Docket Nos. 14-15757, 14-15874, 14-15892

In the

United States Court of Appeals for the Ninth Circuit

Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; Steve WARGOCKI; Michael J. SOHA; Rodney Albert BRACKIN; and George MALIGA; *and a class of persons similarly situated*,

Plaintiffs-Appellants & Cross-Appellees

v.

US AIRLINE PILOTS ASSOCIATION,

Defendant-Appellee & Cross-Appellant

US AIRWAYS, INC.,

Intervenor-Cross-Appellant

Appeal from final judgment and rulings necessary thereto by the United States District Court for the District of Arizona, No. 2:13-CV-00471, Hon. Roslyn O. Silver, Senior United States District Judge

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FIRST CROSS-APPEAL BRIEF OF PLAINTIFFS-APPELLANTS ADDINGTON, *et al*.

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III. LIST OF ABBREVIATIONS USED

ALPA .....Air Line Pilots Association

DFR ..... Duty of fair representation

Doc. ..... District Court document number

ER ..... Excerpt of record

Ex. ..... Trial exhibit

MOU ..... Memorandum of Understanding

RLA ..... Railway Labor Act

USAPA ..... US Airline Pilots Association

IV. JURISDICTIONAL STATEMENT

The certified West Pilot Class has a ripe claim that the US Airline pilots Association ("USAPA") breached its duty of fair representation ("DFR") pursuant to the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, because, without a legitimate union purpose, USAPA included language in a collective bargaining agreement that purportedly nullifies an existing agreement to use a seniority order that was determined by an arbitrator in 2007 and accepted by US Airways in 2008. This Court has federal question jurisdiction, pursuant to 28 U.S.C. § 1291, to review the following District Court judgments: (1) that USAPA had a legitimate union purpose to abrogate an agreement to use an arbitrated seniority order; and (2) that the certified West Pilot Class does not have the right to be separately represented in the pending McCaskill-Bond seniority integration with the American Airlines pilots. Final judgment was entered on March 31, 2014. (Doc. 305 [ER 130].) Notice of this appeal was timely filed on April 21, 2014. (Doc. 306 [ER 131].) Notices of the cross-appeals by USAPA and US Airways were timely filed on May 2 and 5, 2014. (Docs. 308 & 311 [ER 133 & 136].)

V. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1) Whether USAPA breached the duty of fair representation because, without a legitimate union purpose, it added language to the MOU that abrogates the West pilots' right to be integrated with the East pilots according to the Nicolau Award?

2) Whether West pilots have a right to separate representation in the pending McCaskill-Bond seniority integration with the American Airlines pilots because there is compelling evidence that USAPA will not represent West pilots fairly?

VI. STATEMENT OF THE CASE

US Airways and America West merged in 2005. At the time, the pilots from these two airlines (referred to as "East pilots" and "West pilots," respectively) and the pre-merger airlines entered into a contract called the "Transition Agreement." Among other things, this contract provided that the pilots would arbitrate a single seniority list if they were unable to reach agreement on such a list. A seniority list created in such an arbitration would be the final resolution of the East-West seniority integration dispute.

After an integrated seniority list (known as the "Nicolau Award") was created by arbitration, the East pilots refused to abide by those terms. Instead, the East pilots used their majority power to replace the Air Line Pilots Association ("ALPA"), a multi-airline union then representing both pilot groups, with the US Airline pilots Association ("USAPA"), a single-airline union created and controlled by the East pilots. From the start, USAPA has consistently stated and demonstrated that it will never implement the Nicolau Award.

In 2008, the West pilots sued to compel USAPA to negotiate a single contract that would incorporate the Nicolau Award. A jury found that USAPA breached its duty of fair representation because, without a legitimate union purpose, it repudiated the agreement to implement the Nicolau Award. And, the District Court provided suitable injunctive relief.

But, on appeal, a divided panel of this Court found that the claim was not ripe. Although the Court vacated the injunction, it strongly cautioned USAPA that there would be a ripe claim if USAPA made a ratified contract that dishonored the existing commitment to implement the Nicolau Award.

US Airways merged with American Airlines before it reached agreement with USAPA on a contract that would integrate pilot operations from the 2005 merger with America West Airlines. In January 2013, USAPA was a party to a contract, called the Memorandum of Understanding ("MOU"), that provides for a single set of wages and conditions of employment for the East and West pilots.[1] This contract went into effect in late 2013 when US Airways actually merged with American Airlines.

USAPA added paragraph 10(h) to the MOU to negate the requirement in the 2005 Transition Agreement that USAPA and US Airways (the post 2005 merger entity) use the Nicolau Award to order the seniority of the East and West pilots. USAPA claims that this paragraph in the MOU replaces or supersedes the seniority integration language in the 2005 Transition Agreement. USAPA also asserts that this paragraph gives it the right to put

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[1] *In the Matter of Allied Pilots Ass'n*, 41 NMB 174, 183 (Aug. 8, 2014) (holding that "[t]he material post-merger terms and conditions of employment for the legacy American and US Airways Pilots have already been established" in the MOU.) [ER 364].)

the East and West pilots into a seniority order different than the Nicolau Award when their seniority is integrated with that of the American Airlines pilots.

Despite overt seniority conflicts of interest between the East and West pilots, USAPA claims that a single USAPA committee (the "Merger Committee"), which is controlled by East pilots, can and must represent both East and West pilots in the MOU seniority integration process that will integrate these pilots with those from American Airlines. USAPA claims the Merger Committee can be fair but admits that it will never agree to use the Nicolau Award seniority order and if it did, that agreement would be reviewed and rejected by USAPA's governing body, the Board of Pilot Representatives, which is also dominated by the East pilots.

In March 2013, nine West pilots filed a class-action lawsuit to establish that USAPA violated its duty of fair representation by putting seniority language into the MOU that nullifies the existing obligation to honor the Nicolau Award. After pointless opposition to class certification by USAPA, the District Court readily certified the "West Pilot Class." In Claim One the West Pilot Class asserts that USAPA violated its duty because it put that language into the MOU without a legitimate union purpose. In Claim Four, the West Pilot Class asserts that McCaskill-Bond and general principles of

fairness give them the right to separate and independent representation in the process of integrating seniority with the American Airlines pilots.

After a two-day bench trial, the District Court denied relief on Claim One, holding "by the slimmest of margins" that USAPA did not breach its duty of fair representation. (Doc. 298 at 21:5 to 21:6 [ER 102].) Still, the court noted that it "ha[d] serious doubts that USAPA will fairly and adequately represent all of its members while it remains a certified representative." (*Id.* at 21:6 to 21:8 [ER 102].) The District Court also denied relief on Claim Four, holding that only a currently certified union can represent workers in McCaskill-Bond proceedings.

The West Pilot Class appeals both of these rulings. It also seeks remand so that the District Court can address its claim for a common benefit attorneys' fee award in that light.

VII. BACKGROUND

The material facts set out below are supported by the facts stipulated by all parties in the *Proposed Final Pretrial Order for Bench Trial* (Doc. 206-1 at 13-34 [ER 060-81) and, in a few instances by additional factual findings made by the District Court. (Doc. 298 at 1, n.1 [ER 082]) All deposition transcripts cited were designated and submitted to the District Court to be considered as evidence.

A. Merger of America West and US Airways

In May 2005, two airlines, America West and US Airways, announced their agreement to merge to become a single airline known as US Airways (the "2005 Merger"). (Doc. 206-1 at Stipulated Fact ("SF") #1 [ER 060].) At the time, US Airways had 5,100 pilots ("East pilots") and America West had 1,900 pilots ("West pilots"). (*Id.* at SF # 2 [ER 060].) None of the West pilots were on furlough. (*Id.* at SF # 3 [ER 060.) But 1,700 of the East pilots were. (*Id.* at SF # 4 [ER 060].)

In 2005, the Air Line Pilots Association ("ALPA") represented both the East and West pilots. (*Id.* at SF # 5 [ER 060].) On September 23, 2005, ALPA, on behalf of both pilots groups, entered into a contract with the merging airlines that is called the "Transition Agreement." (*Id.* at SF # 6 [ER 060]; Ex. 113 (copy of Transition Agreement) [ER 179-195].) Pursuant to that contract, until certain conditions were satisfied, the post-merger airline

entity (which is also called "US Airways") would conduct separate pilot operations using the two pre-merger collective bargaining agreements and the two pre-merger separate seniority lists, one set for each of the pilot groups. (*Id.* at SF ## 8-9 [ER 060-61].)

After three specified conditions were satisfied, the 2005 Transition Agreement required that US Airways would integrate its pilot operations using a single, integrated pilot seniority list. These three conditions were: (1) US Airways obtains a single operating certificate (this occurred in 2007); (2) the two pilot groups create a single seniority list according to the procedures set out in a document called "ALPA Merger Policy" (this also occurred in 2007); and (3) the pilots and airline negotiate a new collective bargaining agreement, referred to as the "Single Agreement," that would apply to all pilots (this occurred in February 2013 when USAPA's rank-and-file ratified the MOU). (*Id.* at SF ## 16-19 [ER 061-62]; *see also* Ex. 116 at (excerpts of ALPA Merger Policy) [ER 240-248].)

If the East and West pilots could not agree to an integrated seniority list, ALPA Merger Policy provided that a neutral arbitration board would create a single integrated seniority list that would "be final and binding on all parties to the arbitration and shall be defended by ALPA." (Doc. 206-1 at SF # 21 [ER 062].) This list was created by arbitration after the East and

West pilots were unable to create such a list through negotiation or mediation. (*Id.* at SF ## 22-23 [ER 062].)

