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

13 US AIRWAYS, INC., a Delaware
14 corporation, *et al.*,

Plaintiff,

15 vs.

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

and

US AIRLINE PILOTS ASS'N, an
unincorporated association,

Defendants.

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

**WEST PILOTS' RESPONSE
JOINING US AIRWAYS' MOTION
FOR RELIEF FROM JUDGMENT,
PURSUANT TO RULE 60(b)(6),
DOC. 199**

23 Defendants Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin
24 IRANPOUR; Roger VELEZ; Steve WARGOCKI; Michael J. SOHA; Rodney Albert
25 BRACKIN; and George MALIGA, on behalf of the West Pilot Class, join US
26 Airways' *Motion for Relief from Judgment Pursuant to Federal Rule of Civil*
27 *Procedure 60(B)(6) – Based on New Developments*, Doc. 199, for the reasons
28 explained in the Memorandum of Points and Authorities that follows.

MEMORANDUM OF POINTS AND AUTHORITIES

1
2 The situation is worse than described by US Airways in its memorandum.
3 (Doc. 200.) Now, USAPA’s leadership is telling its rank-and-file “that Judge
4 Silver obviously believes there are legitimate union purposes for setting aside
5 the Nicolau Award.” *CLT Domicile Update* (Oct. 29, 2012) (copy attached to
6 Jacob declaration filed concurrently). USAPA’s leadership enumerates seven
7 reasons that purportedly provide a legitimate basis to dishonor the Nicolau
8 Award. These are as follows:

- 9 1. USAPA has a duty to fairly represent not only former America
10 West Pilots, but all US Airways pilots.
- 11 2. It is legitimate to integrate seniority based on date of hire.
- 12 3. It is legitimate to respect pre-merger career expectations.
- 13 4. It is legitimate to take into account changed circumstances
14 including the relative economic strength and viability of America
15 West flying VS US Airways flying.
- 16 5. USAPA is not required to follow the ALPA Merger Policy in
17 effect at the time of the Nicolau Award, which eliminated length
18 of service as a relevant consideration, but is entitled to pursue a
19 “fair and equitable” integration.
- 20 6. It is legitimate to place a pilot with 25 years of seniority above
21 a pilot with 9 years, or a pilot with 15-16 years seniority above a
22 pilot still in ground school.
- 23 7. Each of the other crafts on the property integrated seniority
24 based on date of hire, and no case-precedent holds that DOH
25 integration violates the duty of fair representation.

26 *Id.* (directly quoting original).

27 The West Pilots firmly disagree. The Nicolau Award resulted from
28 arbitration that all agreed would be a final and binding resolution of the
seniority dispute. None of USAPA’s reasons provide a legitimate basis to set it
aside. Indeed, essentially all of these “legitimate” considerations were litigated
in the initial seniority integration case and thus considered by George Nicolau.

1 These “legitimate” considerations have been litigated and rejected beginning in
2 2005, culminating in this litigation 7 years later. But, as long as USAPA is
3 telling the rank-and-file otherwise, the East Pilots cling to the fantasy that they
4 can get a new contract without implementing the Nicolau Award because of
5 these “new” considerations.

6 US Airways argues that changed circumstances more firmly establish
7 ripeness. To the extent that the Court agrees but questions whether it is bound
8 by *Addington v. US Airline Pilots Ass’n*, 606 F.3d 1174 (9th Cir. 2010), it should
9 consider that the Ninth Circuit’s opinion expressly limited its ripeness holding
10 to the facts at that time. The Court stated:

11 Although we do not hold that a DFR claim based on a union’s
12 promotion of a policy is never ripe until that policy is effectuated, we
13 conclude that, in this case, there is too much uncertainty standing in
14 the way of effectuation of Plaintiffs’ harm to warrant judicial
intervention at this stage.

15 *Id.* at 1181 (emphasis added).

16 An appellate court reviews whether there was standing when the
17 complaint was filed. *See Sacks v. Office of Foreign Assets Control*, 466 F.3d 764,
18 774 (9th Cir. 2006). In *Addington*, therefore, the Ninth Circuit addressed
19 whether the DFR claim was ripe in October 2008, when USAPA was a mere six
20 months into its tenure as the bargaining representative and had just rejected
21 the Nicolau Award for its date of hire list with conditions and restrictions. It is
22 now four years later.

23 USAPA has now steadfastly insisted for four and a half years that it will
24 implement a CBA that does not include the Nicolau Award. At some point in
25 time, courts are permitted to take a litigant at its word. US Airways is correct
26 that, left to themselves, the pilots will not resolve this dispute. *See US Airways*
27 *Memo.* at 5:8 to 5:16 (Doc. 200). Given the passage of time, and USAPA’s
28 unequivocal promise that it will never accept the Nicolau Award, the Court is

1 on sound ground to move forward and decide the issues presented in this
2 litigation.

3 A declaratory ruling on USAPA's purported legitimate reasons will surely
4 help. If the Court rules that USAPA has legitimate reasons, the West Pilots
5 must accept that. But if it finds otherwise, it should declare that "[t]he pilots
6 must choose between the status quo and a single new CBA that incorporates
7 the Nicolau Award with whatever improvements in wages and working
8 conditions USAPA can negotiate for the East Pilots and the West Pilots alike."
9 *Addington v. US Airline Pilots Ass'n*, 2009 WL 216914, *29 (D. Ariz. Jul. 17,
10 2009). Either way, with such clear guidance effective contract negotiations can
11 proceed.

12 For the foregoing reasons and for the reasons set out by US Airways in
13 support of its motion, the West Pilots join US Airways' motion and ask that the
14 Court vacate the October 11, 2012 summary judgment decision (Doc. 193) and
15 judgment (Doc. 194), and proceed to consider the merits of Counts I and II.

16 Dated this 1st day of November, 2012.

17 **POLSINELLI SHUGHART, PC**

18 /s/ Andrew S. Jacob

19 By _____

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24 **Certificate of Service**

25 I hereby certify that on this 1st day of November 2012, I electronically
26 transmitted the foregoing document to the U.S. District Court Clerk's Office by
27 using the ECF System for filing and transmittal.

28 /s/ Andrew S. Jacob

By _____