language speaks for itself. USAPA does not dispute that the terms and conditions of the CBA remain in effect, and it is immaterial whether that is because of the RLA's status quo provisions.

US Airways' Statement of Fact ¶ 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."

USAPA's 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.

US Airways' Reply. USAPA agrees that ALPA's merger policy provided for arbitration; indeed, the language of ALPA's merger policy speaks for itself. (Doc. 34-3 at 7, 9.) USAPA's additional points do not affect the undisputed nature of the policy.

First, the East Pilots and West Pilots indisputably were represented by ALPA, so whether the ALPA merger policy would have applied to other groups is irrelevant.

Second, USAPA's contention that the *award* was not "fair and equitable" does not dispute the provision of the ALPA Merger Policy cited in this fact.

Third, the specific provision USAPA discusses states that "[t]he purpose of arbitration shall be to reach fair and equitable resolution consistent with ALPA policy." (Doc. 34-3 at 7.) US Airways accurately characterized this provision.

US Airways' Statement of Fact ¶ 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."

USAPA's 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.

US Airways' Reply. USAPA agrees that the language of the policy is undisputed, and that ALPA did not participate in the arbitration.

US Airways' Statement of Fact ¶ 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.

USAPA's 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.

US Airways' Reply. As discussed in Facts 4, 6, 10, and 11, the East CBA, the West CBA, the Transition Agreement, and the ALPA Merger Policy all stated that the pilots "shall" or "will" engage in arbitration if they could not agree on an integrated seniority list. (Doc. 156-3 at 19; Doc. 34-1 at 13 Doc. 156-3 at 30; Doc. 34-3 at 7, 9.) US Airways' statement that these documents required such arbitration is not argument; it is an accurate description of the documents. The contractual language speaks for itself.

The US Airways MEC, as the representative of the East Pilots, selected members of the East Pilots' Merger Committee. The America West MEC, as the representative of the East Pilots, selected members of the East Pilots' Merger Committee. It is immaterial to the stated fact whether US Airways used the words East Pilots or East Pilots' Merger Committee because the East Pilots selected the members of their Merger Committee through the MEC.

US Airways' Statement of Fact ¶ 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.

USAPA's 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.

US Airways' Reply. USAPA agrees that Arbitrator Nicolau was selected, but purports to dispute the identity of the parties that selected him. The US Airways MEC, as the representative of the East Pilots, selected members of the East Pilots' Merger Committee. The America West MEC, as the representative of the East Pilots, selected members of the East Pilots' Merger Committee. It is immaterial to the stated fact whether US Airways used the words East Pilots or East Pilots' Merger Committee because the East Pilots selected the members of their Merger Committee through the MEC.

US Airways' Statement of Fact ¶ 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.

USAPA's 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.

US Airways' Reply. USAPA agrees that Arbitrator Nicolau was a full-time arbitrator, mediator and attorney. His qualifications are described in his resume, and US Airways' recitation of those qualifications is not "argumentative." The resume speaks for itself.

US Airways' Statement of Fact ¶ 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.

USAPA's 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.

US Airways' Reply. USAPA agrees that Captains Gillen and Brucia were the non-voting members of the Arbitration Board, but purports to dispute the identity of the parties that selected them. The US Airways MEC, as the representative of the East Pilots, selected members of the East Pilots' Merger Committee. The America West MEC, as the representative of the East Pilots, selected members of the East Pilots' Merger Committee. It is immaterial to the stated fact whether US Airways used the words East Pilots or East Pilots' Merger Committee because the East Pilots selected the members of their Merger Committee through the MEC.

US Airways' Statement of Fact ¶ 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.

USAPA's 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.

US Airways' Reply. The identity of the attorneys who represented the East and West Pilots is a historical fact, not "a matter of law for the Court." Moreover, USAPA agrees that the attorneys were Katz & Ranzman, P.C., and Bredhoff & Kaiser, P.L.L.C., but USAPA purports to dispute who their *clients* were. The US Airways MEC, as the representative of the East Pilots, selected members of the East Pilots' Merger Committee. The America West MEC, as the representative of the East Pilots, selected members of the East Pilots' Merger Committee. It is immaterial to the stated fact whether US Airways used the words East Pilots or East Pilots' Merger Committee because the East Pilots selected the members of their Merger Committee through the MEC.