Mr. George Nicolau chaired the arbitration board. (Ex. 114 at 1 [ER 196].) The board issued its award (called the "Nicolau Award") on May 1, 2007. (Doc. 206-1. at SF # 24 [ER 062].) Among other things, the Nicolau Award places the 1,700 East pilots who were on furlough in 2005 at the bottom of the integrated seniority list. (*Id.* at SF # 27 [ER 063].) Mr. Nicolau explained that the board did this because "merging active pilots with furloughees, despite the length of service of some of the latter, is not at all fair or equitable." (*Id.* at SF # 28 [ER 063].) The East pilots objected to that aspect of the Nicolau Award as well to its failure to otherwise integrate East and West pilots based on their dates-of-hire at their pre-merger airlines. (*See id.* at SF # 35 [ER 063].)

On December 20, 2007, US Airways accepted the Nicolau Award as the single seniority list envisioned by the Transition Agreement. (*Id.* at SF # 30 [ER 063].) That should have ended the dispute over East-West seniority integration. But, it didn't.

B. The Formation and Election of USAPA

In May 2007, shortly after the Nicolau Award was announced, East pilot Stephen Bradford and other East pilots formed a committee to investigate whether they could form a new union to take over representation

of the US Airways pilots, East and West, and prevent implementation of the Nicolau Award. (*Id.* at SF # 36 [ER 063].) This committee envisioned creating a single-airline union—a union that the East pilot majority could control, a union that would assert it was not bound by the Transition Agreement seniority provisions, a union that could prevent implementation of the Nicolau Award in the "next merger." (*Id.* at SF # 39 (USAPA formed to replace ALPA) [ER 064.])[2] To ensure that this union, which came to be known as USAPA, would support the East pilot seniority position, it was created with a constitution that does not allow it to use the Nicolau Award single seniority list. (*See id.* at SF ## 50, 51 [ER 064]; *Paul DiOrio depo.* at 47:14 to 47:19 (East pilot leader testifying that using Nicolau Award would be "in violation of the [USAPA] constitution") [ER 331]; *Steven Crimi depo.* at 19:2 to 19:16 (same) [ER 324].)

An election contest between ALPA and USAPA followed. (*Id.* at SF # 41 [ER 064].) During the pre-election campaign, Mr. Bradford and other USAPA supporters made it very clear that the "centerpiece" of USAPA's

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[2] *See also* Ex. 36 (Stephen Bradford email to R. Weber, expressing concern that Nicolau award would be used in the "next merger") [ER 165]; Ex. 41 (Bradford telling East pilots, "If ALPA is not there, the [Nicolau] award is not there.") [ER 169]; Ex. 40 at 2 (Bradford telling East pilots, "[T]he Nicolau Award won't die until ALPA dies") [ER 168]; *Bradford depo*. at 68:14 to 71:24 (authenticating these exhibits) [ER 289-92].

policy would be to implement a date-of-hire seniority integration that put East pilots who were furloughees in 2005 ahead of West pilots who were active in 2005—something that Mr. Nicolau found was neither fair nor equitable. *Id.* at SF ## 28, 51 [ER 063, 065]; Ex. 40, 41 [ER 167, 169].)[3]

USAPA won the election and, on April 18, 2008, the National Mediation Board certified USAPA as the collective bargaining representative for the entire pilot craft or class (East and West pilots). (Doc. 206-1 at SF # 43-44 [ER 064].)[4]

C. USAPA Seniority Policy

In September 2008, USAPA proposed a date-of-hire seniority list to US Airways. (*Id.* at SF # 54 [ER 065].) This seniority proposal combined the pre-merger East and West lists by date-of-hire, without regard to whether a pilot was on furlough at the time of the merger and without regard to the a pilot's pre-merger status (such as Captain or First Officer). (*Id.* at SF # 59 [ER 065].) USAPA has never withdrawn this date-of-hire seniority proposal.

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[3] *See also Bradford depo.* at 75:4 to 75:22 (date-of-hire is USAPA's "centerpiece") [ER 295]; *id.*at 82:7 to 82:20 ("date-of-hire is a founding principal of this union" that is "enshrined in our constitution") [ER 296].

[4] "Craft or class" is the Railway labor Act term for a "bargaining unit."

(*Id.* at SF # 51, 55 [ER 064, 065].) And, US Airways has never accepted such a list. (*Id.* at SF # 56 [ER 065].) [5]

At trial in this action, West pilot Brian Stockdell used exhibits to illustrate the consequences of ordering the East pilots (in red and black) and the West pilots (in blue) according to USAPA's date-of-hire list rather than according to the Nicolau Award list. (Ex. 118, 119, 150 [ER 249-51].) He showed that the West pilots had higher seniority than all 1,700 East pilots (in black) who were on furlough in 2005, when ordered according to the Nicolau Award. (*Stockdell testimony* at 182:9 to 182:25 [ER 257] & Ex. 150 [ER 251].) He also showed that the West Pilots had much lower seniority when ordered according to USAPA's date-of-hire list. (*Id.*) Finally, he showed that the West pilots, as a group, would lose income of about $280 million over the six-year term of the MOU if their seniority positions vis-à-vis the East pilots were determined according to USAPA's date-of-hire order rather than according to the Nicolau Award. (*Id.* at 184:1 to 186:11 [ER 259-61] & Ex. 150 [251].)

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[5] USAPA makes far too much of the fact that its seniority proposal contains conditions and restrictions. USAPA concedes, "Conditions and restrictions that apply to a pilot group before a merger may or may not carry forward in a seniority integration proceeding with another pilot group." (*Id.* at SF #58 [ER 065]). Consequently, these conditions and restrictions provide little value in a merger with a third airline.

USAPA's constitution continues to have a date-of-hire seniority provision that leaves no leeway to implement the Nicolau Award. (Doc. 206-1 at SF # 50 [ER 064]; *DiOrio depo.* at 47:14 to 47:19 [ER 331]; *Crimi depo.* at 19:2 to 19:16 [ER 324].) Consequently, USAPA has refused to take any steps towards implementing the Nicolau Award and, barring a direct court order will never do so. (Doc. 206-1 at SF# 51 [ER 064].)

D. Prior Litigation

1. The 2008 Jury Trial

In 2008, six West pilots sued USAPA in the District of Arizona, claiming that USAPA breached its duty of fair representation by repudiating the Transition Agreement obligation to use the Nicolau Award. *See generally Addington v. US Airline pilots Ass'n*, CV 08-1633-PHX-NVW, 2009 WL 2169164 (D. Ariz. Jul. 17, 2009), vacated for lack of ripeness, 606 F.3d 1174 (9th Cir. 2010). The case was certified as a class action and proceeded to a jury trial where the West pilots prevailed. *Id.* On appeal, however, this Court (in a divided ruling) dismissed the action as not presenting a ripe controversy. *Addington v. US Airline pilots Ass'n*, 606 F.3d 1174, 1180 (9th Cir. 2010). But, the Court cautioned USAPA that the West pilots would have a ripe claim if and "[w]hen the collective bargaining agreement is finalized." *Id.* at 1180 n.1.

2. The 2010 Declaratory Judgment Action

On July 27, 2010, US Airways filed a declaratory judgment action in the District of Arizona, alleging that it required guidance, *inter alia*, as to whether it would be liable if it entered into a collective bargaining agreement with USAPA that did not implement the Nicolau Award. (Doc. 206-1 at SF # 61 [ER 065.) The District Court ruled in October 2012. (Ex. 115 [ER 231-40].) In that ruling, the District Court provided substantial guidance as to what was required of USAPA. The Court stated, among other things, that "[d]iscarding the Nicolau Award places USAPA on dangerous ground." (*Id.* at 7:18 to 7:19 [ER 237].) It also explained that USAPA's date-of-hire "seniority proposal does not breach its duty of fair representation provided it is supported by a legitimate union purpose." (*Id.* at 9:3 to 9:4 (emphasis added) [ER 239].) In other words, the District Court cautioned USAPA that it was not free to disregard the Nicolau Award.

USAPA's leaders and attorneys grossly misinterpreted the District Court's declaratory judgment by telling its East pilot members that it was now free to ignore the Nicolau Award. (Doc. 298 at 3:17 to 3:21 [ER 084]; Ex. 19 at 3 (omitting the requirement to act with a legitimate union purpose) [ER 141].)[6] Such misinformation strengthened the East pilots' belief that

[6] *See also Gary Hummel depo.*, 100:24 to 101:19 (Sep. 17, 2013) (USAPA President confirming that Ex. 19 was a report to pilots stating that

USAPA had an unrestrained legal right to impose a date-of-hire seniority list on the West pilots, that USAPA was free to disregard the 2005 agreement to implement the Nicolau Award.

E. Merger with American Airlines

On November 29, 2011, AMR Corporation and its subsidiary, American Airlines, Inc., commenced voluntary Chapter 11 cases in the United States Bankruptcy Court for the Southern District of New York, *In re AMR Corp.*, Case No. 11-15463. (Doc. 206-1 at SF # 69 [ER 066].) On February 13, 2013, US Airways Group, Inc. (the parent of US Airways) and AMR entered into an agreement to merge US Airways and American. (*Id.* at SF # 70 [ER 066].) In April, 2013, the Bankruptcy Court approved the merger subject to conditions that are not at issue here. (*Id.* at SF ## 71-73 [ER 066-67].) On April 8, 2014, the National Mediation Board found that "American and US Airways constitute a single transportation system." *In the Matter of Allied Pilots Ass'n*, 41 NMB at 355. [ER 355].

