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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 REPLY IN FURTHER SUPPORT OF MOTION TO CONDUCT DISCOVERY PURSUANT TO RULE 56(d) OF THE FEDERAL RULES OF CIVIL PROCEDURE**

Defendant US Airlines Pilots Association ("USAPA") submits this reply in further support of USAPA's Motion to Conduct Discovery pursuant to Rule 56(d) of the Federal Rules of Civil Procedure and in response to the West Pilots' and US Airways' opposition.

INTRODUCTION

USAPA believes that as a matter of law, summary judgment in favor of USAPA on US Airways' Second Claim for Relief (Count II) is warranted because USAPA has no legal obligation to enter into an agreement on seniority that mirrors the ALPA/Nicolau list and, alternatively, because it has multiple reasonable and good faith reasons not to. Simply put, USAPA is not bound to follow the ALPA/Nicolau list in negotiations for a new collective bargaining agreement. In the event this Court disagrees and believes that the DFR question presented in US Airways' First Claim for Relief (Count I) can be litigated now based on USAPA's pending bargaining proposal (which is subject to further change), USAPA should be entitled to present the factual landscape currently in existence and show how it has changed over time and to conduct discovery on this point. USAPA should also be permitted to discover and present evidence regarding the West Pilots' and the Army of Leonidas' failure to cooperate with USAPA regarding the very bargaining proposals they are challenging and regarding their efforts to thwart and prevent USAPA from engaging former America West pilots in meaningful participation in the bargaining process. The attempt of the West Pilot Class and US Airways to "freeze" the relevant facts as of a date seven years ago makes no sense and is clearly contrary to Ninth Circuit and Supreme Court authority. If the duty of fair representation were confined to a historical snapshot, it would have made no sense for the Ninth Circuit to rule the case was not ripe.

I. DISCOVERY REGARDING THE CURRENT FACTUAL LANDSCAPE IS WARRANTED

In its summary judgment motion and its opposition to West Pilots' motion, USAPA has shown that it is not bound by the ALPA arbitration decision and is free to bargain on a clean slate. USAPA's pursuit of a non-Nicolau seniority proposal is

reasonable and rational and West Pilots have failed to show that it is motivated by hostility, discrimination or bad faith. Nevertheless, in defense of its position that a seniority proposal different from Nicolau is fair and reasonable, USAPA should also be permitted to show that even if USAPA was somehow compelled to justify a departure from the ALPA arbitration decision, the facts and circumstances transpiring over the last seven years completely undermine the principal assumptions upon which the Nicolau award was based. USAPA submits that discovery will assist it in showing that, in light of changed circumstances, *continuing to promote Nicolau is not only not required, it would be unreasonable.*

US Airways' basis for opposing discovery—that no facts affecting the career expectations of the pilots arising beyond the date of the merger in 2005 should be used to evaluate whether USAPA would breach it duty of fair representation in 2012— is illogical and flies in the face of the Ninth Circuit and Supreme Court's instructions that the matter is not ripe and that it is the factual landscape existing now (and in the future) that must be evaluated to determine whether pursuit by USAPA of its own seniority proposals strays so far outside the wide range of reasonableness as to be irrational.[1] The Ninth Circuit in *Addington v. U.S. Airline Pilots Ass'n*, 606 F.3d 1174, 1182 (9th Cir. 2010), dismissed the claim against USAPA on ripeness grounds, finding that the Supreme Court's decision in *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991), precluded a claim of breach of duty of fair representation in the collective bargaining context until after negotiations have been completed and a "final product" has been reached. In *O'Neill*, the Supreme Court made clear that in assessing whether a breach of the duty of

[1] US Airways asserts that discovery is not needed "unless USAPA can disregard Nicolau" (Doc. 170, p.2). USAPA does not read this to be fundamentally different from USAPA's position that the Court should first decide whether USAPA is free, as a matter of law and as a newly certified representative, to bargain from a clean slate, and that USAPA is entitled to discovery if the Court determines to decide the DFR claim (despite the Ninth Circuit's decision in *Addington),* and to require USAPA to justify its departure from the ALPA/Nicolau list.

