**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF NORTH CAROLINA**
**CHARLOTTE DIVISION**
**CIVIL ACTION NO. 3:14-CV-577-RJC-DCK**

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| **US AIRLINE PILOTS ASSOCIATION,** | ) |
| | ) |
| **Plaintiff,** | ) |
| | ) |
| **v.** | ) |
| | ) |
| **ROGER VELEZ, and LEONIDAS, LLC,** | ) |
| | ) |
| **Defendants.** | ) |
| | ) |
| | ) |

**JOINT MEMORANDUM OF LAW**
**IN SUPPORT OF CONDITIONAL CLASS CERTIFICATION, PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT AGREEMENT AND RELEASE, AND APPROVAL OF THE CONTENT AND METHOD OF DISTRIBUTION OF THE NOTICE TO CLASS MEMBERS**

## INTRODUCTION

The Parties have reached a settlement in this case and jointly move the Court, pursuant to Fed. R. Civ. P. 23, 23.1, and 23.2, for entry of an order (1) certifying two settlement classes an East Pilot Settlement Class and a West Pilot Settlement Class; and (2) preliminarily approving the parties Settlement Agreement and Release, including specifically:

> (a) Approving the Notice of Settlement Agreement and Fairness Hearing, substantially in the form set forth in Exhibit 2 as meeting the requirements of Fed. R. Civ. P. 23(c)(2)(A), 23(e) and 23.1(c);
>
> (b) Finding that the requirements of Fed. R. Civ. P 23(a) and (b)(2) are satisfied, appointing John Owens, Bob Burdick, and Mark King as the representatives of the East Pilot Settlement Class and Eddie Bollmeier, Bill Tracey, and Simon Parrott as the representatives of the West Pilot Settlement Class and Lee Seham and Stanley J. Silverstone as counsel for the East Pilot Settlement Class, and Marty Harper and Kelly J. Flood as counsel for the West Pilot Settlement Class, and preliminarily approving the Settlement Agreement and Release as being within the range of reasonableness such that the Notice of Settlement Agreement and Fairness Hearing should be provided;

(c) Scheduling the Fairness Hearing pursuant to Fed. R. Civ. P. 23(e) on a date ordered by the Court, provided in the preliminary approval Order, and in compliance with applicable law, to determine whether the Settlement Agreement and Release should be approved as fair, reasonable, and adequate, and to determine whether a Final Order should be entered approving the Settlement Agreement and Release and dismissing the consolidated actions, and all counter-claims and third-party actions with prejudice;

(d) Determining that the Notice of Settlement Agreement and Fairness Hearing comply with all legal requirements, including but not limited to the Due Process Clause of the United States Constitution and Fed. R. Civ. P. 23;

(e) Directing that Notice of Settlement Agreement and Fairness Hearing shall be given to the Classes as provided in the Settlement Agreement and Release and this joint brief;

(f) Providing that any written objections and/or comments submitted by any Class Member to the entry of a Final Order approving the Settlement Agreement and Release shall be considered by the Court at the Fairness Hearing only if, on or before the date(s) specified in the Notice of Settlement Agreement and Fairness Hearing and preliminary approval Order, such objector submits written objections and/or comments and/or a request to speak at the Fairness Hearing following the procedures set forth in the Notice of Settlement Agreement and Fairness Hearing;

(g) Establishing dates by which the Parties shall file and serve all motion papers in support of the entry of a Final Order approving the Settlement Agreement and Release;

(h) Pending the Fairness Hearing, staying all proceedings in the consolidated actions, other than proceedings necessary to carry out or enforce the terms and conditions of this Settlement Agreement and Release and the preliminary approval Order; and

(k) Pending the Fairness Hearing, enjoining the Parties and any and all Class Members, from commencing or prosecuting, either directly or indirectly, any action in any forum (state or federal) asserting any of the Released Claims.

## I. STATEMENT OF FACTS

The US Airline Pilots Association (□USAPA□) was the certified bargaining agent of the pilots of US Airways from April, 2008 until September 16, 2014, at which time the Allied Pilots Association (□APA□) was certified as the representative of the pilots of the carrier formed by the

2013 merger of US Airways and American Airlines. As of September 16, 2014, USAPA was involved in various matters on behalf of the US Airways pilots, including among other things sponsoring and supporting the USAPA Merger Committee in the McCaskill-Bond seniority list integration ("SLI") process, and litigation involving USAPA, including *Addington v. USAPA, et al.,* 2:13-CV-00471-ROS *("Addington III")*, which at the time was pending on appeal before the Ninth Circuit. *Addington III*, and its predecessor actions commencing in 2008 with *Addington v. USAPA*, *et al*., 2:08-cv-01633-NVW ("*Addington I*") and in 2010 with *US Airways v. Addington, et al.*, 2:10-cv-01570-ROS ("*Addington II*"), are class actions brought by and against pilots of the former America West Airlines, which merged with US Airways in 2005. The former America West pilots ("West Pilots") claimed that USAPA breached its duty of fair representation by favoring pre-merger US Airways pilots ("East Pilots") over the West Pilots.