"as a result of Judge Silver's . . . ruling, USAPA is free to use whatever seniority list we want") [ER 333-34]; *see also id.* 103:15 to 104:24 (same) [ER 335-36]; *Crimi depo.* at 122:13 to 123:1 (East pilots representative, same) [ER 327-28]; *Bradford depo.* at 108:4 to 108:21 (same) [ER 299].

F. The Memorandum of Understanding ("MOU")

Even before it formally agreed to merge with American Airlines, US Airways began negotiating labor contract terms with the Allied Pilots Association ("APA"), the union for American Airlines pilots—terms that would go into effect if and when such a merger occurred. (Doc. 206-1 at SF # 74 [ER 067].) On April 23, 2012, APA and US Airways (without USAPA's involvement) executed an agreement on such terms, referred to as the "Conditional Labor Agreement" or "APA Term Sheet." (*Id.* at SF # 75 [ER 067].) Later, US Airways agreed to discuss modifying or adding to those terms with USAPA. (*Id.* at SF # 76 [ER 067].)

USAPA gave its Negotiating Advisory Committee the task of negotiating modifications or additions to the APA Term Sheet. (*Id.* at SF # 78 [ER 067].) For its part, US Airways insisted that the pilot seniority integration provisions must comply with the 2007 McCaskill-Bond Amendment to the Federal Aviation Act, 49 U.S.C. § 42112, note, § 117(a). (*Id.* at SF # 77 [ER 067].)[7] And, all the drafts circulated during these

[7] McCaskill-Bond provides that merging airlines must fairly and equitably integrate the seniority of employees affected by the merger. In general, if affected employees cannot negotiate a seniority integration they can compel the use of binding neutral arbitration. A copy of the text is provided. (Doc. 97-1 [ER 008].)

negotiations stated that the seniority integration process would be consistent with McCaskill-Bond. (*Id.* at SF # 92 [ER 069]).

The outcome of these negotiations were memorialized in a document entitled "Memorandum of Understanding Regarding Contingent Collective Bargaining Agreement," which the parties refer to as the "MOU." (*Id.* at SF # 80 [ER 068].)[8] On August 20, 2012, negotiators for US Airways and USAPA tentatively approved a draft of the MOU. (*Id.* at SF # 81 [ER 068].) When USAPA's governing body, the Board of Pilot Representatives ("Board of Pilot Representatives"), reviewed that draft, it found deficiencies and directed the Negotiating Advisory Committee to negotiate further. (*Id.* at SF # 83 [ER 068].)[9] But, it did not identify any seniority-related deficiencies. (*Hummel depo*. at 158:6 to 160:19 (unable to identify anything other than economic terms and insurance needing further negotiation) [ER 338-40]; *Colello depo.* at 54:21 to 56:14 (listing MOU deficiencies without mention of seniority terms) [ER 313-15].)

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[8] Some of the briefing to the District Court referred to the August 2012 draft of the MOU as "MOU I."

[9] *Colello depo.* at 39:9 to 39:15 (Negotiating Advisory Committee stating that the Board of Pilot Representatives directed committee to renegotiate specific items) [ER 309]; *id.* at 47:20 to 48:7 (same) [ER 311-12].

Further negotiations between the USAPA Negotiating Advisory Committee and US Airways were delayed until December 2012 by matters that are not at issue here. (*Id.* at SF ## 85, 86 [ER 068].) Negotiations resumed on December 10, 2012, and ended on January 2, 2013. (*Id.* at SF # 87 [ER 068].) In the course of those negotiations, notwithstanding that the Board of Pilot Representatives did not identify problems with the seniority integration provisions in the August 2012 draft of the MOU, USAPA added seniority language to the final MOU draft that gave rise to this litigation. (Doc. 298 at 4:4 to 4:5 ("USAPA made changes to a provision regarding seniority rights.") [ER 085].)

USAPA first proposed having the MOU state, "This MOU is not intended to nor shall it constitute the 'Single Agreement' referred to in Paragraph VI.A. of the September 23, 2005 Transition Agreement." (Doc. 206-1 at SF # 95 [ER 069]; Ex. 25 at 2 (showing that this language was circulated by USAPA) [ER 163]).

USAPA later proposed this language that became paragraph 10(h):

> US Airways agrees that neither this Memorandum nor the JCBA [Joint Collective Bargaining Agreement] shall provide a basis for changing the seniority lists currently in effect at US Airways other than through the process set forth in this paragraph 10.

(*Id.* at SF # 93; [ER 069]; Ex. 93 at 3 (showing that this language was proposed by "PS" – USAPA's merger counsel Pay Szymanski) [ER 178]; *see also* Doc. 298 at 4:16 to 4:18 (same) [ER 085].)

The District Court found that USAPA "likely believed" that, without this language, the MOU "would have triggered obligations under the Transition Agreement, including implementation of the Nicolau Award." (Doc. 298 at 4:9 to 4:11 [ER 085].) It found that USAPA was "motivated in large part simply by a desire to ensure the Nicolau Award never take effect." (*Id.* at 4:23 to 5:1 [ER 085-86].)

The MOU contains substantial economic improvements for US Airways pilots. (Doc. 206-1 at SF # 98 [ER 069].) But, none of those improvements were obtained in exchange for adding paragraph 10(h) to the MOU.[10] There is no evidence, in other words, that USAPA put paragraph 10(h) into the MOU in exchange for better wages or other favorable concessions from US Airways that would benefit the pilots in aggregate.

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[10] *Colello testimony* at 304:22 to 305:8 (USAPA Negotiating Advisory Committee Chairman testified that no economic benefit was exchanged by the airline for paragraph 10(h): "So was there any economic benefit for the parties to agree to include 10H? I would say the answer was no.") [ER 279-80].

In fact, none of USAPA's officers or committee chairmen admitted to knowing why USAPA proposed the language in paragraph 10(h). (*E.g.*, *Colello testimony* at 297:15 to 297:23 [ER 278].) But, they all agreed that this language allows USAPA to order the seniority of US Airways pilots (East and West) by date-of-hire, not by the Nicolau Award, when they are integrated with the seniority of the American Airlines pilots.[11] Indeed, the chairman of USAPA's negotiating committee, Dean Colello, testified in his deposition that paragraph 10(h) provides USAPA the "clean slate" that, in October 2012, the District Court told USAPA it did not have and could not get unless it had a legitimate union purpose. (*Colello depo.* at 85:24 to 86:9

[11] *Jess Pauley depo.* at 18:18 to 20:16 (USAPA Merger Committee Chairman stating that an East pilot dominated committee (overseen by the East pilot dominated Board of Pilot Representatives) will decide East/West seniority integration) [ER 349-51]; *David Ciabatoni depo.* 50:7 to 50:15 (USAPA Grievance Committee Chairman stating that USAPA will submit a date-of-hire list as required by its Constitution) [ER 305]; *Crimi depo.* at 94:18 to 94:24 (stating that a recent effort to eliminate the date-of-hire provision in USAPA's Constitution failed) [ER 325]; *Bradford depo.* at 52:23 to 53:6 (stating that USAPA will present a date-of-hire seniority order for its pilots) [ER 286-87]; *id.* at 126:2 to 126:7 (it will be up to the [East pilot dominated] Board of Pilot Representatives to decide) [ER 301]; *id.*at 162:2 to 162:19 (the effect of Paragraph 10(h) is to "take away the requirement" to use the Nicolau Award by amending the 2005 Transition Agreement) [ER 303].

[ER 321-23] & Ex. 115 at 2:1 to 2:2 & 9:3 to 9:4 [ER 232 & 239].) Mr. Bradford wrote in an email to other USAPA leaders in regard to the MOU that USAPA "agreed to a new seniority process that does not include the Nicolau Award." (Ex. 59 [ER 175].)

After he refused to sit for a deposition, Mr. Szymanski, USAPA's merger counsel and counsel in this litigation, personally tried to explain at trial to explain why USAPA put paragraph 10(h) into the MOU by shouting it out in open court. At the same time, he refused (when invited by the court) to provide such evidence under oath and be subject to cross-examination. (Doc. 298 at 4:16 to 4:23 & n.2 [ER 085].) The district court did not permit USAPA's lawyer to provide unsworn evidence under such conditions. (*Id.*) Thus, this record is devoid of <u>any</u> admissible evidence about USAPA's legitimate union purpose for adding language to the MOU, paragraph 10(h), that abandons the existing agreement to implement the Nicolau Award.

In February 2013, USAPA put the final version of the MOU to a ratification vote by its rank-and-file. (Doc. 206-1 at SF # 115 [ER 072].) A substantial majority of these members voted for ratification. (*Id.* at SF # 127 [ER 072].) But many pilots represented by USAPA did not vote. In particular, approximately 300 West pilots were not eligible to vote on MOU ratification because they refuse to join USAPA or are now on furlough. (*Id.*

at SF ## 129-30 [ER 073].) Hundreds more who were eligible chose not to vote. (*Id.* at SF # 128 [ER 073].)

The MOU is a functionally complete collective bargaining agreement because it provides all material terms such as wages and other conditions of employment for the pilots from the two merging airlines. *In the Matter of Allied Pilots Ass'n*, 41 NMB at 355. [ER 364]. It also requires a process that will necessarily result in a Joint Collective Bargaining Agreement ("JCBA"). (Doc. 206-1 at SF # 135 [ER 074].) For example, New American (the airline emerging from the merger) and its pilots agree, if they cannot negotiate a JCBA, or if the pilots do not ratify a negotiated JCBA, that an arbitrator will impose a JCBA through "final and binding" arbitration that must be "consistent with the terms of the MTA" and "specifically shall adhere to the economic terms of the MTA and shall not change the MTA's Scope terms . . . ." (Ex. 24 at ¶ 27 [ER 157].)[12]

In other words, the MOU is a collective bargaining agreement. It is the "Single Agreement" referenced in the Transition Agreement that replaces the separate East and West contracts that were in effect at the time of the 2005 merger with America West.