fair representation occurs, a court must consider whether "in light of the factual and legal landscape *at the time of the union's actions*, the union's behavior is so far outside a 'wide range of reasonableness,' as to be irrational." *O'Neill*, 499 U.S. at 67 (emphasis added), *citing Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). Because USAPA's bargaining proposals are not final and no agreement with US Airways has been reached, an evaluation of the West Pilots' claim for breach of the duty of fair representation must, at a minimum, take into account "the factual and legal landscape" existing at the present time.[2]

Contrary to the claims of US Airways and the West Pilot Class, seniority rules, like other contract provisions, are not somehow frozen in time to a point seven years ago when the two airlines merged. The union is not permitted to ignore facts that render contract proposals or even existing contract provisions unreasonable. Rather, USAPA's duties and responsibilities as collective bargaining representative are ongoing and dynamic and must necessarily take into account the facts as they exist today. As the Ninth Circuit noted in *Addington*: "USAPA's final proposal may yet be one that does not work the disadvantages Plaintiffs fear, even if that proposal is not the Nicolau Award." 606 F.3d at 1181. And it was in this context that the Ninth Circuit made clear that "USAPA is at least as free to abandon the Nicolau Award as was its predecessor, ALPA." *Id.*[3]

As stated in the Declaration of Patrick Szymanski (Doc. 163-1), although USAPA is aware of some facts relevant to changes in the airline's operations since 2005, USAPA

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[2] Contrary to West Pilots' claims, USAPA's motion sets forth with great particularity the discovery it seeks and explains in detail that it is necessary for its defense. *See* Doc. 163.

[3] In implicit acknowledgement that today's facts and circumstances are relevant, in its Statement of Facts (Doc. 156-1, ¶36), US Airways purports to describe what would have happened if the ALPA/Nicolau list had been implemented. While US Airways now proposes that its statement is not material and that the Court can disregard it (Doc. 170, at p. 2), USAPA not only disputes the factual assertion (Doc. 162, Response to US Airways SOF ¶36), it is entitled to seek evidence on these issues.

should have a right to discover all relevant facts to controvert several of the factual contentions made by the West Pilot Class and US Airways so that it can present its best defense. [4]

Changed conditions alone can establish that a seniority proposal (and ultimate contract) that does not incorporate the ALPA/Nicolau list comports with USAPA's duty to fairly represent all the pilots. For example, in *Hendricks v. Airline Pilots Ass'n Int'l*, 696 F.2d 673 (9th Cir. 1983), the Ninth Circuit addressed a claim by a group of pilots who alleged that their bargaining representative (ALPA) breached its duty of fair representation by agreeing in negotiations to eliminate a contract provision that enabled the pilots to earn extra compensation. In rejecting this claim, Chief Judge Browning explained:

> The collective bargaining relationship . . . is a continuing relationship. "The assumption as well as the aim of [the Railway Labor Act] is a process of permanent conference and negotiation between the carriers on the one hand and the employees through their unions on the other." [citations omitted.] "[C]ollective bargaining agreements must be flexible and subject to change . . . . It is frequently necessary to modify a contract to meet changing conditions." [citation omitted.] These principles of national labor policy argue strongly against appellants' allegation the union breached its duty of fair representation in negotiating the October revision of the June agreement. . . .
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> . . . .
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> Both the creation of the preference and its termination were justified by the same basic consideration—the best interest of the bargaining unit as a group. Both agreements were rational accommodations to changing

[4] USAPA seeks discovery from US Airways regarding "operational and financial matters, including furloughs and recalls, aircraft population, hours of flying and the volume of traditional East routes being flown by West pilots (and vice versa)" which USAPA believes will demonstrate that assumptions underlying the ALPA/Nicolau list were erroneous at the time the arbitration award was issued and that, in any event, subsequent events have proven exactly the opposite of those assumptions. Doc. 163-1, at p. 2. We further note that even while claiming current events are not relevant, the West Pilot Class demonstrates otherwise by introducing a 2012 document regarding the currently ongoing USAPA election of officers. Doc. 166-1.

> economic circumstances. Neither was vulnerable merely because its immediate impact was less favorable to some part of the group than another.