US Airways' Statement of Fact ¶ 20. The East Pilots and West Pilots, through their counsel, "agreed on the arbitration ground rules."

USAPA's 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.

US Airways' Reply. The East and West Pilots' agreement regarding the arbitration ground rules is a historical fact, not "a matter of law for the Court." Moreover, USAPA agrees what the ground rules for the arbitration were, but only purports to dispute the identity of the parties that established those rules. The US Airways MEC, as the representative of the East Pilots, selected members of the East Pilots' Merger Committee. The America West MEC, as the representative of the East Pilots, selected members of the East Pilots' Merger Committee. It is immaterial to the stated fact whether US Airways

used the words East Pilots or East Pilots' Merger Committee because the East Pilots selected the members of their Merger Committee through the MEC.

US Airways' Statement of Fact ¶ 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.

USAPA's 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.

US Airways' Reply. By "this process," US Airways meant the arbitration. USAPA agrees that neither US Airways nor America West was directly involved in the arbitration and that a 35-page award was issued by Arbitrator Nicolau. Therefore, this fact is not in dispute.

US Airways' Statement of Fact ¶ 23. "The US Airways initial proposal was grounded on a pilot's Date of Hire adjusted for Length of Service. That proposal placed the most senior America West pilots below some 900 US Airways pilots and integrated a number of furloughed US Airways pilots with active America West pilots."

USAPA's 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. It is not disputed that ¶23 accurately quotes a portion of the Nicolau Award (except there is no open quote before "grounded" in the original).

US Airways' Reply. USAPA agrees that this fact accurately quotes the Nicolau Award (as corrected to omit the extra quotation mark), and does not (and cannot) dispute that the East Pilots' proposal was based on date-of-hire. US Airways does not disagree with USAPA that its date-of-hire proposal contained a series of conditions and restrictions. The material facts are therefore undisputed.

US Airways' Statement of Fact ¶ 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.

USAPA's 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.

US Airways' Reply. USAPA's assertion that US Airways has somehow "mischaracteriz[ed]" the Nicolau Award is false.

The Nicolau Award states: "While the Board has repeatedly expressed misgivings as to the fairness of each group's full proposal, in our judgment certain aspects of both meet the fair and equitable standard. That standard, it must be recalled, does not rank its stated criteria in any particular order. Rather they are goals to be kept in mind as equities are matched to various integration methods until a fair and equitable result is reached." (Doc. 35-6 at 25.) "Here, a majority is of the opinion that the facts of this case justify our conclusion." (Doc. 35-6 at 32.) US Airways did not mischaracterize these statements by saying that Arbitrator Nicolau fashioned what he thought to be a "fair and equitable" seniority integration.

The Nicolau Award also states: "Of considerable importance is the question of career expectations." (Doc. 34-6 at 25.) US Airways did not mischaracterize this statement by saying that the Award attributed "considerable importance" to "career expectations."

The Nicolau Award also states: "This, however, does not justify ratios beginning at the top of the list as America West proposes, for there are compensating facts such a methodology ignores. Though Date of Hire, whether adjusted for Length of Service or not, is no longer listed as a determinant or even stated as an integration criterion, there are occasions when consideration should be given to that factor." (Doc. 34-6 at 27.) US Airways did not mischaracterize this statement by saying the Award gave "consideration" to the "Date of Hire" factor.

The language of the Nicolau Award speaks for itself: it gives consideration to both career expectations (as the West Pilots requested) and date-of-hire (as the East Pilots requested), without fully accepting the position of either party.

US Airways' Statement of Fact ¶ 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.

USAPA's 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.

US Airways' Reply. As US Airways noted, its figures were approximations. Nothing in USAPA's response undermines the accuracy of US Airways' figures as approximations. US Airways cannot confirm, but does not dispute for purposes of this motion that the exact figures, as USAPA asserts, are listed in the Nicolau Award as 517 and 1,691, respectively. (Doc. 34-6 at 33 n.5; Doc. 34-6 at 6.) US Airways also cannot confirm, but does not dispute USAPA's additional fact that approximately 300 US Airways pilots had been recalled, although Arbitrator Nicolau rejected the contention that consideration should be given to recalls that occurred after the merger. (Doc. 34-6 at 31.)