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[12] The parties use the term "MTA" to refer to the MOU as the "Merger Transition Agreement" upon the actual merger of US Airways and American Airlines.

G. The 2013 Bench Trial

The District Court held a two-day bench trial in October 2013. In its subsequent order, it made factual findings consistent with those set out herein. Doc. 298 at 1:22 to 6:20 [ER 082-87]. Based on those factual findings, the District Court decided, among other things, the two claims that are at issue in this appeal. Those claims are: (1) that USAPA did not have a legitimate union purpose for putting paragraph 10(h) into the MOU; and (2) that, in these circumstances, the West pilots have the right to be independently represented in the McCaskill-Bond process of integrating seniority with the American Airlines pilots.

1. Breach of Duty of Fair Representation

The District Court held that under federal law, a union action to change seniority "must rationally promote the aggregate welfare of employees in the bargaining unit." *Id.* at 10:10 to 10:11 (quoting *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1535 (7th Cir. 1992)) [ER 091]. That was a correct statement of the law.

In the 2010 declaratory judgment action, the District Court told USAPA that it was bound by the Transition Agreement. (Ex. 115 at 6:11 to 6:15 ("When USAPA became the pilots' new collective bargaining representative, it succeeded 'to the status of the former representative without alteration in the contract terms.'") [ER 236]. And, it told USAPA

that it must have a legitimate union purpose (and the agreement of US Airways) to make change any part of the Transition Agreement. (*Id.* at 7:2 to 7:3 & 8:3 to 8:5 [ER 237 & 238].) That was also correct.

In the trial on appeal, the West Pilot Class argued (and the Court "assumed" it to be so) that the Transition Agreement required USAPA to keep the East and West pilots in the Nicolau Award seniority order in a subsequent merger with another pilot group (such as this merger with American Airlines). (Doc. 298 at 10:15 to 10:17 [ER 091]).[13] This action arose because USAPA put a provision, paragraph 10(h), into the MOU that

[13] The Transition Agreement incorporates ALPA Merger Policy's doctrine that the Nicolau Award was to be "final and binding." Although it does not expressly state that the Nicolau Award must be used in a subsequent merger, that obligation arises from the implied covenant. *Restatement (Second) of Contracts* § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.").

Indeed, there is strong evidence that East pilot leaders understood that the Transition Agreement provided that the Nicolau Award would apply in the "next merger." For example, back in 2007, Mr. Bradford stated that he was creating USAPA because "[t]he pilots of US Airways cannot go into another round of seniority integration [such as this merger with American Airlines] with this award [the Nicolau award] as the starting point." (Ex. 36 [ER 165].) This Court, therefore, should rule as a matter of law that there is an implied agreement to use the Nicolau Award in a subsequent merger.

it intended would operate to free it from that Transition Agreement obligation.

USAPA drafted paragraph 10(h) to get such freedom. (Doc. 298 at 4:9 to 4:11 & 4:23 to 5:1 [ER 085-86].) Indeed, the Chairman of the USAPA Merger Committee testified that this language would operate to allow his committee to create a "methodology" of seniority integration other than using the Nicolau Award to integrate the East and West pilot seniority with that of the American Airlines pilots. (*Pauley testimony* at 404:13 to 404:21 [ER 281]).

The West Pilot Class asserted that USAPA did not have a legitimate union purpose for putting such language into the MOU. (Doc. 134 at 13, ¶¶ 98, 99 [ER 053].) USAPA never conceded that it needed a legitimate union purpose. It, therefore, made no effort to prove that it had one. It offered no admissible evidence or explanation (other than the attempt by Mr. Szymanski noted above) for why it put paragraph 10(h) into the MOU. (Doc. 298 at 4:16 to 4:23) (explaining that Mr. Szymanski, the author of paragraph 10(h), could have provided sworn admissible evidence on the subject, but refused to do so) [ER 085].)

Notwithstanding USAPA's failure to provide a reason for paragraph 10(h), the District Court hypothesized *sua sponte* that USAPA "could have rationally decided that [paragraph 10(h)] was necessary to prevent the drag-

out fight that surely would have accompanied any non-neutral, seniority-related provision." (*Id.* at 12, n.8 [ER 093].) In other words, the District Court provided an element of USAPA's requisite proof regarding its legitimate union purpose after USAPA failed to do so on its own. It is important to emphasize that USAPA never once asserted this as its reason for putting paragraph 10(h) into the MOU.[14] USAPA's actual reason (and only evident reason) to add paragraph 10(h) to the MOU was "to ensure the Nicolau Award never take effect." (Doc. 298 at 4:23 to 5:1 [ER 085-86].)[15]

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[14] USAPA referred to this intransigence excuse as an "impasse" during the 2008 jury trial. Perhaps USAPA abandoned that excuse here because its illegitimacy was so well-established in the 2008 jury trial, where Judge Wake explained as follows:

> [A]n impasse . . . would not justify USAPA's actions as a matter of law. Majority opposition does not defeat the duty of fair representation; the duty exists to restrain the majority. USAPA's argument would allow a union to punish any disfavored minority by pointing to the majority preference in the union as long as that majority threatens to obstruct the collective bargaining process, in this case by hijacking contract ratification. Discrimination and bad faith would be permitted as long as a zealous majority of union members insisted.

Addington, 2009 WL 2169164 at *18 (citation omitted).

[15] Paragraph 10(h) was not "neutral" in effect. Without paragraph 10(h), the Transition Agreement required using the Nicolau Award in the

In August 2012, USAPA expected the District Court to rule in the 2010 declaratory judgment action that USAPA was not bound by the Transition Agreement. At the time, USAPA was confident that the pending order would allow it to decide how the East and West pilots would be integrated in the process of integrating with the American pilots. Consequently, USAPA did not see a reason to put pre-emptive seniority language into the MOU.

But, in October 2012, the District Court ruled that USAPA was bound by the Transition Agreement (unless it was modified with the consent of US Airways). (Ex. 115 at 6:18 to 6:20 [ER 236].) Only then did USAPA see a need to put language into the MOU that would nullify the Transition Agreement seniority language. Indeed, when negotiations restarted in December 2012, USAPA desperately sought to add language to the MOU that would have such an effect.

USAPA thought that it could duck having to articulate a legitimate union purpose for paragraph 10(h) by claiming that its counsel was the only person who knew the purpose for paragraph 10(h) and by refusing to have counsel provide that evidence during discovery. But, in his deposition testimony, USAPA's vice-president Bradford let it slip that USAPA's

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present merger with American Airlines. USAPA put paragraph 10(h) into the MOU to nullify that agreement. That favored the East pilots.

purpose was to "take away the requirement" to use the Nicolau Award by amending the Transition Agreement. (*Bradford depo.* at 162:2 to 162:19) [ER 303]. That is not a legitimate purpose.

The District Court inexplicably also briefly discussed what appears to be more a question of damages than of duty. It held that it could not decide the duty of fair representation claim in favor of the West Pilot Class because it could not compare the West pilots' seniority rights in the American Airlines merger to their rights under the Nicolau Award. (Doc. 298 at 10:22 to 10:27 ("That new seniority regime will include the thousands of pilots from American Airlines and it will be difficult to compare that regime to the Nicolau Award.") [ER 091]). But the West Pilot Class showed that it would be substantially harmed if West pilots were integrated with the American Airlines pilots in an East-West date-of-hire order no matter how that integration was done. That is so because they would have lower seniority than if they were integrated in the Nicolau Award seniority order. (Ex. 150 [ER 251].) The District Court missed that point.

In addition, the District Court lost sight of the central question: whether USAPA had a legitimate union purpose for abrogating the agreement to integrate the East and West pilots according to the Nicolau Award. USAPA had to prove that it had such a purpose at trial. But, USAPA never offered such proof. Rather, the District Court hypothesized a reason for USAPA's

action. Without the District Court's conjecture, USAPA never would have gotten there.

The District Court also drifted from the central question by addressing a question that was not at issue—whether USAPA had a legitimate reason for entering into the MOU itself. (*Id.* at 10:27 to 11:2 [ER 091-92]). The answer to that question hinged on whether the entire MOU promoted the aggregate welfare of the pilots.

The District Court mistakenly held that USAPA had a legitimate reason for paragraph 10(h) because the MOU provided improved wages. (*Id.* at 11:8 to 11:9 [ER 092].) Although the West Pilot Class did not contest that the MOU provided improved wages, that fact was not dispositive of its duty of fair representation claim. The straight-forward simple question that was dispositive was whether USAPA had a legitimate purpose for abandoning its obligation to use the Nicolau award. Again, the answer is "no."

The West Pilots Class' claim asks whether USAPA had a legitimate purpose for putting paragraph 10(h) into the MOU. The legitimacy of paragraph 10(h) must be judged as if it were enacted by itself. Otherwise the artificial device of including an illegal contract provision with other contract provisions would allow a union to evade its duty to contract with a legitimate union purpose. The overall benefit of a contract cannot excuse an illegal provision. If it were otherwise, there would have been no basis to

challenge the racially discriminatory provision at issue in *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944), the decision that first recognized the duty of fair representation in the context of contract provisions. The fact that the illegal provision addressed in *Steele* was racial discrimination does not matter. Whatever the nature of the illegality, a contract provision that favors one group of workers at the expense of another must be tied to a legitimate union purpose.