USAPA's Constitution and Bylaws provide that decertification is an event that triggers dissolution but that the commencement date of dissolution can be deferred if there is a need for collective legal action on behalf of the pilot group, including, but not limited to, representation in SLI proceedings. On September 16, 2014, the USAPA National Officers determined to defer the commencement date of the dissolution of USAPA and also decided that no distribution of USAPA assets was appropriate at that time because of ongoing collective legal action, including its anticipated participation in the McCaskill-Bond SLI process. Concurrently, a West Pilot, on behalf of himself and other West Pilots who were similarly situated, objected to USAPA's financial support of the USAPA Merger Committee, as well as the decision to defer the dissolution commencement date and demanded immediate distribution of USAPA's assets to its members. Also on September 16, 2014, USAPA commenced *USAPA v. Velez, et al.*, 3:14-cv-00577-RJC-DCK ("USAPA DJ Action"), a declaratory judgment action against a class of West

Pilots and Leonidas, LLC, seeking declarations as to the validity of the actions taken by the USAPA National Officers to defer dissolution and related decisions, and to enjoin any litigation challenging those actions. The named defendant West Pilot, on behalf of himself and a putative similarly situated class of West Pilots, counterclaimed against USAPA, seeking, among other things, reimbursement of money that USAPA spent to support the USAPA Merger Committee after USAPA's September 16, 2014 decertification in the approximate sum of $1.8 million, West Pilots' allocation of the merger dues increase (in the approximate sum of $1.4 million), and West Pilots' share of the $1.3 million reimbursement from American Airlines (in the approximate amount of $500,000).

In the fall of 2014, the SLI process was proceeding before a panel of three arbitrators agreed upon in the Protocol Agreement and in compliance with McCaskill-Bond. The West Pilots' request for a separate merger committee designation went to arbitration in December, 2014, and on January 9, 2015, the Preliminary Arbitration Board issued its award finding that the APA could and should designate a West Pilot Merger Committee to participate in the SLI process. On January 22, 2015, the APA designated the West Pilot Merger Committee as an autonomous committee. As of that time, for SLI purposes, the East Pilots were represented by the USAPA Merger Committee, which was supported financially by USAPA. The West Pilots continued to object to USAPA's financial support of the USAPA Merger Committee, without equal financial support for the West Pilot Merger Committee.

On February 23, 2015, three members of USAPA commenced an action arising under Title V of the Labor Management Reporting and Disclosure Act ("LMRDA") against current and former USAPA officers and members of the BPR, in their individual capacities, alleging, *inter alia*, that defendants breached their fiduciary duties by expending USAPA funds after it was

decertified on matters that were not collective legal action on behalf of the pilot group. *Bollmeier v. Hummel, et al.,* 3:15-cv-00111 (□LMRDA action I□). On October 12, 2015, the same *Bollmeier* plaintiffs commenced *Bollmeier v. Frear, et al*., 3:15-cv-00480 (□LMRDA action II□), which is identical to LMRDA action I, and brought against five former USAPA BPR members who had not appeared in LMRDA action I. The *Bollmeier* LMRDA actions sought an injunction to prevent USAPA from spending additional funds for the SLI process and restitution from the defendants for the funds already expended.

The two *Bollmeier* LMRDA actions were consolidated before this Court with the USAPA DJ Action. On December 2, 2015, defendants in LMRDA action II filed a motion to dismiss plaintiffs□claims under Rule 12(b)(6) and a motion for the Court to reconsider its order granting a preliminary injunction. The defendants in LMRDA action I and defendant Borman in LMRDA action II asserted claims for indemnification against USAPA under provisions of the USAPA Constitution and Bylaws.

On June 26, 2015, the Ninth Circuit issued its decision in *Addington III,* finding that USAPA breached its duty of fair representation to West Pilots, and remanded the case to the district court with instructions to enjoin USAPA from participating in SLI proceedings unless it advocated for the Nicolau Award, and to consider West Pilots□claim for attorneys□fees. *Addington v. US Airline Pilots Ass'n*, 791 F.3d 967 (9th Cir. 2015). On June 29, 2015, the USAPA Merger Committee permanently withdrew from the SLI proceedings. On August 27, 2015, this Court issued a preliminary injunction finding there was likelihood of success on the merits of the LMRDA claim in LMRDA action I and enjoined USAPA from spending any money on seniority-related matters and from dissolving without notice and the Court□s consent. Doc. 75.

In December 2015, the West Pilots filed with the District Court for the District of Arizona their application for attorneys' fees in the *Addington* cases, seeking the total sum of approximately $3.7 million.

From January 26-28, 2016, all of the parties and their counsel engaged in court-approved mediation over three days in Charlotte, North Carolina, in an effort to resolve all outstanding litigation, including all issues relating to the dissolution of USAPA and distribution of its assets, and any other potential claims. Those efforts, which continued with the assistance of Mediator Gary Hemric, Esq., in the weeks following the mediation sessions, resulted in a Memorandum of Settlement ("MOS") that sets forth the principles and blueprint for a proposed Settlement Agreement and Release of all the consolidated cases and the West Pilots' motion for attorneys' fees in the *Addington* litigation.

The proposed Settlement Agreement and Release ("Settlement Agreement") puts to final rest eight years of litigation between East Pilots and West Pilots. The main terms of the Settlement Agreement include (1) settlement of the West Pilots' claim for attorneys' fees in the *Addington* litigation and all claims, counterclaims, and third-party claims in the USAPA DJ Action, LMRDA action I, and LMRDA action II; (2) agreement to a proposed class of East Pilots and a proposed class of West Pilots, all of whom will receive written notice of the settlement and the opportunity to file written objections or comments and attend a Fairness Hearing; (3) payment by USAPA in the amount of $5.5 million to counsel for the benefit of the West Pilots, representing full and final consideration in settlement of the consolidated cases and the West Pilots' motion for attorneys' fees in *Addington* III; (4) dismissal of all claims, counterclaims, and third-party claims by all parties to the consolidated cases with prejudice; (5) conversion of certain terms of the August 27, 2015 preliminary injunction relating to certain

activities of USAPA into a permanent injunction, and extending its duration for three years after entry of the Final Order; and (6) mutual releases of all possible related claims[1].