US Airways' Statement of Fact ¶ 27. The integrated seniority list generated through the Nicolau Award satisfied the specified criteria set out in the Transition Agreement.

USAPA's 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.

US Airways' Reply. None of USAPA's statements disputes that the Nicolau Award satisfied the specified criteria set out in the Transition Agreement. USAPA does not identify a single criterion set out in the Transition Agreement that allegedly was not satisfied. A comparison of the terms of the Transition Agreement and the terms of the Nicolau Award makes clear that the criteria were satisfied. (Compare Doc. 156-3 at 30 with Doc. 34-6 at 34-35.) Thus, this fact is or should be undisputed.

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

USAPA's 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.

US Airways' Reply. It is undisputed that ALPA in fact submitted the integrated seniority list in late 2007, and it is undisputed that ALPA was required to submit the integrated seniority list by the Transition Agreement. US Airways takes no position concerning ALPA's motives for presenting the Nicolau Award to the Company at the time that it did so. US Airways does not contend that the Transition Agreement required submission of the list at any specific time, and USAPA's argument is therefore misplaced. The text of the Transition Agreement states that the seniority lists "will be integrated in accordance with ALPA Merger Policy and submitted to the Airline Parties for acceptance." (Doc. 156-3 at 30.) The contractual language speaks for itself.

US Airways' Statement of Fact ¶ 29. As required by the Transition Agreement, US Airways accepted the integrated seniority list on December 20, 2007.

USAPA's 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" and the term "the integrated seniority list" argumentative, offering a legal conclusion and not a statement of material fact. USAPA also objects to the extent Plaintiff refers 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 ¶ 29 in part. It is not disputed that US Airways accepted the integrated seniority list on December, 20, 2007. USAPA disputes the introductory clause of ¶29, in that irrespective of provisions of the Transition Agreement, the Airline Parties' acceptance of the Nicolau seniority list was the result of their independent judgment that it met the criteria specified in the Transition Agreement and that it was otherwise proper to do so, despite the fact that the US Airways MEC had requested that ALPA not release the list to the airlines and despite the fact that a petition

to certify USAPA as the bargaining representative was pending. Moreover, USAPA disputes the implication the Transition Agreement required the Airline Parties to accept the list on December 20, 2007, one day after it was submitted to it by ALPA and in the context of a legal challenge to the Nicolau Award by the US Airways MEC and the pendency of a representation petition before the NMB.

US Airways' Reply. USAPA agrees that US Airways accepted the integrated seniority list. Although USAPA purports to dispute that US Airways was required to do so, it cites no facts or evidence to support that contention. US Airways' contractual obligation to accept the integrated seniority list was unaffected either by the pending USAPA petition or any request that the East Pilots may have made to ALPA not to present the Nicolau Award to the Company. The text of the Transition Agreement states that "[t]he Airline Parties will accept such integrated seniority list, including conditions and restrictions, if such list and conditions and restrictions comply with" certain criteria. (Doc. 156-3 at 30.) As discussed in Fact 29, the criteria were satisfied. The use of the word "will" indicates the requirement is mandatory. US Airways' statement that it was "required" to accept the list is not argument; it is an accurate description of the Transition Agreement. The contractual language speaks for itself.

US Airways' Statement of Fact ¶ 30. However, the integrated seniority list has never taken effect because the Transition Agreement prohibits post-merger US Airways from using an integrated seniority list prior to "Operational Pilot Integration," and because "Operational Pilot Integration" cannot occur under the Transition Agreement until after the negotiation of a single collective bargaining agreement applicable to the integrated pilot groups – which, largely because of the unresolved seniority dispute, has not happened to this day.

USAPA's Response. 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.

US Airways' Reply. The text of the Transition Agreement states: "US Airways, America West and the Single Carrier may not use an integrated pilot seniority list prior to Operational Pilot Integration as defined in Section VI.A, below." (Doc. 156-3 at 30.) It further states that Operational Pilot Integration will only occur following "negotiation of the Single Agreement." (Doc. 156-3.) US Airways' statement that the Transition Agreement prohibits US Airways from using the integrated seniority list because no single CBA has been negotiated is not argument; it is an accurate description of the Transition Agreement. The contractual language speaks for itself.