The question raised by the West Pilots Class' claim, the question that properly addresses USAPA's duty of fair representation, is whether USAPA had a legitimate reason for paragraph 10(h). The answer to that question can only be "no."

2. McCaskill Bond Participation

The District Court also addressed whether the West pilots had a right to be independently represented in the McCaskill Bond process. (Doc. 298 at 12:21 to 20:17 [ER093-101). As argued and urged by USAPA, the District Court held (in error) that "the process contemplated by McCaskill-Bond allows *only* the certified bargaining representatives to participate in seniority integration proceedings." (*Id.* at 20:16 to 20:17 (emphasis original) [ER 101].) On that basis, the District Court ruled that the West pilots had no right to separate, independent representation in that process.

The District Court noted that this ruling also cut against USAPA. It stated, "if arbitration pursuant to McCaskill-Bond is needed [to create an integrated seniority list for the US Airways and American Airlines pilots], it will not occur until after a new collective bargaining representative for all pilots is certified." (*Id.* at 5, n.4 [ER 086]) And because APA will very likely be chosen to represent all the pilots at New American, the District Court noted that the substantive portion of seniority arbitration will occur when USAPA is no longer a certified bargaining representative. (*Id.* at 20:19 to 20:23 ("It is almost certain USAPA will lose that election [to represent the entire pilot craft at New American.]") [ER 101].) Consequently, "when USAPA is no longer the certified representative, it must immediately stop participating in the seniority integration." (*Id.* at 21:11 to 21:12 [ER 102]).

USAPA convinced the court to preclude West pilots from having separate and independent participation in the McCaskill-Bond process on the basis that a separate committee that would represent the West pilots would not be a certified bargaining representative. (*Id.* at 20:16 to 20:17 (emphasis original) [ER 101].) The District Court noted that USAPA merely won a "Pyrrhic victory" when it accepted that argument. (*Id.* at 20:19 [ER 101].) The District Court noted that in the foreseeable future, when APA is certified to represent all pilots involved in this merger, USAPA will no longer be a certified bargaining representative. (*Id.* at 20:19 to 20:23 [ER

101].) When that occurs, USAPA will not be able to represent East or West pilots in seniority integration. (*Id.* at 20:19 [ER 101].)

But, the District Court's analysis of Count Four was very flawed. In footnote 15 of its order, the District Court went so far as to admit that it did not understand how three pilot groups (East, West and American) could arbitrate a seniority integration dispute if the carrier did not participate and there was only one union:

> The parties have not explained how the process contemplated by the MOU could ever take effect. The MOU contemplates the need for arbitration but also requires the postmerger carrier remain neutral. Under the Court's reading of McCaskill-Bond, there will be no need for arbitration because, based on explicit language in the MOU, prior to the arbitration, there will have been an election and there will be only one certified representative for all pilots. Simply put, with the carrier having promised neutrality, there will not be two parties to go to arbitration. Whether the post-merger carrier's promise to remain neutral regarding seniority violates the obligations imposed on it by McCaskill-Bond is an open question and one not presented in this case.

"Footnote 15" (Doc. 298 at 21, n.15 [ER 102]).

Footnote 15 (above) shows that the District Court did not understand that the only role for a union and a carrier in seniority integration is to ensure

a fair, neutral process. That was the situation under the CAB's Labor Protection Provisions. It is how this is done under McCaskill-Bond and ALPA Merger Policy. It is not clear why the District Court was confused. But, it plainly was.

The CAB's Labor Protective Provisions, which are now incorporated by McCaskill-Bond, "impose[d] upon the carrier a duty to integrate seniority listings fairly and equitably and a duty to submit certain disputes between it and its employees to arbitration." *Great No. Pilots Ass'n*, 91 C.A.B. 795, 799-800 (1981). Consequently, under the CAB, the carrier did not advocate for either side. Rather, the carrier discharged its duty by providing a fair process where its employees had fair, unconflicted representation. A union is in a similar position when it represents both sides involved in a merger.

ALPA Merger Policy defined the seniority integration process in the 2005 pre-McCaskill-Bond merger involving America West because both merging pilot groups were represented by ALPA. In that seniority integration, ALPA did not advocate for either side. Rather, it stayed neutral and had each pilot group appoint a separate, independent committees as its representative. (Ex. 114 at 1 (noting that "each group chooses a Merger Committee, whose representatives are charged with . . . seeking to determine a fair and equitable integration of their respective [seniority] lists.") [ER 196].)

A similar procedure has been used in the airline mergers that occurred under McCaskill-Bond (after 2007). *See, e.g., In The Matter Of The Seniority Integration Arbitration Between The Pilots Of Northwest Airlines, Inc. And The Pilots Of Delta Air Lines, Inc.* (Dec. 8, 2008) (pre-merger Northwest and pre-merger Delta pilots were both represented by same union; arbitration was conducted between "Delta Pilots Merger Representatives" and "Northwest Pilots Merger Representatives") (Doc. 300-2) [ER 104]; *see also* Doc. 300 at 6:1 to 6:27 (US Airways explaining this process and offering several other examples in its motion to correct the judgment) [ER 116].) In each such instance, a separate, independent committee, not the union, represented each merging pilot group.

The parties, therefore, provided ample information to the District Court to help it understand that a union does not take sides when it represents factions with conflicting interests in seniority integration. In such cases, each such faction has a separate and independent representative of its choosing. This the District Court did not understand. That misunderstanding was fatal to its conclusions.

The District Court was correct, however, that USAPA must not advocate for a position in the process of determining East-West seniority integration. But, that was not because USAPA would soon be a de-certified bargaining representative. Rather, it was because USAPA owes equal loyalty

to both East and West pilots. Both USAPA and APA when it becomes the bargaining representative for all must stay neutral in the East-West seniority dispute. To do that, they must provide separate, independent committees to represent the East and West pilots in the seniority integration process.[16]

3. Post Judgment

On February 7, 2014, US Airways made a motion to both correct the Judgment (Doc. 299) and to modify the Order (Doc. 298) pursuant to Federal Rules of Civil Procedure 60(a), 52(b) and 59(e). (Doc. 300 [ER 110-20].) It sought to correct the Judgment to properly describe the class of West pilots that is bound by the judgment. (*Id.* at 2:1 to 2:4 [ER 111]). It sought to modify the Order by removing footnote 15, which was based on a misunderstanding that could be misused to impede the seniority integration process after APA takes over representing pilots who are now represented by USAPA. (*Id.* at 2:4 to 2:10 [ER 111].) USAPA responded to the US Airways motion by asking the District Court to also delete the language that precludes it from participating in seniority integration after APA is certified to represent all pilots affected by thus merger. (Doc. 301 [ER 121].)

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[16] The West Pilot Class is confident that APA understands its duty in this regard and will organize the seniority integration process accordingly. On the other hand, USAPA will never do so unless directly ordered by the court.

On March 31, 2014, the District Court made a technical change to the judgment, to properly describe the West Pilot Class. (Doc. 304 at 2:3 to 2:7 [ER 129]). But, without explanation, it declined to remove footnote 15. (*Id.* at 1:28 to 2:1 [ER 128-29]).

4. Appeal

Plaintiffs filed a timely notice of appeal on April 21, 2014. (Doc. 306 [ER 131]). On May 2, 2014, USAPA filed a timely notice of cross-appeal. (Doc. 308 [ER 133]). And, on May 5, 2014, US Airways filed a timely notice of cross-appeal. (Doc. 311 [ER 136]).

VIII. LEGAL ARGUMENT

A. Standard of Review

This Court "review[s] de novo purely legal questions and mixed questions of law and fact requiring [the Court] to exercise judgment about legal principles." *Cordoba v. Holder*, 726 F.3d 1106, 1113 (9th Cir. 2013). And, it reviews the District Court's factual findings for clear error. *Cape Flattery Limited v. Titan Maritime, LLC*, 647 F.3d 914, 917 (9th Cir. 2011). This appeal raises mixed issues of law and fact in regard to contract and statutory interpretation. Because the resolution of each such issue is grounded in interpretation of legal principles, each should be reviewed de novo.

B. Ripeness

"[A] litigant need not await the consummation of threatened injury to obtain preventive relief"; rather, "[i]f the injury is certainly impending, that is enough." *Addington*, 606 F.3d at 1179. In its 2010 opinion in the appeal of the 2008 jury trial, this Court held that the West pilots would have a ripe claim if USAPA entered into a ratified collective bargaining agreement that failed to follow the seniority provisions in the 2005 Transition Agreement. *See id.* at 1180 n.1 ("we leave USAPA to bargain in good faith pursuant to its DFR [duty of fair representation], with the interests of all members—both

East and West—in mind, under pain of an unquestionably ripe DFR suit, once a contract is ratified.").

In February, 2013, USAPA made a ratified contract, the MOU, that nullified the Transition Agreement seniority provisions. (Ex. 59 (Bradford admitting, "We have agreed to a new seniority process [in the MOU] that does not include the Nicolau Award.") [ER 175].) USAPA does not dispute that the challenged language in the MOU relieves it of the Transition Agreement obligations to implement the Nicolau Award. West pilots will be directly harmed by this action because, absent judicial intervention, USAPA will rely on paragraph 10(h) to ignore the Nicolau Award when integrating seniority with the American Airlines pilots. (*See* n.11, above.) Consequently, the West Pilot Class has a ripe claim that USAPA wrongfully added paragraph 10(h) to the MOU because it did so without a legitimate union purpose.[17]

[17] The 2010 panel majority of this Court that held the 2008 action lacked ripeness apparently thought that the East-West seniority dispute would resolve without judicial intervention. Not only has that not come to be true but, four years later, the same dispute continues to fester and threatens to interfere with the operation of New American. Respectfully, by now this Court should agree that firm and definitive judicial intervention is long overdue.