## II. MOTION TO CERTIFY SETTLEMENT CLASSES

The law allows a class to be certified solely for the purpose of settlement when settlement is reached prior to Rule 23 certification. *Mateo-Evangelio v. Triple J Produce, Inc.*, 2016 WL 183485, at *3 (E.D.N.C. Jan. 14, 2016). While "[t]here is a strong judicial policy in favor of settlement . . . parties seeking class certification must still meet the four prerequisites of Federal Rules of Civil Procedure 23(a)(1) through (4) and then must establish that they constitute a proper class of at least one of the types delineated in Rules 23(b)(1) through (3)." *Id.* However, because settlement makes a trial unnecessary, "courts do not need to inquire whether the class will be manageable at trial." *Id.*, citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

### A. Precisely Defined Classes Exist and Their Respective Class Representatives are Members of their Respective Proposed Class

Before determining whether a class should be certified, the district court must first make two initial determinations: (1) whether a precisely defined class exists; *Haywood v. Barnes*, 109 F.R.D. 568, 576 (E.D.N.C. 1986); and (2) whether the class representative is a member of the proposed class. *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977).

The proposed settlement provides for two settlement classes. As this Court has noted, "[i]n-fighting between the US Airways "East Pilots" and America West "West Pilots" began over ten years ago, soon after the two airlines merged to become the single airline known as US Airways, because the two pilot groups could not reach an agreement regarding the integration of

[1] The released claims in the Settlement Agreement do not include *Karas v. Allied Pilots Association, et al.*, 3:16-cv-00168-TJM-DEP, currently pending in the U.S. District Court for the Northern District of New York, and in which USAPA is a named defendant.

their two differing seniority lists. Doc. No. 75, at 2. Thus, an East Pilot Settlement Class and a West Pilot Settlement Class for settlement purposes is a logical and appropriate way to structure the settlement given the lengthy history of the East Pilot and West Pilot dispute.

The East Pilot Settlement Class is defined as:

> All pilots who were employed by US Airlines/American Airlines as of September 16, 2014 and who were listed on the US Airways East Pilot Seniority List.

The West Pilot Settlement Class is defined as:

> All pilots who were employed by US Airlines/American Airlines as of September 16, 2014 and who were listed on the US Airways West Pilot Seniority List.

Both initial determinations are satisfied. The East Pilot Settlement Class and the West Pilot Settlement Class are sufficiently precise. The named representatives are each members of their respective class. John Owens, Bob Burdick and Mark King were all employed by US Airlines/American Airlines as of September 16, 2014, and were listed on the US Airways East Pilot Seniority List. Eddie Bollmeier, Bill Tracey, and Simon Parrott were all employed by US Airlines/American Airlines as of September 16, 2014, and were listed on the US Airways West Pilot Seniority List. No party contests that the representatives are members of their respective class.

**B. The Proposed Settlement Classes Satisfy Rule 23(a) Requirements**

A plaintiff seeking to certify a class must satisfy the four threshold requirements of Rule 23(a), as well as the requirements for certification under one of the three subsections of Rule 23(b). Fed.R.Civ.P. 23; *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 423 (4th Cir. 2003). The parties seek certification under Rule 23(b)(2).

Rule 23(a) provides that a case is appropriate for certification as a class action if: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a). These requirements are known as numerosity, commonality, typicality, and adequacy of representation.

The numerosity test is met where the class is "so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). There is no set number that satisfies this requirement, and the decision whether to certify is based on the facts of each particular case. *Cypress v. Newport News General & Nonsectarian Hospital Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967). Courts have certified classes composed of as few as eighteen, *see Cypress,* 375 F.2d at 653, and as large as fourteen hundred. *Gunnells*, 348 F.3d at 425 (Affirming district court finding that "1400 employees plus their families . . . easily satisfied Rule 23(a)(1)'s numerosity requirement."); *see also Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984), *cert denied* 469 U.S. 827 (1984) ("Previous cases . . . suggest that a class as large as 74 persons is well within the range appropriate for class certification."); *Cent. Wesleyan Coll. v. W.R. Grace & Co.,* 6 F.3d 177, 183 (4th Cir.1993) (Affirming district court finding that "some 480 potential class members would easily satisfy the numerosity requirement."); *Lilly v. Harris–Teeter Supermarket,* 720 F.2d 326, 333 (4th Cir.1983), *cert. denied* 466 U.S. 951 (1984) (229 class members was "easily enough to demonstrate the existence of the class"); *Simpson v. Specialty Retail Concepts*, 149 F.R.D. 94 (M.D.N.C. 1993) (Over 300 class members satisfied numerosity requirement.).

"[A] class of as few as twenty-five to thirty members raises a presumption that joinder would be impracticable." *Rodger v. Electronic Data Systems Corp.*, 160 F.R.D. 532, 535 (E.D.N.C. 1995). Notwithstanding the presumption, like numerosity, whether joinder is impracticable depends on the particular facts of the case. *Id.*, at 536. Factors the court will consider in making the determination include "judicial economy arising from the avoidance of a multiplicity of actions, geographic dispersion of class members, financial resources of class members, [and] the ability of claimants to institute individual suits." *Id.*, quoting *Robidoux v. Celani,* 987 F.2d 931, 936 (2d Cir.1993).