USAPA's assertion that the unresolved seniority dispute is not a principal cause of the failure to reach agreement on a single CBA is wrong. As the Ninth Circuit explained, the East Pilots withdrew their representatives from the committee negotiating a single CBA in August 2007 because their MEC allegedly determined they would never ratify a CBA incorporating the Nicolau Award. *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1178 (9th Cir. 2010). The statement by USAPA that US Airways has not bargained in good faith is demonstrably wrong. To the contrary, USAPA has engaged in illegal slowdown conduct in violation of the RLA. *See US Airways, Inc. v. US Airline Pilots Ass'n*, 2011 U.S. Dist. LEXIS 111138; 191 L.R.R.M. 2910; 161 Lab. Cas. (CCH) P10,410

(W.D.N.C. Sept. 28, 2001). US Airways has consistently sought an agreement, including making a comprehensive proposal for a single CBA with a $122 million annual pay increase in May 2007. (Doc. 61-3 at 2.) In any event, the reason for not reaching agreement on a single CBA is immaterial—the issue presented in this lawsuit is limited to the seniority integration dispute, not the failure to reach an agreement.

US Airways' Statement of Fact ¶ 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.

USAPA's 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.

US Airways' Reply. This fact is indisputable. The East Pilots formed a new union, USAPA, for the express purpose of advancing a date-of-hire seniority list that they perceive to be more favorable to them than the Nicolau Award. *Addington*, 606 F.3d 1174 at 1178 ("Five months after certification, USAPA presented a seniority proposal to the airline. The proposal incorporated date-of-hire principles. Although the proposal

contained some protections for West Pilots, it was not nearly as favorable to West Pilots as the Nicolau Award.").

US Airways' Statement of Fact ¶ 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."

USAPA's 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. It 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.

US Airways' Reply. USAPA agrees that it was a newly-formed union and that its constitutional objectives include the date-of-hire provision quoted above. USAPA's purported dispute of the fact that USAPA was formed by the East Pilots is unsupported and unbelievable—as this dispute makes clear, USAPA was not formed by the West Pilots. *See also Addington*, 606 F.3d at 1177 ("The East Pilots, who were dissatisfied with the seniority integration proposal ALPA arrived at through the union's internal arbitration, led a successful effort to decertify ALPA and replace it with a new union, U.S. Airline Pilots Association ('USAPA'). Headed by an East Pilot, USAPA was constitutionally committed to pursuing date-of-hire principles, in contrast to ALPA, whose merger policy committed it to pursuing the arbitrated seniority list.").

US Airways' Statement of Fact ¶ 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.

USAPA's 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.

US Airways' Reply. USAPA's motion to strike an "implicit contention" is not a proper motion to strike the evidence submitted by US Airways, which is undisputed. USAPA agrees that the NMB certified USAPA as the bargaining representative for both the East and West Pilots. USAPA moves to strike conclusions regarding how and why the East and West Pilots voted, but the stated fact only sets forth the indisputable premise: the East Pilots outnumbered the West Pilots, as discussed in Fact 3.

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

USAPA's 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.

US Airways' Reply. USAPA agrees that the parties continue to be engaged in collective bargaining negotiations for a single labor contract, and that no agreement has been reached. USAPA's allegations regarding the reasons no single CBA has been reached do not dispute this fact. US Airways disagrees with USAPA's allegation that US Airways has not bargained in good faith, as discussed in Fact 30. Significantly, after USAPA filed its Response in this action, the Eastern District of New York dismissed the lawsuit to which USAPA refers. Although USAPA had alleged that US Airways somehow engaged in bad-faith bargaining, District Court Judge Allyne R. Ross found no basis for such an allegation and dismissed all five causes of action alleged by USAPA--including four that were dismissed with prejudice. (Doc. 171-1.) In any event, nothing in the asserted fact speaks to the reason why no single CBA has been reached.

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

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

US Airways' Reply. As US Airways noted, its figures were approximations. Nothing in USAPA's response undermines the accuracy of US Airways' figures as approximations. US Airways does not dispute for purposes of this motion that, as USAPA asserts, only 144 West Pilots and 84 East Pilots were actually furloughed, as a result of negotiations between US Airways and USAPA.

US Airways' Statement of Fact ¶ 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.