C. Claim One: Duty of Fair Representation

In Claim One, the West Pilot Class sought a ruling that USAPA "breached the duty of fair representation by entering into the MOU because [without a legitimate union purpose] the MOU abandons a duty to treat the Nicolau Award as final and binding." (Doc. 134 at 13, ¶ 99 [ER 053].) For remedy, the class sought "an injunction requiring [USAPA] to conduct seniority integration according to the MOU procedures but using the seniority order in the Nicolau Award list to order the US Airways pilots." (*Id.* at 17, ¶ 136 [ER 057].)

The District Court ruled that "USAPA avoided liability on the DFR claim by the slimmest of margins." (Doc. 298 at 21:5 to 21:6 [ER 102].) That slim margin was created by the District Court itself providing USAPA an invalid legitimate union purpose after USAPA failed to prove any purpose (legitimate or not) itself. The West Pilot Class asks this Court to: (1) vacate that judgment; (2) direct entry of judgment in favor of the West Pilot Class; and (3) remand for injunctive relief.

1. USAPA had to have a legitimate union purpose to make a contract that nullified the Transition Agreement seniority provisions.

Union conduct "unrelated to legitimate union interests" is wrongful. *Robesky v. Oantas Empire Airways Ltd.*, 573 F.2d 1082, 1090 (9th Cir. 1978). Unions are particularly constrained in regard to altering seniority

rights because such action inherently favors some members at the expense of others. *Rakestraw*, 981 F.2d at 1533 ("[A] union may not juggle the seniority roster for no reason other than to advance one group of employees over another.").

Where a worker claims that a union wrongfully agreed to change what had earlier been agreed to be a final seniority order, the union itself has the burden to offer and prove an objectively legitimate purpose in its defense. *Barton Brands*, 529 F.2d at 800 (holding, where a "final" seniority order was changed "in order to be absolved of liability[,] the Union must show some objective justification for its conduct"). A union, therefore, has the burden at trial to establish that it had a legitimate union purpose for its actions. *Laborers & Hod Carriers Loc. No. 341 v. NLRB*, 564 F.2d 834, 840 (9th Cir. 1977) (explaining that "[i]n defense the Union has not shown that it acted for a legitimate purpose."). And the worker must have an opportunity to contest the legitimacy of that purpose.

2. MOU paragraph 10(h) changed an existing seniority agreement because it nullified the Transition Agreement seniority provisions.

The Transition Agreement provided that the Nicolau Award must be incorporated into the "Single Agreement" that would replace the separate contracts that governed the work of the East and West pilots. (Doc. 206-1 at SF # 19 [ER 062].) USAPA's founder and vice-president Stephen Bradford

testified that the effect of paragraph 10(h) was to "take away the requirement" to use the Nicolau Award by amending the Transition Agreement. (*Bradford depo.* at 162:2 to 162:19) [ER 303].) Indeed, the District Court found that USAPA intended that paragraph 10(h) would "ensure the Nicolau Award never take effect." (Doc. 298 at 4:23 to 5:1 [ER 085-86].)

In May 2007, Mr. Bradford understood in the context of the 2005 American West merger that negotiation of the "Single Agreement" (as referenced in the Transition Agreement) would trigger implementation of the Nicolau Award. (Ex. 36 [ER 165].) The MOU is that "Single Agreement" because it replaced the separate East and West contracts. That is why USAPA first sought to add a provision to the MOU that would expressly disclaim that the MOU is the "Single Agreement." (Ex. 58 [ER 174].) Apparently, USAPA decided that was too overt a wrongdoing and added paragraph 10(h) to the MOU in its place to accomplish the same end.

The District Court declined to directly decide whether an unmodified Transition Agreement would have required using the Nicolau Award in the seniority integration with the American Airlines pilots. Rather, the District Court merely assumed this to be so:

> [T]he West pilots claim USAPA breached its duty of fair representation by "abandoning the existing obligation to use the Nicolau Award." (Doc. 267 at 11).

> For present purposes, the Court will assume such an obligation existed. Therefore, the question is whether USAPA had a legitimate union purpose for that abandonment.

(Doc. 298 at 10:15 to 10:18 [ER 091].)

The District Court should not have been so circumspect. It previously decided in the declaratory judgment action that, unless modified, the Transition Agreement bound USAPA to implement the Nicolau Award in good faith. (Ex. 115 at 6:18 to 6:20 ("Thus, just as ALPA would have been bound by the Transition Agreement had it remained the pilots' representative, USAPA is bound by the Transition Agreement.") [ER 236]; *id.* at 6:11 to 6:12 ("When USAPA became the pilots' new collective bargaining representative, it succeeded 'to the status of the former representative without alteration in the contract terms.'") [ER 236].)

Moreover, Mr. Bradford effectively admitted this in his deposition testimony. (*Bradford depo.* at 162:2 to 162:19) (stating that paragraph 10(h) takes away such a requirement) [ER 303]. And even more telling, back in May 2007, he wrote a letter to ALPA leadership complaining that as things stood then, if there was another merger, US Airways pilots would "go into another round of seniority negotiations with this award [the Nicolau Award] as the starting point in our negotiations." (Ex. 36 at 1 [ER 165].)

With such evidence and none to the contrary, the District Court should have ruled that unless modified the Transition Agreement required using the Nicolau Award in good faith in this current merger. Consequently, this Court must rule as a matter of law that, prior to the MOU, the Transition Agreement required USAPA to implement the Nicolau Award when US Airways pilots (East and West) are merged with the American Airlines pilots.

In sum, the unmodified Transition Agreement required using the Nicolau Award. Although USAPA can modify the Transition Agreement with the consent of US Airways, the duty of fair representation limits USAPA's discretion to do so unless it can prove a legitimate purpose. *Barton Brands*, 529 F.2d at 800. (*See also* Ex. 115 at 8:3 to 8:5 (holding that USAPA must have a legitimate union purpose to alter such terms) [ER 238].) As demonstrated below, USAPA did not offer evidence of such a purpose and certainly did not prove such a purpose.

3. USAPA did not have a legitimate union purpose.

So what does the law say is a legitimate union purpose for a provision that purports to change an agreement on seniority rights? It says that a union has a legitimate reason to change such an agreement if it reasonably anticipates obtaining a benefit or concession from the employer as a consequence of making that change. In *Baker v. Newspaper & Graphic*

Commc'ns Union, Loc. 6, 628 F.2d 156, 166 (D.C. Cir. 1980), for example, the union had a legitimate reason to agree to the employer's demand to change a seniority order that was agreed to be permanent because it did so in exchange for the employer keeping the plant open. In *Rakestraw*, the union had a legitimate reason to demote the seniority of workers who crossed picket lines in the past because this demotion could "strengthen the hand of organized labor in future conflicts with management." 981 F.2d at 1535. In both *Rakestraw* and *Baker*, then, the court found a direct link between changing a seniority agreement and obtaining a specific benefit to the workers in aggregate.

USAPA did not prove or even assert a legitimate union purpose during the 2013 bench trial that underlies this appeal. But, following the lead of the District Court, USAPA may now contend in its response here that the overall benefit of the MOU or the perceived intransigence of the East pilot majority—their perceived refusal to ratify any contract that could lead to implementation of the Nicolau Award—created an objectively legitimate purpose to put paragraph 10(h) into the MOU. If USAPA makes such arguments, it would be wrong on both accounts.

a. The overall benefit of a contract does not excuse abandoning an existing seniority agreement.

The record here has no example of a court that allowed a union to put wrongful provisions into a contract on the mere basis that the contract provided unrelated benefits that had no direct link to the provisions at issue. Were it otherwise, a union could tack all sorts of wrongful provisions onto an otherwise legitimate contract. For example, a contract that obtained better wages could, for no linked legitimate reason, put a disfavored race or gender at the bottom of the seniority list. That has long been illegal. *See Steele*, 323 U.S. at 202 (Union may not enter into a collective bargaining agreement which favors white union members at the expense of black non-member employees in the bargaining unit.). It was just as illegal here to change the Transition Agreement seniority terms to the detriment of the West pilots.

This Court, therefore, must find that the District Court was in error where it held that the overall economic benefit of the MOU justified USAPA abrogating the Transition Agreement seniority provisions. (Doc. 298 at 11:8 to 11:9 [ER 092].) Although overall economic benefit justified the MOU, it did not justify adding paragraph 10(h) to the MOU. Overall economic benefit, therefore, did not prove a legitimate union purpose for USAPA. It was error for the District Court to hold otherwise.

b. Majority intransigence does not excuse abandoning an existing seniority agreement.

A line of cases establishes that the preference of a majority faction does not provide a legitimate purpose to change a seniority agreement in favor of the majority. The leading decision, for example, states that a union's "seniority decisions may not be made solely for the benefit of a stronger, more politically favored group over a minority group." *Barton Brands*, 529 F.2d at 798-99.

In *Barton Brands*, workers agreed to a final resolution of a merger related seniority dispute. *See id.* at 796. But, sometime later when layoffs began, the majority group insisted on reopening the seniority issue. *Id*. The union complied and re-formulated seniority to put the minority group first in line for layoffs. *Id*. The *Barton Brands* court strongly disapproved. It held "that in order to be absolved of liability the Union must show some objective justification for its conduct beyond that of placating the desires of the majority of the unit employees at the expense of the minority." *Id.* at 800.