Id. at 677-78. Similarly in *Hays v. Nat'l Elec. Contractors Ass'n, Inc.*, 781 F.2d 1321, 1324 (9th Cir. 1985), the Ninth Circuit recognized the union's duty to adapt to changed circumstances and rejected a breach of duty of fair representation claim brought by a group of employees who challenged a policy that been in existence for over 20 years and was changed to severely limit their employment opportunities. The Ninth Circuit held that the collective bargaining agreement "needed to be clarified because of the changed circumstances-*viz*, drastic drop in job opportunities." Along with *Addington*, these cases show that events occurring since the ALAP/Nicolau list was created are directly relevant to the DFR claim and that USAPA should therefore be entitled to conduct discovery concerning these matters and the changed circumstances they represent.

II. DISCOVERY REGARDING WEST PILOTS' FAILURE TO COOPERATE IS WARRANTED

USAPA should also be permitted to conduct discovery to show that the West Pilot representatives and the Army of Leonidas have obstructed and attempted to thwart USAPA in carrying out its bargaining duties because, as a matter of law, such a failure to cooperate is fatal to the claim that USAPA has breached its DFR. The response of the West Pilot Class misapprehends the law governing breach of the duty of fair representation and merely begs the question. West Pilots' deliberately mischaracterize the purpose of USAPA's discovery request by saying it concerns nothing more than "USAPA's failure to get West Pilots to agree to dishonor the Nicolau arbitration." Doc. 166, at pp. 5-6. To the contrary, and as USAPA has repeatedly said, what USAPA seeks to discover are the facts underlying what appear to be actions and communications by the West Pilot representatives and the Army of Leonidas to persuade West pilots to refuse to cooperate with USAPA in the performance of its duties as the exclusive bargaining representative.

Contrary to West Pilots' assertions, obstruction and failure to cooperate are clearly

relevant to whether a union has complied with its duty to act reasonably and in good faith. *See, e.g., Republic Steel Corp. v. Maddox,* 379 U.S. 650, 653, (1965) (employee must afford the union the opportunity to act on his behalf); *Pegump v. Rockwell Int'l Cor*p. 109 F.3d 442, 444-45 (8th Cir. 1997) (dismissing claim for breach of duty of fair representation where, *inter alia*, plaintiff failed to cooperate); *Soto v. ECC Indus., Inc.*, 05 CIV. 4764 BMC MDG, 2007 WL 3232222 (E.D.N.Y. Oct. 31, 2007), *aff'd*, 358 Fed. App'x 220 (2d Cir. 2009) ("The facts are undisputed that plaintiff failed to cooperate in the union's attempt to consider whether to pursue his grievance, and there were ample additional grounds for the union to decide not to do so. Given the undisputed facts, no reasonable jury could find that the union acted outside of the broad discretion that the law allows . . . ."); *Mack v. Otis Elevator Co.*, No. 00 CIV 7778 LAP, 2001 WL 1636886, at *13 (S.D.N.Y. Dec. 18, 2001) (claim of breach of duty of fair representation undermined by refusal to cooperate with union); *Decrosta v. Nat. Post Office Mail Handler*s, Nos. 90-CV-1269, 90-CV-585, 1994 WL 173825 (N.D.N.Y. May 4, 1994) (granting summary judgment to union where conclusory allegations of Union's bad faith were belied by "plaintiff's own failure to cooperate").

III. USAPA IS ENTITLED TO DEVELOP ITS OWN MATERIAL FACTS THROUGH DISCOVERY

Cases involving a duty of fair representation are fact intensive and require inquiry into the existing "factual and legal landscape." By their very nature, DFR claims require discovery. In *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 70-71 (1991) (emphasis added), for example, the Court noted that "*after extensive discovery*, ALPA filed a motion for summary judgment." *See also Kirbyson v. Tesoro Ref. & Mktg. Co.*, 09-3990 SC, 2010 WL 2734780 (N.D. Cal. July 12, 2010) ("After the parties engage in discovery, the Court will be in a better position to determine if the USW's conduct constitutes a breach of its duty"); *Warner v. McLean Trucking Co.*, 627 F. Supp. 203, 214 (S.D. Ohio 1985) (noting history and opportunity for discovery in breach of duty of fair representation case). USAPA's targeted discovery topics will enable it to present

material facts opposing summary judgment on Count I.