"Commonality requires that "there are questions of law or fact common to the class." *Lienhart v. Dryvit Systems, Inc*., 255 F.3d 138, 146 (4th Cir. 2001), *citing* Fed.R.Civ.P. 23(a)(2). Commonality is satisfied so long as all class members share but one legal or factual issue. *Rodgers*, 160 F.R.D. at 537. "[A] single common question is sufficient to satisfy the rule." *Haywood*, 109 F.R.D. at 577.

"Typicality requires that the claims of the named class representatives be typical of those of the class." *Lienhart*, 255 F.3d at 146. A claim is typical "if it arises from the same event or course of conduct which gives rise to the claims of other class members and is based on the same legal theory." *Haywood*, 109 F.R.D. at 578. For typicality to be met, the "representative party's interest in prosecuting his own case must simultaneously tend to advance the interests of the absent class members." *Deiter v. Microsoft Corp*., 436 F.3d 461, 466 (4th Cir. 2006). "[C]lass representatives must not have an interest that is antagonistic to that of the class members." *Rodgers*, 160 F.R.D. at 538.

The adequacy of representation requirement ensures that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). This requirement

is met if it appears that (1) the named representative has interests in common with, and not antagonistic to, the proposed class's interests; and (2) class counsel are qualified, experienced and generally able to conduct the litigation. *Simpson*, 149 F.R.D. at 102.

1. The West Settlement Class Meets the Rule 23(a) Prerequisites

The West Pilots have been certified as a class in all three *Addington* cases.[2] Most recently, the West Pilots were certified as a class in *Addington III*, where the Arizona District Court held as follows:

> The four requirements of Rule 23(a) are met. First, the proposed class satisfies the numerosity requirement because it consists of approximately 1,600 West Pilots. Second, the commonality requirement is met because this litigation will "generate common *answers* "to classwide issues. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). In particular, this litigation will decide whether USAPA acted appropriately with respect to all West Pilots. Third, the typicality requirement is met because the claims of the representative parties are identical to the claims of the proposed class. *See Hanlon v. Chyrsler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). And fourth, the adequacy requirement is met because the representative parties will fairly and adequately protect the interests of the class.

*Addington v. US Airline Pilots Association*, 13-cv-00471-ROS (D. Ariz.), Doc. 194, Order dated Sept. 18, 2013, at 2-3.

As in *Addington III*, the West Pilot Settlement Class satisfies Fed.R.Civ.P. 23(a). First, the proposed class satisfies the numerosity requirement because it consists of approximately 1,600 West Pilots, and joinder of such a large class of geographically diverse pilots is impracticable. USAPA DJ Action, Doc. 46, Amended Complaint, ¶30. Second, the commonality requirement is met because there are questions of law or fact common to the class, including, *inter alia* (i) the issues in the USAPA DJ Action concerning the validity of the National Officers"

[2] In *Addington III*, the court stated "[t]his is the third time a number of West Pilots have been involved in litigation with their current union, USAPA. In the two previous litigations, the court certified a class comprised of approximately 1,600 West Pilots." *Addington v. USAPA*, 13-cv-00471-ROS (D. Ariz.), Doc. 194, Order dated Sept. 18, 2013, at 1.

decisions to defer USAPA's dissolution and distribution of its assets; (ii) the LMRDA issues in the *Bollmeier* LMRDA action I and LMRDA action II, which were asserted as derivative claims "for the benefit of the labor organization" under 29 U.S.C. § 501(b), and therefore prosecution and settlement of such claims are governed by Fed.R.Civ.P. 23.1 and 23.2; and (iii) the West Pilots' claim for attorneys' fees for the *Addington* litigation. Though the *Bollmeier* LMRDA actions are derivative actions on behalf of all USAPA members, given the history of divergent interests of the East and West Pilots as to seniority-related matters, delineating a West Settlement Class and an East Settlement Class best ensures that their respective interests are met by their respective East and West class representatives.

Third, the typicality requirement is met because the claims of the representative parties are identical to the claims of the proposed class. The claims arise from the same alleged course of conduct by the National Officers and current and former BPR members, and they are all based on the same legal theory. Fourth, the adequacy requirement is met because the representative parties will fairly and adequately protect the interests of the class. Their interests are identical and not antagonistic. Class counsel is the same as in the previous class actions, and have represented West Pilots since 2008.

2. The East Settlement Class Meets the Rule 23(a) Prerequisites

First, the proposed class satisfies the numerosity requirement because it consists of approximately 3576 East Pilots. Declaration of John Owens, ¶3. Second, the commonality requirement is met because there are questions of law or fact common to the class. The common questions include, *inter alia* (i) the issues in the USAPA DJ Action concerning the validity of the National Officers' decisions to defer USAPA's dissolution and distribution of its assets; (ii) the LMRDA issues in *Bollmeier* LMRDA action I and LMRDA action II, which were asserted as

derivative claims for the benefit of the labor organization under 29 U.S.C. § 501(b), and thus affect East Pilots to the same extent as West Pilots; and (iii) the West Pilots claim for attorneys fees for the *Addington* litigation. The *Bollmeier* LMRDA action complaints specifically allege they are actions brought by union members seeking restitution to USAPA, for the benefit of its members . *Bollmeier* LMRDA action I, Doc. 1, Compl., ¶ 1.