Barton Brands, therefore, stands for three propositions. First, a union that changes an existing seniority agreement must offer a legitimate reason for doing so. Second, the change in seniority must rationally promote the aggregate welfare of employees in the bargaining unit. And, third, majority

preference, no matter how strongly expressed, does not provide a legitimate reason for a union to change seniority.

The duty of fair representation exists to restrain the majority from using its power to impose its will. *See Air Wisconsin pilots Protection Committee v. Sanderson*, 909 F.2d 213, 216 (7th Cir. 1990) (Posner, J.); *see also Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 64 (1975) (holding that "Congress did not, of course, authorize a tyranny of the majority over minority interests"). Majority intransigence, therefore, cannot make an exception to the duty of fair representation no matter how extreme that intransigence. If it did, the exception would swallow the rule. Discrimination and bad faith would be permitted as long as a zealous majority of union members insisted. That is not how the duty of fair representation works. (*See* n.14, above.)

Yet, the District Court accepted contentions that intransigence provided a legitimate reason. The District Court stated, "USAPA could have rationally decided the neutral provision [paragraph 10(h)] was necessary to prevent the drag-out fight that surely would have accompanied any non-neutral, seniority-related provision." (Doc. 298 at 12, n.8 [ER 093].)

But USAPA did not even offer this as its reason for adding paragraph 10(h) to the MOU. USAPA only offered that kind of excuse for its actions in prior litigation (the 2008 jury trial and the 2010 declaratory judgment

action). Not only is catering to majority intransigence not a legitimate purpose but it was error for the District Court to embrace an argument from prior litigation that USAPA apparently abandoned in this litigation.

In addition, the District Court also should not have accepted USAPA's characterization of paragraph 10(h) as "neutral." Paragraph 10(h) is not "neutral" in its effect because its effect was to change the Transition Agreement requirement to implement the Nicolau Award. Abrogating an existing right is not neutral. It is decidedly partisan.

Finally, USAPA surely should not be excused for majority intransigence because whatever intransigence existed at the end of 2012 was wrongfully fomented by USAPA mischaracterizing the District Court's ruling from the declaratory judgment action. Soon after that ruling was made, in October 2012, USAPA misled the East pilot majority by announcing that the District Court ruling established that USAPA was free to disregard the Nicolau Award. (Doc. 298 at 3:17 to 3:21) [ER 084]; *see also* n.6, above.) Quite differently, the court ruled that USAPA was free to disregard the Nicolau Award if it had a legitimate reason to do so. (*Id.*)

USAPA, having mismanaged East pilot expectations, cannot later use East pilot intransigence to justify paragraph 10(h). It was error then for the District Court to use that intransigence to excuse USAPA. This Court, therefore, must find it was error to hold that East pilot intransigence could

have justified USAPA abrogating the Transition Agreement seniority provisions.

4. The District Court ought not to have supplied purported legitimate reasons for USAPA actions.

The court should not have supplied purported legitimate reasons for USAPA's actions where USAPA was unwilling or incapable of doing so itself. *Cf. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, (1983) (holding that a court should not supply a "reasoned basis for the agency's action that the agency itself has not given"). In other words, a union such as USAPA cannot sit back and offer no justification for an action that favors one group of workers at the expense of another and have the court invent a reason for its actions. A court certainly cannot invent a legitimate purpose on the union's behalf after the trial has ended. That would be particularly unfair because it leaves the wronged workers no opportunity to dispute the legitimacy of a purported legitimate purpose. Surprisingly, that is what happened here.

USAPA had the burden on its own to prove a legitimate purpose. Consequently, it ought to have lost Claim One because it failed to provide any admissible evidence of a legitimate purpose for putting paragraph 10(h) into the MOU. USAPA escaped a ruling that it breached the duty of fair representation only because the District Court invented purposes (overall

economic benefit and ensuring majority ratification) for USAPA in its post-trial order— rationales that USAPA neither suggested, nor pursued, at trial. That was error.

For obvious reasons of fairness, courts do not address an argument that was not raised at trial (here it was first raised by the court in its post-trial order). *Cf. Duggan v. Hobbs*, 99 F.3d 307, 313 (9th Cir. 1996) (refusing to address an "alter ego issue [that] was not tried in the district court even by implication"). It was particularly unfair here for the District Court to supply reasons for USAPA's actions after the trial, when USAPA refused to do so during the trial.

Both during pre-trial discovery and at trial, USAPA's officers and leaders consistently denied knowing why USAPA put paragraph 10(h) into the MOU. They stated either that the reasons were privileged or that they were known only to their counsel, Mr. Szymanski. (*E.g.*, *Pauley depo.* at 80:12 to 80:18 (Szymanski objecting to questioning along such lines, stating "the reasons and the discussion about why seem to me to be privileged") [ER 354]; *Hummel depo.* at 146:2 to 146:8 (USAPA President testifying that he did not know why Mr. Szymanski put paragraph 10(h) into the MOU) [ER 337].)[18]

[18] Similar testimony was given by multiple USAPA officers and committee chairman, all of whom are East pilots. (*Bradford depo.* at 150:1

USAPA elected to keep its reasons for paragraph 10(h) out of the trial. Because USAPA elected such a strategy, the District Court should not have provided hypothetical reasons for paragraph 10(h) on its own. And it should not have done so after trial when it was too late for the West Pilot Class to fully demonstrate that these reasons—overall economic benefit and overcoming East pilot intransigence—were not legitimate union purposes.

5. Remedy

Where a union has breached the duty of fair representation, courts have broad authority to take affirmative action to make the aggrieved workers whole. *Franks v. Bowman Transportation Co.*, 424 U. S. 747, 769 (1976) ("[R]emedies constituting authorized 'affirmative action' include an award of seniority status, for the thrust of 'affirmative action' redressing the wrong incurred by an unfair labor practice is to make 'the employees whole. . . .'"); *Bernard v. Airline pilots Association*, 873 F.2d 213, 215, 219 (9th Cir. 1989)

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to 150:19 (Vice-President) [ER 302]; *Pauley depo.* at 78:4 to 78:22 & 79:18 to 80:11 (Chairman Merger Committee) [ER 352-54; *Ciabatoni depo.*, 57:22 to 57:24 (Chairman Grievance Committee) [ER 306]; *Owens depo.*, 108:15 to 108:19, 112:10 to 112:20 & 116:19 to 116:23 (Chairman Business Intelligence Committee) [ER 342, 343, 347]; *Colello depo.*, 70:11 to 71:11 & 72:20 to 73:11 (Chairman Negotiation Advisory Committee) [ER 316-17 & 318-19].)

(affirming injunctive relief that imposed a seniority list on the airline and union).

This Court can and should direct the entry of an order that all concerned parties must disregard paragraph 10(h) and any other part of the MOU to the extent that such provisions nullify the Transition Agreement requirement to use the Nicolau Award seniority order. It should direct the District Court to enter an order that an unmodified Nicolau Award must be used to order the seniority of the East and West pilots in the pending McCaskill-Bond process of integrating with the American Airlines pilots. Anything less will simply prolong this East-West pilot seniority dispute that has been festering far too long as it is.

As the Seventh Circuit explained in a related context:

> If [a union] were free to ignore the merged seniority list, the employees of the post-merger airline would have very little job security; as a concomitant, disputes over seniority would fester — as they have done in this case, in which the plaintiffs are indirectly challenging the finality of the merged seniority list.

Air Wisconsin, 909 F.2d at 216.

D. Claim Four: McCaskill-Bond

In Claim Four, the West Pilot Class sought a declaratory ruling that it had the right to separately participate in the process of integrating with the

American Airlines pilots through representatives chosen by class members. For some reason, the District Court had particular trouble with this claim. It misapplied related decisions by the Civil Aeronautics Board ("CAB"), failed to appreciate the process by which workers resolve seniority integration disputes, and ignored the fundamental doctrine of unconflicted representation. On de novo review, this Court should rule that West pilots must have independent party status and representatives of their choosing in the pending McCaskill-Bond seniority integration process.

1. The CAB provided separate representation to groups that were unfairly represented by their unions.

The McCaskill-Bond amendment incorporates Section 3 and 13 of the Labor Protective Provisions ("LPPs") that controlled seniority integration in airline mergers when the CAB regulated the industry. *See Allegheny-Mohawk Merger Case*, 59 C.A.B. 19, 45 (1972); (Doc. 99-4 [ER 021]; *see also* Doc. 97-2 (copy of LPPs §§ 3 & 13) [ER 010].) The CAB adopted the LPPs to "ward off labor strife that could impede or delay a route transfer or merger, or detrimentally affect a carrier's stability or efficiency." *Braniff Master Exec. Council of the APA v. C.A.B.*, 693 F.2d 220, 223 (D.C. Cir. 1982). That same purpose logically underlies the reasons Congress enacted McCaskill-Bond.

LPP § 3 required that "provisions shall be made for the integration of seniority lists in a fair and equitable manner." *Allegheny-Mohawk*, 59 C.A.B. at 45. It also provided, if "employees affected" by a merger cannot agree on how to merge their seniority lists, that "the dispute may be submitted by either party for adjustment in accordance with section 13." *Id.* [ER 023]. LPP § 13(a) provides that this "adjustment" shall be by neutral arbitration. *Id.* at 46 [ER 024].[19]

Without question, West pilots are "employees" affected by the merger of US Airways and American Airlines.[20] As such, they are covered by LPP § 3 and should be represented in the pending seniority integration process from initial negotiation of a protocol all the way through to neutral arbitration (if needed). The question is who should be their representatives.

