

1 Defendant US Airline Pilots Association (“USAPA”) submits this memorandum
2 of law in opposition to the West Pilots’ motion to add language to the Court’s proposed
3 Order on the motions for summary judgment.

4 USAPA respectfully submits the Court should either strike or decline to consider
5 this motion. In the event the Court determines to consider the motion, USAPA
6 respectfully submits all branches of this motion should be denied. Submitted in the guise
7 of avoiding misinterpretation, in fact, this extraordinary application is nothing less than
8 an attempt by the West Pilots to revise the Court’s proposed decision and to have the
9 Court adopt arguments and positions that the West Pilots advanced but were
unambiguously rejected by the Court.

10 I. THE MOTION IS IMPROPER AND SEEKS UNNECESSARY AND
11 INAPPROPRIATE RELIEF

12 The West Pilots are understandably disappointed with the Court’s proposed
13 resolution of the pending summary judgment motions. However, briefing and argument
14 are closed and this submission, without leave of Court, is in the nature of an unauthorized
15 and untimely sur-reply and should be disregarded or stricken.¹ The West Pilots’ claim
16 that clarification is necessary is disingenuous. The proposed order is quite clear that
17 USAPA is free to negotiate any seniority proposal. At oral argument Counsel for USAPA
18 made clear that it takes its duty of fair representation seriously. That is why, in reporting
19 to the membership on the oral argument, USAPA noted, consistent with its obligations

20 ¹ As Judge Bolton recently noted in denying a motion for leave to file a surreply:

21 Defendants seek leave to file a surreply...The local rules of practice for
22 this District do not provide for the filing of a surreply, and surreplies are
23 not authorized by any other rules of procedure absent express prior leave of
the Court. *See* LRCiv 7.2 (providing for one response and one reply only). .
24 *Frazier v. Honeywell Pension and Savings Plan*, No. CV 10-1618-PHX-SRB, order at p.
25 8 n.7 (D. Ariz. Oct. 3, 2012) (citing *Spina v. Maricopa Cnty. Dept. of Transp.*, No. CV
26 05-0712-PHX-SMM, 2009WL 890997, at *1 (D. Ariz. Apr. 1, 2009); *Millenium 3 Tech.*
27 *v. ARINC, Inc.*, No. CV 08-1257-PHX-JAT, 2008 WL 4737887, at *2 (D. Ariz. Oct. 29,
2008)). Likewise, if the West Pilots were attempting to seek reconsideration, the motion
28 would also be improper as per Local Rule 7.2 (g) because it is repetitive of oral and
written arguments previously asserted.

1 under the duty of fair representation, that “Counsel for USAPA reiterated that USAPA
2 was prepared to engage in serious, genuine discussions with the West Pilots over the
3 seniority proposal, and was hopeful the parties would continue to work together to
4 achieve a new comprehensive collective bargaining agreement.” (Exhibit “A” to
5 Declaration of Gary Silverman dated October 5, 2012) Instead of disclosing the message
6 posted on the day of the hearing for the entire membership, West Pilots attempt to distort
7 a brief email message sent by USAPA’s President to the other Officers and Board
8 members.

9 Regardless, the brief message is accurate and forms no basis to claim a
10 misunderstanding. The motion cites the following statement as evidence of potential
11 misunderstanding: “USAPA is free to propose any seniority integration and is not bound
12 by the NIC.” (Doc. 190, p. 2) In fact, this summary statement is wholly consistent with
13 the Court’s summary statement of its determination set forth at the outset in the proposed
14 order: “Having reviewed all of the filings, the Court concludes [USAPA] is free to pursue
15 any seniority position it wishes during the collective bargaining negotiations.” (Proposed
16 Order, p. 1) Thus, the potential misunderstanding posited by the West Pilots is illusory
17 and the premise for this application is without merit.

18 Moreover, the language sought by West Pilots to be included in the proposed order
19 (Doc. 190, p. 3) is unnecessary as to the first proposal and improper as to the second. As
20 to the former, there is no need for the Court to add language relating to legitimate union
21 purpose because (a) the Court’s views on this point are clearly set forth therein, and (b) as
22 the Court states, citing *Addington v. U.S. Airline Pilots Ass’n*, 606 F.3d 1174, 1181-82
23 (9th Cir. 2010), ultimate determination in that regard is not ripe. (Proposed Order, p. 7)
24 The latter proposed addition, the language the West Pilots seek to add concerning the
25 alleged failure by USAPA to articulate a legitimate purpose for using a seniority list other
26 than the Nicolau Award, is improper in that it is contrary to the Court’s finding (which is
27 based upon and fully consistent with *Addington*) that such a finding is premature and
28 must await the finalization and ratification of a collective bargaining agreement.
(Proposed Order, pp. 7-8)

1 when he denied the West Pilots' motion to transfer this action to his court because the
2 *Addington* case was previously assigned to him, once the action was dismissed for lack of
3 subject matter jurisdiction, the proceeding was concluded, and any new case would write
4 on a clean slate. *Addington*, 2010 WL 4117216, at *2 (D. Ariz. Oct. 19, 2010).

5 **CONCLUSION**

6 For all of the foregoing reasons, Defendant USAPA respectfully requests that the
7 Court strike or deny the West Pilots' motion (Doc. 190).

8
9 Respectfully submitted this 5th day of October, 2012.

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

11 By: s/Susan Martin
12 Susan Martin
13 Jennifer L. Kroll
14 1850 N. Central Ave. Suite 2010
Phoenix, AZ 85004

15 Patrick Szymanski (*pro hac vice*)
16 Patrick Szymanski, LLP
17 1900 L Street, NW, Ste 900
Washington, DC 20036

18 Brian J. O'Dwyer (*pro hac vice*)
19 Gary Silverman (*pro hac vice*)
20 O'Dwyer & Bernstien, LLP
21 52 Duane Street, 5th Floor
New York, NY 10007

22 Attorneys for US Airline Pilots Association
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CERTIFICATE OF SERVICE

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I hereby certify that on October 5, 2012, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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

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

Attorneys for Plaintiff

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

Attorneys for West Pilot Class

s/T. Mahabir