Third, the typicality requirement is met because the claims of the representative parties are identical to the claims of the proposed class. The claims arise from the same alleged course of conduct by the National Officers and current and former BPR members, and they are all based on the same legal theory. Fourth, the adequacy requirement is met because the representative parties will fairly and adequately protect the interests of the class. Their interests are identical and not antagonistic. Class counsel represented USAPA from the time of its creation until December, 2011, including representing USAPA in *Addington I*, and by virtue of USAPA s representation of the East Pilots, represented the interests of the East Pilots from the time of USAPA s creation until December, 2011.

**C. The Settlement Classes Satisfy Fed.R.Civ.P. 23(b)(2)**

A putative class satisfies Rule 23(b)(2) if (1) the party opposing the class has acted on grounds generally applicable to the class, (2) thereby making final injunctive relief or corresponding declaratory relief appropriate with respect to the class as a whole. Fed.R.Civ.P. 23(b)(2). The 1966 Advisory Committee Notes to this rule provide that it was

> intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. . . . The [Rule] does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages.

Rule 23(b)(2) Advisory Committee's Note. Accordingly, Rule 23(b)(2) does not "cover cases where the primary claim is for damages, but is only applicable where the relief sought is . . . predominantly injunctive or declaratory." *Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594, 595 (4th Cir. 1976) (internal quotation marks and ellipsis omitted); *see also Zimmerman v. Bell*, 800 F.2d 386, 389-90 (4th Cir. 1986) (holding that Rule 23(b)(2) does not apply where the proposed class seeks "essentially monetary relief," but is "limited to claims where the relief sought was primarily injunctive or declaratory").

The East and West Settlement Classes satisfy Rule 23(b)(2) because the relief sought in the USAPA DJ Action and the *Bollmeier* LMRDA actions are predominantly injunctive or declaratory, and not for money damages.[3] The USAPA DJ Action seeks a declaration that the National Officers' decision to defer dissolution and distribution of assets upon USAPA's NMB decertification was valid and within their constitutional authority and consistent with the USAPA Constitution and Bylaws. Doc. 46, Am. Compl., p. 22. The *Bollmeier* LMRDA actions seek injunctive relief enjoining USAPA officers from further expending any USAPA funds in furtherance of the SLI process, and other matters that are not collective legal action. *Bollmeier* LMRDA action I, Doc. 1, Compl., p. 15; *Bollmeier* LMRDA action II, Doc. 1, Compl., p. 15. While the *Bollmeier* LMRDA action plaintiffs seek restitution of funds wrongfully expended, the purpose of restitution in an LMRDA § 501 action is to provide restitution to the union, not money damages to any individuals. *Reed v. United Transp. Union*, 633 F.Supp. 1516, 1527 (W.D.N.C. 1986) (Plaintiff in a § 501 action "must be seeking relief on behalf of the union rather than on his own behalf."), *reversed on other grounds*, 828 F.2d 1066 (4th Cir. 1987).

[3] In *Addington I*, the court certified the West Pilot class as a Rule 23(b)(2) class, stating that "Rule 23(b)(2) was designed for cases like this one." Case No. 08-cv-1633, Doc. 248, Order dated Mar. 10, 2009.

Although the proposed Settlement Agreement includes monetary payment by USAPA to counsel for the benefit of the West Pilots, the payment is "incidental" and "non-individualized" and thus does not predominate the uniform injunctive and declaratory relief the settlement provides. *Berry v. Schulman*, 807 F.3d 600, 609 (4th Cir. 2015). The relief the proposed Settlement Agreement provides is "indivisible" benefitting all members of the respective classes at once and in the same manner. *Id.* The ultimate objective of the settlement is to resolve all outstanding claims and litigation while still allowing for USAPA to wind up its business affairs. *See* proposed Settlement Agreement attached as Exhibit 1. West Settlement Class members will be disclaiming any and all interest in USAPA treasury funds, including any funds under the dissolution provisions of USAPA's Constitution and Bylaws, or the merger dues increase provision. Ex. 1. ¶3. The amount of a West Pilot's individual interest, if any, in the USAPA treasury funds is governed by USAPA's Constitution and Bylaws. The disclaimed and waived interest provided in the proposed Settlement Agreement applies to the West Settlement Class as a whole and flows directly from the claims asserted in the USAPA DJ Action and the *Bollmeier* LMRDA actions, thus "making them non-individualized under *Dukes* and "incidental" for purposes of Rule 23(b)(2).[4] *Berry*, 807 F.3d at 610; *but see Rehberg v. Flowers Baking Co. of Jamestown, LLC*, 2015 WL 1346125, at *13 (W.D.N.C. Mar. 24, 2015) ("Though Plaintiff's claims for declaratory relief are likely "mere preludes" for monetary relief, the court finds it appropriate for Plaintiff to maintain the action under Rule 23(b)(2)."). Moreover, neither the third-party complaint in the USAPA DJ Action nor the *Bollmeier* LMRDA actions included individual monetary claims.

[4] The Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) held that claims for individualized monetary relief may not be certified under Rule 23(b)(2).

The monetary relief in the Settlement Agreement is incidental to the *Bollmeier* LMRDA action claims which formed the basis of the injunctive relief provided in the Settlement Agreement. The crux of the *Bollmeier* LMRDA actions were the *Bollmeier* plaintiffs' claims that USAPA expending treasury funds for the USAPA Merger Committee was not collective legal action under its Constitution and Bylaws. The injunctive relief in the Settlement Agreement provides relief to each member of the West Settlement Class. It provides that the portion of the preliminary injunction "preventing USAPA and any officers, servants, employees, and attorneys, and anyone in active concert or participation therewith from causing, permitting, or directing USAPA to spend any USAPA funds for any seniority-related matter or seniority list" is to be made permanent for a period of three years from entry of the Final Order. Certification under Rule 23(b)(2) is appropriate.