Surely, the West pilots cannot be represented by an entity or individuals that have material conflicts with the West pilots' interests. The evidence proves that USAPA, its Merger Committee, and its merger counsel have shown a clear pattern of bias against West pilot interests in seniority

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[19] The history of relevant decisions by the CAB is explained in detail in a brief filed by US Airways. (Doc. 98 [ER 011-020].)

[20] Although the East and West pilots were also affected by the 2005 merger of US Airways and America West, that merger is not directly subject to McCaskill-Bond, which did not go into effect until 2008.

integration with the East pilots.[21] The East pilot controlled Merger Committee, therefore, cannot represent both East and West pilot interests and decide how the seniority of those two groups will be integrated. The merger counsel who opposes the West Pilot Class in this action cannot advise a committee charged with protecting West pilot interests.[22] Yet, that is exactly what will happen unless this Court vacates the judgment on Claim Four.

It should go without saying that Congress did not intend to have McCaskill-Bond be implemented in a manner that conflicts with the fundamental rule that representation must be free of material conflicts of interest. There is no question that there are such conflicts here. The District Court recognized that USAPA is strongly aligned with East pilot seniority interests that directly conflict with West pilot interests. (Doc. 298 at 20:23 to 21:1 ("The Court has no doubt that—as is USAPA's consistent practice—USAPA will change its position when it needs to do so to fit its hard and unyielding view on seniority.") [ER 101-02].) For years, USAPA has repeatedly pushed, if not crossed, the limits of propriety in its efforts to

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[21] If nothing else, more than six years of nearly continuous litigation between the West pilots and USAPA reflect this conflict of interest.

[22] Why USAPA's merger counsel has not recognized this conflict is surprising.

prevent implementation of the Nicolau Award. USAPA, therefore, can neither directly, nor indirectly through representatives such as its Merger Committee, represent West pilots in the seniority integration with the American pilots. It cannot choose who will represent and/or provide legal counsel to West pilots in that process.

The District Court misapplied the forgoing principles. Although it readily recognized USAPA's bias and noted that, in some instances, the CAB allowed minority groups to be independently represented in seniority arbitrations, the District Court found itself constrained by one CAB decision and ruled, as a matter of law, that McCaskill-Bond does not allow independent representation. (*Id.* at 18:18 to 18:23.)

To reach that mistaken conclusion, the District Court relied exclusively on *Nat 'l Airlines, Arbitration*, 84 C.A.B. 408 (Oct. 24, 1979), where the CAB denied a minority faction's request for separate representation. (Doc. 298 at 18:24 to 18:16 & 19:11 to 19:13 [ER 099 & 100]; *see* Doc. 111-2 (copy of decision) [ER 038-40].) The District Court, however, failed to recognize that *Nat 'l Airlines* is materially distinguishable from this situation because, in contrast to this situation, there was no evidence in *Nat 'l Airlines* that the union was biased against the minority group (the "Group") seeking separate representation.

In *Nat 'l Airlines*, the Group "asked the Board to grant it separate arbitration rights under the LPPs if the Group concludes, after the completion of the seniority list integration, that its interests have not been adequately represented by the unions charged with its representation." 84 C.A.B. at 476-77. (Doc. 111-2 at 70-71 [ER 039-40]). In other words, the Group wanted a prospective grant of the right to get a do-over of seniority integration if it did not like the outcome. Of course the CAB denied such a request.

It is particularly important to note that in *Nat 'l Airlines* the CAB made no finding that the union had ever represented the Group unfairly. Nothing in the opinion even suggests this. Consequently the CAB had no basis to grant the requested relief.

The situation here is very different. The District Court expressed "serious doubts that USAPA will fairly and adequately represent all of its members while it remains a certified representative." (Doc. 298 at 21:6 to 21:8 [ER 102].) That compelling reason to provide separate independent representation to West pilots was not present in *Nat 'l Airlines*. The District Court failed to recognize the significance of this distinction. That led to an erroneous application of *Nat'l Airlines*.

2. Remedy

"The District Court has jurisdiction to enforce by injunction petitioners' rights to nondiscriminatory representation by their statutory representative." *Graham v. Bdh. of Firemen*, 338 US 232, 240 (1949). The only way that West pilots can have nondiscriminatory representation here is to have representatives separate from and independent of USAPA. This Court, therefore, should vacate the judgment on Claim Four, direct the District Court to enter judgment in favor of the West Pilot Class, and direct the entry of an order that West pilots must have full party status in the MOU seniority integration process, with representatives of their choosing.

E. Claim Three: Fee Award

In Claim Three, the West Pilot Class sought a fee award under common benefit doctrine. The Court did not reach the merits of that claim because the class did not prevail on a substantive claim. (Doc. 298 at 21:14 to 21:17 [ER 102].) If this Court vacates the judgment in whole or part, it should remand for the District Court to re-address the class' attorneys' fees claim in that light. And, the Court should also make a common benefit fee award here for fees and expenses incurred in this appeal. (Docs. 97 & 106 [ER 001-07 & 028-37].)

Courts make common benefit fee awards where litigation confers "a substantial benefit on the members of an ascertainable class, and . . . the

court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393-394 (1970). This doctrine applies where a worker successfully sues a union "because to allow the others [the union rank-and-file] to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Hall v. Cole*, 412 U.S. 1, 6 (1973) (internal quotation and alteration marks omitted). Indeed, common benefit fee shifting is so applicable to such matters that some courts have held that it is mandatory. *E.g.*, *Harrison v. United Transp. Union*, 530 F.2d 558, 564 (4th Cir. 1975) ("application of *Hall* therefore compels an award of attorney's fees").

All of the pilots have an interest in seeing USAPA (or any union that might represent them in the future) abide by its duty of fair representation. Because this litigation defines and enforces that duty, the entire craft (including East pilots) benefitted from this litigation. Both this Court and the District Court, therefore, should apply common benefit doctrine and award reasonable fees and related litigation expenses to the West Pilot Class.

Had the West Pilot Class not filed their initial action in 2008, defended in the declaratory action in 2010, and filed this action in 2013, USAPA would claim that it was shielded by the six-month limitations on duty of fair

representation claims. Each of these litigation steps, therefore, were necessary to preserve the right to enforce the duty of fair representation here. Consequently, the West pilot Class is entitled to a common benefit award for that entire course of litigation—including the fees and expenses incurred in this appeal. *See Wininger v. SI Management LP*, 301 F.3d 1115, 1121 (9th Cir. 2002) ("We are aware of no case restricting a district court's equitable powers to award attorneys' fees to the litigation directly before the court.").

On remand, the District Court should make the West Pilot Class whole with an award equal to that amount. And, this Court should award the class the reasonable fees and related litigation expenses that they incurred on this appeal.

IX. CONCLUSION

For the reasons set forth herein, this Court should find that the District Court was in error where it entered judgment in favor of USAPA on Claims One and Four. This Court should vacate that judgment and remand with instruction for the District Court to: (1) enter judgment on Claims One and Four in favor of the West Pilot Class; (2) provide injunctive relief; and (3) consider the merits of Claim Three for a common benefit fee award. This Court should also enter an order awarding the West Pilot Class the reasonable fees and related litigation expenses incurred on this appeal.

DATED: August 8th, 2014.

Respectfully submitted

/s/ Andrew S Jacob

_____

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X. CERTIFICATION OF COMPLIANCE

CERTIFICATION OF COMPLIANCE TO FED. R. APP. 32 (A)(7)(C) AND CIRCUIT RULE 32-1

I certify that: (check appropriate option(s))

__X__1. Pursuant to FRAP 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached First Cross-Appeal brief is

◙ Proportionately spaced, has a typeface of 14 points or more and contains 13,394 words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

or is

□ Monospaced, as 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

_____2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

□ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

□ This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

□ Proportionately spaced, has a typeface of 14 points or more and contains _____ words.

□ Monospaced, has 10.5 or fewer characters per inch and contains _____ pages or _____ words or _____ lines of text.

_____ 3. Briefs in Capital Cases.

□ This brief is being filed in a capital case pursuant to the type-volume limitations set forth in Circuit Rule 32-4 **and is**

□ Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 21,000 words; reply briefs must not exceed 9,800 words),

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□ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 75 pages or 1,950 lines of text; reply briefs must not exceed 35 pages or 910 lines of text).

_____ 4. Amicus Briefs.

□ Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionately spaced, has a typeface of 14 points or more and contains 7,000 words or less,

or is

□ Monospaced, has 10.5 or fewer characters per inch and contains not more than either 7,000 words or 650 lines of text,

or is

□ **Not** subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed. R. App. P. 32(a)(1)(5).

August 8, 2014 /s/ Andrew S. Jacob
Date Signature of Attorney

XI. PROOF OF SERVICE

I am over the age of eighteen years of age, not a party to this action, and employed by Polsinelli, P.C.

On August 8, 2014 I caused *First Cross-Appeal Brief of Plaintiffs-Appellants & Cross-Appellees* to be electronically filed with the Clerk of the Ninth Circuit Court of Appeals. In addition, I properly served what was electronically filed by mail by causing a true and correct copy to be placed in a sealed envelope, with postage prepaid, deposited with the United States Postal Service on this day following ordinary business practices addressed to opposing counsel at the last address given, as follows:

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I declare under penalty of perjury under the laws of Arizona that the foregoing is true and correct and this declaration was executed on August 8, 2014 at Phoenix, AZ.

/s/ *Andrew S. Jacob*

XII. STATEMENT OF RELATED CASES

Pursuant to 9th Cir. R. 28-1.6, Appellees state that they are not aware of any cases related to the instant case now pending in the Ninth Circuit.

DATED: August 8, 2014 */s/ Andrew S. Jacob*