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13 **IN THE UNITED STATES DISTRICT COURT**
14 **FOR THE DISTRICT OF ARIZONA**

15 US AIRWAYS, INC., a Delaware
16 corporation, *et al.*,

17 *Plaintiff,*

18 vs.

19 Don ADDINGTON; John BOSTIC;
20 Mark BURMAN; Afshin IRANPOUR;
21 Roger VELEZ; Steve WARGOCKI;
22 Michael J. SOHA; Rodney Albert
23 BRACKIN; and George MALIGA, on
24 behalf of themselves and the certified
25 WEST PILOT CLASS,

26 and

27 US AIRLINE PILOTS ASS'N, an
28 unincorporated association,

Defendants.

CASE NO. 2:10-cv-01570-PHX-ROS

**WEST PILOTS' MOTION TO
ADD LANGUAGE TO THE
ORDER ON THE PENDING
MOTIONS FOR SUMMARY
JUDGMENT**

29 Defendants Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin
30 IRANPOUR; Roger VELEZ; Steve WARGOCKI; Michael J. SOHA; Rodney Albert
31 BRACKIN; and George MALIGA, on behalf of the West Pilot Class, move this
32 Court to add language to its order on the pending motions for summary
33 judgment that will preclude misinterpretation of the Court's ruling and allow
34 this Court to retain jurisdiction after dismissal.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Additional language to preclude misinterpretation.

At oral argument on October 2, 2012, the Court indicated that the body of its order ruling on the pending summary judgment motions will include the following findings of law:

- (1) USAPA is bound by the Transition Agreement no less that ALPA would have been bound had it remained the pilots representative;
- (2) Abandoning the Nicolau Award would put USAPA on “dangerous ground,” risking liability for breach of the duty of fair representation;
- (3) USAPA’s abandonment of the Nicolau Award would be permissible only if it was “supported by a legitimate union purpose”; and
- (4) US Airways must ensure that any seniority list used in a future collective bargaining agreement is supported by a legitimate union purpose.

But, notwithstanding that USAPA has yet to articulate a legitimate purpose for abandoning the Nicolau Award, the Court declined to enter summary judgment on Count I that USAPA cannot possibly have such a purpose. The Court explained that it could not do so because it was conceivable that a legitimate purpose for abandoning the Nicolau Award might arise in the course of future collective bargaining negotiations.

The Court’s proposed order vindicates positions long held by the West Pilots. Yet, it largely fell on deaf USAPA ears. Indeed, immediately after yesterday’s hearing, Gary Hummel, the President of USAPA, announced that the Court’s proposed order means that “USAPA is free to propose any seniority integration and **is not bound by the Nic**[olau Award].” R. Velez, Decl., ¶ 3 (Oct. 3, 2012) (emphasis added). Surely, the Court does not intend to convey that meaning.

1 To make the Court's meaning as clear as possible, therefore, the West
2 Pilots ask that the Court add the language that follows to its proposed order on
3 the pending summary judgment motions:

4 (1) USAPA (and its successor in any future merger) must use the
5 Nicolau Award in any collective bargaining agreement that allows the
6 integration of flight operations of the East and West Pilots unless it
7 has a legitimate union purpose to do otherwise; and

8 (2) To date, USAPA has not articulated to this Court a legitimate
9 union purpose for using a seniority list other than the Nicolau Award
10 in a collective bargaining agreement that would allow the integration
11 of flight operations of the East and West Pilots.

12 **II. Conditional Dismissal**

13 The device of a conditional dismissal allows a court to retain jurisdiction
14 to reopen a case in the event that there is a need for further litigation, which is
15 highly likely in this case. Such intention must be expressed in the final order of
16 dismissal. *O'Connor v. Colwin*, 70 F. 3d 530, 532 (9th Cir. 1995).

17 This procedure is most commonly used in the context of *forum non*
18 *conveniens* dismissals. *E.g., Carijano v. Occidental Petroleum Corp.*, 643 F. 3d
19 1216, 1235 (9th Cir. 2011). But, it is occasionally used in other contexts. For
20 example, it was used by a district court when it dismissed a case in favor of an
21 appeal before the Army Board for the Correction of Military Records.
22 *Montgomery v. Rumsfeld*, 572 F. 2d 250, 252 (9th Cir. 1978). When it approved
23 this procedure, the Ninth Circuit explained that the district court properly
24 "retain[ed] jurisdiction of the matter to avoid the **necessity of commencing**
25 **the civil action all over again** should the administrative remedy fail to resolve
26 the dispute." *Id.* at 254 (emphasis added).

27 In the instant case, this dispute is to be dismissed in favor collective
28 bargaining negotiations. The end result of such negotiations may not allow for

1 implementation of the Nicolau Award. If so, then the West Pilots will have a
2 claim for breach of the duty of fair representation if USAPA fails to articulate a
3 legitimate union purpose for dishonoring the Nicolau Award. If this Court
4 retains jurisdiction, then the West Pilots can bring that claim without incurring
5 the expense and delay of commencing an action for what would be the third
6 time.

7 The West Pilots, therefore, respectfully ask the Court to retain jurisdiction
8 after dismissal. Then, if USAPA and US Airways (or their successors in any
9 future merger) abandon the Nicolau Award in the collective bargaining process
10 without a legitimate purpose, this Court will have the authority to intercede far
11 more quickly and efficiently than a court that has no familiarity with these
12 issues.

13 **III. Conclusion**

14 The West Pilots respectfully ask the Court: (1) to add the language
15 proposed herein to its order on the pending summary judgment motions; and,
16 (2) to express, in its order of dismissal, the intention to retain jurisdiction over
17 future duty of fair representation claims arising from this seniority dispute.

18 Respectfully submitted, this 4th day of October, 2012.

19 **POLSINELLI SHUGHART, PC**

20 */s/ Andrew S. Jacob*

21 By _____

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Certificate of Service

I hereby certify that on this 4th day of October 2012, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the ECF System for filing and transmittal.

/s/Andrew S. Jacob
By _____