## III. THE SETTLEMENT AGREEMENT AND RELEASE IS WITHIN THE RANGE OF POSSIBLE APPROVAL AND SHOULD BE PRELIMINARILY APPROVED

The parties jointly request that the Court preliminarily approve the Settlement Agreement under Fed.R.Civ.P. 23(e) and 23.1(c). The Settlement Agreement would put to final rest eight years of litigation between East Pilots and West Pilots. The main terms of the Settlement Agreement include (1) settlement of the West Pilots' claim for attorneys' fees in the *Addington* cases and all claims, counterclaims, and third-party claims in the USAPA DJ Action, LMRDA action I, and LMRDA action II; (2) certification of a class of East Pilots and a class of West Pilots, all of whom will receive written notice of the Settlement Agreement and the opportunity to file written objections or comments and attend a Fairness Hearing; (3) payment by USAPA in the amount of $5.5 million to counsel for the benefit of the West Pilots, representing full and final consideration in settlement of the consolidated actions and the West Pilots' motion for attorneys' fees in *Addington* III; (4) dismissal of all claims, counterclaims, and third-party claims

by all parties with prejudice; (5) converting certain terms of the August 27, 2015 preliminary injunction relating to certain activities of USAPA into a permanent injunction, and extending its duration for three years from entry of the Final Order; and (6) mutual releases of all possible related claims[5]. Rule 23 provides the mechanism for certifying a class action, including, as here, through classes certified for settlement purposes.

There is a strong judicial policy in favor of settlements, particularly in the class action context. *Case v. Plantation Title Co.*, 2015 U.S. Dist. LEXIS 33580, *22 (D.S.C. Mar. 5, 2015) (*quoting In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998); *see also In re U.S. Oil and Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) (Public policy strongly favors the pretrial settlement of class action lawsuits); *South Carolina Nat'l Bank v. Stone,* 749 F. Supp. 1419, 1423 (D.S.C. 1990) (The voluntary resolution of litigation through settlement is strongly favored by the courts and is particularly appropriate in class actions).

The rationale for this policy is simple. Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources. *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 312-13 (7th Cir. 1980) (citations omitted), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873, 875 (7th Cir. 1998), *aff'd*, 525 U.S. 315 (1999); *accord Covarrubias v. Capt. Charlie's Seafood, Inc.*, 2011 U.S. Dist. LEXIS 72636, *6-7 (E.D.N.C. July 5, 2011) (There is a strong judicial policy in favor of settlement, in order to conserve scarce resources that would otherwise be devoted to protracted litigation.) (*quoting Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984)).

[5] Except for *Karas v. Allied Pilots Association, et al.*, 3:16-cv-00168-TJM-DEP.

Rule 23(e) requires that the court approve any proposed settlement of a class action, and that notice of the settlement be given to all class members. Fed.R.Civ.P. 23(e). The standards for preliminary approval of a class settlement under Rule 23(e) involves a two-step process:

> First, the court conducts a preliminary approval or pre-notification hearing to determine whether the proposed settlement is "within the range of possible approval" or, in other words, whether there is "probable cause" to notify the class of the proposed settlement . . .
>
> Second, assuming that the court grants preliminary approval and notice is sent to the class, the court conducts a "fairness" hearing, at which all interested parties are afforded an opportunity to be heard on the proposed settlement.

*Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 827 (E.D.N.C. 1994); MANUAL FOR COMPLEX LITIGATION §§ 21.632, 30.41 (5th ed. 2004)). "The ultimate purpose of the fairness hearing is to determine if the proposed settlement is 'fair, reasonable, and adequate.'" *Id.*, quoting *Armstrong*, 616 F.2d at 314. If the court determines the proposed settlement to be "fair, reasonable, and adequate", it will give final approval to the settlement. *Horton*, 855 F.Supp. at 827.

At this preliminary stage of settlement proceedings, the court need only decide whether there is "probable cause" to notify class members of the proposed settlement and to proceed with a fairness hearing after which the court will make a formal finding on the fairness of the settlement proposal. *Id.*; *Armstrong*, 616 F.2d at 314 (The pre-notification hearing to determine whether the proposed settlement is "within the range of possible approval". . . "is not a fairness hearing; its purpose, rather, is to ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing."); *Winingear v. City of Norfolk, Va.*, 2014 WL 3500996, at *2 (E.D. Va. July 14, 2014) (same); *Beaulieu v. EQ Indus. Services, Inc.*, 2009 WL 2208131, at *23 (E.D.N.C. July 22, 2009) (same).

When evaluating whether to grant preliminary approval of a class settlement, the court

need not decide the merits of the case or resolve unsettled legal questions. *Carson v. Am. Brands, Inc.,* 450 U.S. 79, 88 (1981). The trial court should not turn the settlement hearing into a trial or a rehearsal of the trial nor need it reach any dispositive conclusions on the admittedly unsettled legal issues in the case. *Flinn v. FMC Corp.,* 528 F.2d 1169, 1172-73 (4th Cir. 1975), *cert. denied* 424 U.S. 967 (1976). Instead, the court should limit its proceedings to whatever is necessary to aid it in reaching an informed, just and reasoned decision. *Id.,* at 1173.