The West Pilots and US Airways erroneously oppose discovery and attempt to limit USAPA's rights to oppose their formulation of the alleged material facts. But discovery under Rule 56(d) is not limited to discovery that would merely enable a party to admit or dispute the other parties' statements of fact. It also allows an opportunity for a party to develop its own additional material facts in opposition to a motion for summary judgment. *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002) (Fed. R. Civ. P. 56(f) provides a device for litigants to avoid summary judgment when they have not had sufficient time to develop affirmative evidence); *VISA Int'l Serv. Ass'n v. Bankcard Holders of Am.*, 784 F.2d 1472, 1475-76 (9th Cir. 1986) (finding abuse of discretion to deny Rule 56(f) request to "probe the facts and circumstances" relating to central issue on summary judgment). *See also Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc.*, 254 Fed. App'x 646, 647 (9th Cir. 2007) ("we are confident that this case is more likely to yield a correct resolution if the parties engage in a reasonable amount of discovery before the district court resolves the issue"); *Garrett v. City & County of San Francisco*, 818 F.2d 1515, 1519 (9th Cir. 1987) (Title VII plaintiff should have been permitted to conduct discovery seeking evidence of disparate treatment that was in the defendants' possession and that was necessary to contradict the defendants' summary judgment motion); *N.L.R.B. v. Smith Indus., Inc.*, 403 F.2d 889, 893 (5th Cir. 1968) ("If the Court must rely 'upon an inquiry into the surrounding facts and circumstances, the Court should refuse to grant a motion for a summary judgment until the facts and circumstances have been sufficiently developed to enable the Court to be reasonably certain that it is making a correct determination of the question of law." (citation omitted)); *U.S. Equal Opportunity Comm'n v. Dillard's Inc.*, 08-CV-1780-IEG PCL, 2011 WL 4507068 (S.D. Cal. Sept. 28, 2011) ("The EEOC has set forth the facts it hopes to elicit and shown that those facts exist and are essential to its opposition to Dillard's motion for summary judgment."); *Local Union No. 1423, Glaziers, Affiliate of Painters, Decorators, & Paperhangers of Am., AFL-CIO v. P.P.G. Indus., Inc.*, 378 F.

Supp. 991, 1000 (N.D. Ind. 1974). West Pilots and US Airways omit facts that USAPA has identified that are not in its control and that are material to its defense.[5]

IV. DISCOVERY CAN BE CONDUCTED EXPEDITIOUSLY

US Airways' expressed desire for expedition provides no basis to deny USAPA the right to conduct the prompt targeted discovery it has proposed.[6] USAPA has already proposed that its discovery be conducted expeditiously. Doc. 130, at p.20. In the Joint Proposed Case Management Plan US Airways stated: "US Airways does not object, however, to limited expedited discovery to the extent that either defendant has a legitimate need for discovery prior to the submission of the summary judgment motions." *Id.* at p.21. Further, it is US Airways not USAPA that has attempted to delay final resolution of this matter by opposing USAPA's right to seek summary judgment dismissing Count III.

CONCLUSION

For the foregoing reasons, USAPA respectfully requests that if the Court determines not to grant USAPA's motion for summary judgment, a ruling on the summary judgment motion by the West Pilot Class on the DFR claim should either be denied or continued under Rule 56(d) of the Federal Rules of Civil Procedure until USAPA has been afforded a reasonable opportunity to conduct discovery.

Respectfully submitted this 19th day of March, 2012.

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[5] The West Pilots' argument that their own facts are undisputed is erroneous. USAPA has disputed, objected or moved to strike many of West Pilots' alleged facts. Doc. 161.

[6] There is no claim by West Pilots that USAPA intentionally delayed reaching an agreement with US Airways. *See Addington*, 606 F.3d at 1180 n.2.

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CERTIFICATE OF SERVICE

I hereby certify that on March 19, 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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