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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Don Addington, *et. al.*,

Plaintiffs,

v.

US Airline Pilots Association, *et. al.*,

Defendants.

Case No.: CV-13-00471-PHX-ROS

US Airline Pilots Association's Motion to Dismiss

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panel of arbitrators would decide is "fair and equitable" in the event the issue went to arbitration under the McCaskill-Bond process. The uncertainty that was the basis for the Ninth Circuit's conclusion that Plaintiffs' DFR claim was not ripe applies with even greater force now. *Addington*, 606 F.3d at 1180 ("Thus, even under the district court's injunction mandating USAPA to pursue the Nicolau Award, it is uncertain that the West Pilots' preferred seniority system ever would be effectuated.").

At this time, no one knows what seniority integration list will ultimately be part of the final merger. "[T]he Supreme Court case that clarified that the DFR was applicable during contract negotiations articulated its holding in terms that imply a claim can be brought only after negotiations are complete and a 'final product' has been reached." *Addington*, 606 F.3d at 1182 (citing *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78, 111 S.Ct. 1127 (1991)); *see also* 2:10-cv-01570-ROS, Doc. 193, p. 7 ("Pursuant to the Ninth Circuit's decision, any claim for breach of the duty of fair representation will not be ripe until a collective bargaining agreement is finalized."). Negotiations are not complete and a "final product" will not be reached unless and until the merger is complete. Because numerous uncertain future contingencies make Plaintiffs' claim speculative, the DFR claim is not yet fit for judicial decision, and the complaint should be dismissed.

2. Plaintiffs' DFR claim rests on interpretation of the MOU, and is thus a "minor dispute" within the exclusive jurisdiction of the System Board of Adjustment.

It is well established that under the RLA disputes growing out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions are subject to mandatory arbitration before the System Board of Adjustment. 45 U.S.C. §§ 184; *Consol. Rail. Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299, 303, 109 S.Ct. 2477, 2480 (1989) ("*Conrail*"); *International Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Aloha Airlines*, 776 F.2d 812, 815 (9th Cir. 1985). Such disputes,

denominated as "minor disputes" "contemplate[] the existence of a collective agreement already concluded . . . The dispute relates either to the meaning or proper application of a particular provision . . ." *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 723, 65 S.Ct. 1282, 1290 (1945). Major disputes, on the other hand, involve disputes concerning the formation of collective agreements, and "therefore the issue is not whether an existing agreement controls the controversy." *Id.* "When in doubt, courts construe disputes as minor." *Ass'n of Flight Attendants v. Mesa Air Group, Inc.*, 567 F.3d 1043, 1047 (9th Cir. 2009) (citing *Bhd. of Locomotive Eng'rs v. Burlington Northern R. Co.*, 838 F.2d 1102, 1111 (9th Cir. 1988)).

Plaintiffs' claims in this action are premised on their assertion that the ratification of the MOU now makes their DFR claim ripe. (Complaint, ¶32) Even if Plaintiffs were free to collaterally attack this Court's judgment, the essence of their claim is that the MOU is a collective bargaining agreement necessitating implementation of the Nicolau Award, which is a "minor dispute." As the System Board has exclusive jurisdiction over "minor disputes", the instant action must be dismissed for lack of subject matter jurisdiction.[8] *Conrail*, 491 U.S. at 310, 109 S.Ct. 2477.

POINT III

PLAINTIFFS FAIL TO STATE A DFR CLAIM AGAINST USAPA

1. The complaint fails to allege facts to support a DFR claim.

In the event this Court decides this case is ripe for review and/or not barred by *res judicata*, the complaint should nevertheless be dismissed for failure to state a claim. In deciding a Rule 12(b)(6) motion to dismiss, a court must determine "whether the

[8] Plaintiffs' claim that the MOU is the "single agreement" referred to in the 2005 Transition Agreement, and that because the MOU has been ratified the Nicolau Award must be implemented under the terms of that Transition Agreement is equally an issue that requires interpretation and application of the Transition Agreement and is therefore also "minor dispute" within the exclusive jurisdiction of the System Board of Adjustment. (See Complaint, ¶¶34, 42, 102-110)

complaint's factual allegations, together with all reasonable inferences, state a plausible claim for relief." *Cafasso, United States ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 (9th Cir. 2011) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79, 129 S.Ct. 1937 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S.Ct. 1955 (2007)).

Plaintiffs have alleged nothing but conclusory allegations in support of their DFR claim against USAPA. "[L]egal conclusions . . . cast in the form of factual allegations" are insufficient to defeat a motion to dismiss. *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011), cert. denied 132 S.Ct. 850 (2011). Aside from reciting the events leading up to the Nicolau Award, the findings of Judge Wake in *Addington I* (which were vacated and dismissed and thus carry no weight), and the Declaratory Judgment Action, Plaintiffs fail to allege any facts supporting their claim that "USAPA does not have a legitimate union purpose to use anything other than the Nicolau Award list to integrate East Pilots and West Pilots." (Complaint, ¶98)

Absent from the complaint are any allegations that USAPA's conduct in entering into the MOU was "arbitrary, discriminatory, or in bad faith", the *sine qua non* of a DFR claim. *See Vaca v. Sipes*, 386 U.S. 171, 190, 87 S.Ct. 903 (1967). Instead, the DFR claim is reduced to mere tautologic repetition of a legal principle but no actual facts as to the alleged DFR.

Moreover, given the current circumstances, *i.e.*, the proposed merger between US Airways and American Airlines, the Complaint is significant for its lack of any allegations to suggest that "in light of the factual and legal landscape at the time", USAPA's behavior "is so far outside a 'wide range of reasonableness,' . . . as to be irrational." *O'Neill*, 499 U.S. at 67, 111 S.Ct. 1127, 1130 (quoting *Ford Motor Co. v.*