The Parties seek preliminary approval of the Settlement Agreement under Fed. R. Civ. P. 23(e). As discussed more fully below, the proposed Settlement Agreement is fair and adequate and probable cause exists to notify the class of the proposed Settlement Agreement.

**A. The Proposed Settlement Agreement is Fair**

Courts within this circuit apply four factors to determine the fairness of a proposed settlement: (1) the posture of the case at the time the proposed settlement was reached, (2) the extent of discovery that had been conducted; (3) the circumstances surrounding the settlement negotiations, and (4) counsel's experience in the type of case at issue. *Beaulieu*, 2009 WL 2208131, at *24 (citing *Jiffy Lube*, 927 F.2d at 158-59; *Horton*, 855 F.Supp. at 828). Applying these factors, if the settlement could reasonably be determined to have been reached through good faith bargaining at arm's length, then it falls within the range of possible final approval with respect to fairness. *Id.*

1. Current Posture of the Consolidated Cases

The consolidated cases had been actively litigated with extensive motion practice when the settlement was reached. Motions in the USAPA DJ Action included defendants' Motions to Dismiss (Docs. 7 and 8), USAPA's Motion to Remand (Doc. 19), and USAPA's Motion for Jurisdictional Discovery (Doc. 24). Motion practice in the *Bollmeier* LMRDA actions included

plaintiffs' Motion for a Temporary Restraining Order or Preliminary Injunction (Doc. 48), defendants' Motion to Vacate the Order Dated March 5, 2015, or, in the Alternative, to Dismiss the Verified Complaint (Docs. 49 and 50), defendants' Motions to Dismiss (Docs. 87 and 96), defendants' Motion for Reconsideration of the Court's Order on the motion to vacate and/or dismiss and on the motion for a preliminary injunction (Doc. 88), plaintiffs' Motion to Dismiss the Third-Party Complaints (Doc. 104), and plaintiffs' Motion to Hold Defendants in Contempt and/or for an Order to Show Cause (Doc. 105).

2. The Extent of Discovery That Had Been Conducted

These consolidated cases were sufficiently advanced at the point that settlement was reached. Prior to reaching a settlement, the Parties engaged in a combination of formal and informal discovery and class counsel conducted an extensive investigation relating to the class claims and the underlying events and transactions, and researched the applicable law with respect to the potential claims and defenses. The investigation and discovery conducted by the Parties in this case was comprehensive and time-consuming. Indeed, there is no dispute that the Parties thoroughly investigated the relevant facts and legal issues through every means available. Such an undertaking yielded substantial information, which allowed the Parties to discuss intelligently and freely the pros and cons of settlement.

3. Circumstances Surround Settlement Negotiations

The Parties and their counsel engaged in court-approved mediation over three days in Charlotte, North Carolina in January, 2016. These negotiations were contentious, adversarial, and without collusion with the *Bollmeier* LMRDA action II defendants initially not even consenting to participate in the mediation. *See Beaulieu*, 2009 WL 2208131, at *25 (Finding the proposed settlement fair where, *inter alia*, the settlement negotiations appear clearly to have been

adversarial, at arm's length, without collusion, contentious, and at time heated.). All parties eventually participated, but the initial three days of mediation did not result in an agreement. However, continued efforts with the assistance of mediator Gary Hemric in the weeks following the mediation sessions, resulted in the Parties reaching a settlement.

4. Counsel's Experience

Counsel for the West Pilot Settlement Class has been representing the West Pilots since 2008, including all of the *Addington* litigation. Counsel for USAPA has represented USAPA since April, 2011, including representation of USAPA in the *Addington* litigation since that date. Counsel for the East Pilot Settlement Class and *Bollmeier* LMRDA action I defendants (Gary Hummel, Stephen Bradford, Rob Streble, Steve Smyser, John Taylor, Joe Stein, Pete Dugstad, Jay Milkey, Stephen Nathan, and Courtney Borman), Seham, Seham, Meltz & Petersen, LLP, was counsel for USAPA from the time of its creation until December, 2011 and represented USAPA in *Addington I*.

The fairness factors favor preliminary approval of the Settlement Agreement.

**B. The Adequacy of the Proposed Settlement Agreement is Within the Range of Possible Approval**

Relevant factors to consider in determining whether a proposed settlement is adequate include:

> (1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement.

*Beaulieu*, 2009 WL 2208131, at *26 (citing *Jiffy Lube,* 927 F.2d at 158; *Horton*, 855 F.Supp. at 829-30).

1. The Relative Strength of the Claims on the Merits

Counsel for all parties asserting claims, counterclaims, and third-party claims have carefully assessed the probability of ultimate success on the merits and the risks of establishing liability and the requested relief. While all counsel certainly believe that the various claims, counterclaims, and third-party claims are strong and could be proven at trial, a finding of liability is never assured, especially in complex litigation.

2. The Existence of any Difficulties of Proof or Strong Defenses

All of the parties face significant risks in establishing liability and defending the claims. For example, the *Bollmeier* LMRDA action defendants may have difficulty in successfully defending the LMRDA claims after this Court's finding that the *Bollmeier* "Plaintiffs are likely to succeed on the merits of their claims." Doc. 75, at 6. On the other hand, at the time of settlement, a motion to dismiss the LMRDA claims by the *Bollmeier* LMRDA action II defendants was pending that, if successful, would result in the dismissal of all of the LMRDA claims against all *Bollmeier* LMRDA action defendants.