USAPA's 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.

US Airways' Reply. In order to avoid any dispute that might require further discovery, US Airways has no objection if the Court does not consider this fact. (Doc. 170 at 3.) USAPA is correct that the Hemenway Declaration does not support this fact. But USAPA's assertion that the fact is "pure speculation" by US Airways is belied by the Ninth Circuit's decision in *Addington*, 606 F.3d at 1178, which US Airways also cited: "At the time of trial, 140 West Pilots had been furloughed. Under a single CBA incorporating the Nicolau Award, none of the West Pilots would have been furloughed." Further, this fact could be independently determined by reviewing the Nicolau Award, determining the identities of the furloughed pilots, and examining their positions on the integrated seniority list. Doing so, however, is unnecessary to the resolution of the defendants' cross-motions for summary judgment.

US Airways' Statement of Fact ¶ 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.

USAPA's 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).

US Airways' Reply. USAPA agrees that this fact accurately describes the West Pilots' allegations in the *Addington* case, but purports to dispute the allegations themselves. US Airways did not take any position regarding the truth of the West Pilots' allegations. US Airways also does not dispute that the Ninth Circuit vacated the judgment in that case; indeed, US Airways expressly discussed that point in the facts below.

US Airways' Statement of Fact ¶ 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."

USAPA's 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.

US Airways' Reply. USAPA's disagreements do not dispute the asserted facts. While USAPA takes issue with describing its seniority proposal as USAPA's "first and only seniority list proposal," USAPA does not and cannot assert that it made any other seniority list proposal. Nor could USAPA need discovery regarding that fact: USAPA would know if it had made any other proposals. USAPA's objection to describing the proposal as being "on a date-of-hire basis" is also not well founded. USAPA's constitution requires a date-of-hire seniority list. (Doc. 156-3 at 89.) In any event, there is no dispute regarding the substance of USAPA's seniority proposal, which speaks for itself. Under USAPA's proposal, "[a] single US Airways pilot seniority list is hereby created, and attached as Appendix A, based on the integration of the pre-merger US Airways (hereinafter, 'East') and former pre-merger America West (hereinafter, 'West') certified pilot seniority lists of January 2007, and as appended by those pilots hired subsequently (hereinafter, 'hew-hire pilots'), on a date-of-hire basis." (Doc. 151-2 at 27.) Further, it is undisputed that, while the ancillary details of its seniority proposal may change, USAPA's demand for a non-Nicolau seniority list based on date-of-hire principles will not. (Doc 39 at 10.) Moreover, USAPA's contention that US Airways has refused to address USAPA's proposal is immaterial to this fact. And it is also misleading:

since the proposal was made, it has been the subject of continual and on-going litigation and, at times, an injunction.

US Airways' Statement of Fact ¶ 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."

USAPA's 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.

US Airways' Reply. US Airways takes no position regarding whether USAPA has been frustrated in efforts to convince West Pilots to accept its constitutionally-mandated date-of-hire seniority proposal. But USAPA's assertion that US Airways has somehow "mischaracterize[d]" its bargaining proposal is false. US Airways directly quoted from the proposal, which states (in full with respect to the section regarding furloughs): "Furlough and recall shall be accomplished on an integrated seniority list basis and shall supersede protected position provisions." (Doc. 151-2 at 32.) There is no dispute regarding the substance of USAPA's seniority proposal, which speaks

for itself. USAPA fails to explain what US Airways allegedly has mischaracterized, or why USAPA would need discovery regarding the substance of its own proposal.

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

USAPA's 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.

US Airways' Reply. This procedural history is undisputed. USAPA's arguments regarding the legal significance of the *Addington* case does not constitute a disputed fact.

US Airways' Statement of Fact ¶ 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."

USAPA's 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.

US Airways' Reply. This procedural history is set forth in the cited decision and is indisputable. *See Addington v. US Airline Pilots Ass'n*, No. CV 08-1633-PHX-NVW, 2009 WL 2169164, at *8 (D. Ariz. July 17, 2009). US Airways does not dispute the decision has been vacated as discussed below in Fact 42.

US Airways' Statement of Fact ¶ 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.

USAPA's 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.