The West Pilots may likewise have difficulty in successfully defending their motion for $3,593,065.35 in attorneys' fees in the *Addington* litigation. On the other hand, USAPA faces the risk of further litigation on the attorneys' fees motion, including a hearing and the possibility that a successful motion may in fact increase the attorneys' fees awarded to the West Pilots.

3. The Anticipated Duration and Expense of Additional Litigation

Settling these cases now saves the Parties from years of litigation and saves the Court's resources. These cases are still in their early stages of litigation. Should the Parties continue to litigate, the Parties would have to engage in formal discovery and class certification proceedings.

Dispositive motions, trial, and appeals would follow, extending the lengthy litigation history between the Parties by at least another two years.

4. The Solvency of Defendant and Likelihood of Recovery on a Litigated Judgment

The solvency of USAPA is an issue to be considered because it is no longer a certified union receiving dues income, and faces the risk of liability on the *Bollmeier* LMRDA action defendants' indemnification claims. The likelihood of recovery of the *Bollmeier* LMRDA action plaintiffs' restitution claims against individual defendants is also a factor that favors settlement.

5. The Degree of Opposition to the Settlement

The Parties are aware of several potential objectors, but believe that they are a small minority. The Parties believe that the majority of former US Airways pilots, East and West, prefer to end their lengthy disputes with this settlement.

Based on the foregoing, the Settlement Agreement is clearly fair, adequate and within the range of possible final approval such that it is reasonable. As described above, the Settlement Agreement provides a significant remedy for all Parties and the settlement classes.

Finally, the Settlement Agreement is consistent with the public interest. There is a strong public interest in encouraging settlement of complex litigation and class action suits because they are "notoriously difficult and unpredictable" and settlement conserves judicial resources. *Granada Inv., Inc. v. DWG Corp.,* 962 F.2d 1203, 1205 (6th Cir. 1992). The Settlement Agreement is consistent with the public interest because it finally settles a multitude of claims by multiple parties in two different federal courts and conserves scarce judicial resources.

Accordingly, the Parties submit that the standards for preliminary approval under Fed. R. Civ. P. 23(e) are met, and the Settlement Agreement should be preliminarily approved.

## IV. THE PROPOSED NOTICE OF SETTLEMENT AGREEMENT AND FAIRNESS HEARING IS PROPER AND SHOULD BE APPROVED

The Parties have jointly prepared a Notice of Settlement Agreement and Fairness Hearing ("Notice") that will fairly inform Class Members of the terms of the Settlement Agreement and their options, and satisfy the requirements of due process and Fed. R. Civ. P. 23(c)(2)(A), 23(e) and 23.1(c).

The proposed Notice provides an accurate summary of the consolidated cases, including their litigation history, the settlement and release terms, including class definitions, the effects of the settlement, and the benefits, rights, and limitations of the settlement. *See In re Mutual Funds Inv. Litigation*, 2010 WL 2077972 (D. Md. May 19, 2010) (Approving notice that informs class members of, *inter alia*, the nature of the actions, the class, identity of class counsel, the essential terms of the settlements, and information about how to challenge the settlements.). The proposed Notice also explains what Class Members must do if they wish to submit an objection to the Settlement Agreement.

Upon approval by the Court of the Notice, Class Counsel for the Settlement Classes shall arrange for the delivery of the Notice, Settlement Agreement and Release, preliminary Order, and the MOS to all members of the Settlement Classes to their last-known addresses by regular first-class mail. *See Decohen v. Abbasi, LLC*, 299 F.R.D. 469, 479 (D. Md. 2014) (Where all class members are known in advance, direct mail notice to each class member's last known address, and a second notice if the first was returned as undeliverable was the best practicable notice.). The above documents shall also be delivered by e-mail to those Class Members for whom Class Counsel has or has access to the e-mail addresses, and to the e-mail addresses of Class Members maintained by the Allied Pilots Association. The above documents shall also be posted on the public portion of the USAPA and Leonidas websites. *See In re Mutual Funds Inv.*

*Litigation*, 2010 WL 2077972 (Approving manner of distribution of notice that included, *inter alia*, mailing a copy to all class members and placement on website.).

## V. THE PROPOSED SETTLEMENT AGREEMENT TIMELINE

The following is a proposed timetable for dissemination of the Notice and submission of objections and/or comments in advance of the Fairness Hearing:

| Event | Proposed Deadline |
|---|---|
| Mailing of Notice | 20 days after entry of Preliminary Order |
| Posting of Notice on USAPA and Leonidas websites | 20 days after entry of Preliminary Order |
| Submitting Objections, Comments, and/or Requests to Speak at the Fairness Hearing | 50 days after entry of Preliminary Order |
| Submitting Responses to Objections and/or Comments | 7 business days prior to Fairness Hearing |
| Fairness Hearing | [TO BE INSERTED] |

## CONCLUSION

Based on the foregoing, the Parties jointly request that the Court grant the instant motion and enter an Order granting conditional certification of class action for settlement purposes only, preliminary approval of the Settlement Agreement and Release, and approval of the content and method of distribution of the Notice to Class Members.

Dated: April 11, 2016

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**CERTIFICATE OF SERVICE**

This is to certify that on this date, a true and accurate copy of the foregoing Joint Memorandum of Law in Support of Class Certification, Preliminary Approval of Proposed Class Action Settlement and Release, and Approval of the Content and Method of Distribution of the Notice of Class Members was electronically filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record in this matter via e-mail through CM/ECF.

This the 11 day of April, 2016.

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