US Airways' Reply. The Ninth Circuit decision speaks for itself: "we are without jurisdiction to address the merits of the claim unless it is ripe. . . . We conclude that Plaintiffs' DFR claim is not yet ripe." *Addington*, 606 F.3d at 1179. US Airways is unable to discern what part of this asserted fact USAPA purports to dispute.

US Airways' Statement of Fact ¶ 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.

USAPA's 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.

US Airways' Reply. USAPA agrees that US Airways has been threatened with a lawsuit, but disputes as a legal matter that US Airways could be exposed to substantial damages and invalidation of the CBA, and seeks discovery on that issue. In denying USAPA's Rule 12 motion to dismiss the complaint on ripeness grounds, this Court previously ruled that "US Airways also has a choice of two unappealing options: US Airways can abandon the Nicolau Award during negotiations and be sued by the West Pilots or US Airways can insist on the Nicolau Award and be subject to a work stoppage. Either way, US Airways will be harmed." (Doc. 85 at 5-6.)

US Airways' Statement of Fact ¶ 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.

USAPA's 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.

US Airways' Reply. USAPA admits that it has threatened US Airways with a work stoppage at the "earliest opportunity" unless it obtains an "industry standard" CBA, but denies that it is "directly" tied to the seniority issue. But USAPA has previously stated that it considers a date-of-hire seniority list to be "standard" (Doc. 49 at 26), and that it will not agree to any CBA that does not contain a date-of-hire seniority

list. (Doc. 61-4 at 2.) Thus, USAPA has made clear that unless US Airways agrees to a date-of-hire seniority list, USAPA will consider that a refusal to enter into an industry standard contract. As such, USAPA *has* threatened to engage in a work stoppage unless US Airways accedes to USAPA's demand to replace the Nicolau Award with a date-of-hire seniority list. In this Court's decision denying USAPA's motion to dismiss the complaint on ripeness grounds, the Court expressly stated: "Regardless of the action taken by US Airways, serious injury will occur. The Nicolau Award will either be accepted or it will not. If it is accepted, USAPA has promised a work stoppage." (Doc. 85 at 8.) And USAPA's suggestion that it needs discovery regarding the seriousness of its own threats to engage in a work stoppage is not well taken.

US Airways' Statement of Fact ¶ 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).

USAPA's 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.

US Airways' Reply. USAPA's assertion of "collusion between Plaintiff" and the West Pilots is groundless. It is unsupported by any factual basis. USAPA fails to dispute the material facts asserted: that there is continuing legal uncertainty surrounding

USAPA's seniority demands cannot be disputed; that the West Pilots and USAPA have expressly threatened US Airways cannot be disputed; and that US Airways brought this action seeking alternative declaratory judgments cannot be disputed. Because these facts are indisputable, USAPA's demand for discovery is not well taken.

US Airways' Statement of Fact ¶ 46. This Court has ruled that US Airways' claims are ripe.

USAPA's 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."

US Airways' Reply. USAPA does not and cannot dispute that this Court ruled that US Airways' claims are ripe. Instead, USAPA attacks the basis of this Court's holding. To the extent USAPA argues the Court should reconsider its holding, USAPA's request is untimely and ill-founded, and should be denied.

US Airways' Statement of Fact ¶ 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.

USAPA's 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.

US Airways' Reply. USAPA does not and cannot dispute what relief is sought in this action; the Complaint speaks for itself. USAPA's additional assertion that *Addington* precludes that relief is not a disputed fact, but a legal argument. Moreover, this Court already rejected that legal argument. (Doc. 85 at 7-8.) USAPA offers no valid reason why this Court should reconsider its prior ruling.

Dated: March 9, 2012.

O'Melveny & Myers LLP

By: /s/ Robert A. Siegel
Robert A. Siegel (*pro hac vice*)
Chris A. Hollinger (*pro hac vice*)
Ryan W. Rutledge (*pro hac vice*)
400 South Hope Street, Suite 1500
Los Angeles, CA 90071-2899

US Airways, Inc.
Karen Gillen, State Bar No. 018008
111 West Rio Salado Parkway
Tempe, AZ 85281

Attorneys for Plaintiff US Airways, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2012, the foregoing document was electronically transmitted to the United States District Court Clerk's Office using the CM/ECF System for filing and transmittal.

/s/ Robert A. Siegel
Robert A. Siegel

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