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

11 Don ADDINGTON; John BOSTIC;
 12 Mark BURMAN; Afshin IRANPOUR;
 13 Roger VELEZ; Steve WARGOCKI;
 14 Michael J. SOHA; Rodney Albert
 BRACKIN; and George MALIGA, on
 15 behalf of themselves and all
 similarly situated former America
 West pilots,

16
 17 *Plaintiffs,*

18 vs.

19 US AIRLINE PILOTS ASS'N, an
 20 unincorporated association; and
 US AIRWAYS, INC., a Delaware
 corporation,

21 *Defendants.*

CASE NO. 2:13-CV-00471-PGR

**MOTION TO TRANSFER CASE
 TO JUDGE WAKE OR JUDGE
 SILVER**

(Expedited decision requested)

22 Plaintiffs Don Addington, *et al.*, move to transfer this action to Judge
 23 Wake or Judge Silver pursuant to LRCiv. 42.1(e) and move for an
 24 expedited decision.

25 **A. Background**

26 In 2005, US Airways (a bankruptcy debtor) and America West
 27 Airlines merged to form a new airline also called US Airways. *Addington*
 28 *v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1176 (9th Cir. 2010). The pilots

1 on both sides of that merger (the “East Pilots” from US Airways and the
2 “West Pilots” from America West) agreed to a final and binding arbitrated
3 merger of their separate seniority lists. *Id.* That arbitration was
4 conducted by George Nicolau and an award creating a merged seniority
5 list (the “Nicolau Award”) was announced in May 2007. US Airways
6 accepted the Nicolau Award in December 2007. *Id.* at 1177.

7 The East Pilots repudiated their agreement to treat the Nicolau
8 Award as final and binding. *Id.* at 1177-78. In mid 2007, they formed a
9 single-airline union, USAPA, to oust the multi-airline union that was
10 representing these pilots, the Airline Pilots Association (“ALPA”). *Id.* at
11 1178. They did so because ALPA (which they could not control) was
12 ordering them to use the Nicolau Award list. *See id.* The East Pilots’
13 majority status in the post-merger airline allowed them to control a
14 single-airline union (such as USAPA) because it would only represent US
15 Airways pilots. *See id.* at 1178-79. USAPA succeeded ALPA as the
16 bargaining representative. *Id.* Under East Pilot control, USAPA also
17 repudiated the agreement to honor the Nicolau Award. *Id.*

18 In mid-2008, the West Pilots formed Leonidas, LLC, for the sole
19 purpose of collecting voluntary West Pilot contributions to be used to
20 defend the Nicolau Award in and out of litigation. A. Jacob, *Decl.*, at ¶ 4
21 (filed concurrently). Leonidas has never been a party to litigation. *Id.* at
22 ¶ 5; *see, e.g., Addington v. US Airline Pilots Ass’n.*, 588 F. Supp. 2d 1051
23 (D. Ariz. 2008).

24 In September 2008, the West Pilots filed an action for breach of the
25 duty of fair representation to compel USAPA to implement the Nicolau
26 Award list. *Id.* at 1055. After a 10-day trial, a jury found that USAPA
27 breached the duty of fair representation because its sole objective for
28 repudiating the Nicolau Award was to benefit East Pilots at the expense

1 of West Pilots, rather than to benefit the bargaining union as a whole.
2 *Addington v. US Airline Pilots Ass’n*, No. 2:08-CV-1633-PHX-NVW, 2009
3 WL 2169164, at *7 (D. Ariz. Jul. 17, 2009). Judge Wake ruled further
4 that “[t]he West Pilots remain entitled to a union that will not abrogate
5 the Nicolau Award without a legitimate purpose.” *Id.* at *28. And he
6 enjoined USAPA from breaching its duty of fair representation.

7 USAPA appealed and the Ninth Circuit vacated the judgment on the
8 basis of lack of ripeness. *Addington*, 606 F.3d at 1184. But in so doing, it
9 cautioned USAPA that unless it “bargain[ed] in good faith pursuant to its
10 DFR, with the interests of all members—both East and West—in mind,”
11 there would be “an unquestionably ripe DFR suit, once a contract is
12 ratified.” *Id.*, at 1180 n.1.

13 On July 27, 2010, US Airways filed a declaratory action, to obtain
14 guidance, *inter alia*, as to whether it would be liable if it entered into a
15 collective bargaining agreement with USAPA that did not implement the
16 Nicolau Award. *US Airways, Inc. v. Addington*, No. 2:10-CV-01570-PHX-
17 ROS, Complaint (D. Ariz. Jul. 26, 2010). At issue was USAPA’s date-of-
18 hire “seniority proposal”—a method of seniority integration that Mr.
19 Nicolau found was neither fair nor equitable because it put more than a
20 thousand East Pilots who were on furlough ahead of hundreds of active
21 West Pilots—but that USAPA insisted it had every right and intention to
22 impose over West Pilot objections.

23 Judge Silver agreed with Judge Wake and ruled that USAPA would
24 “breach its duty of fair representation” unless it was “supported by a
25 legitimate union purpose.” *Id.*, Amended Judgment, 1 (Dec. 4, 2012)
26 (Doc. 206). But, she stopped just short of ruling that USAPA did not and
27 could never have such legitimate purpose.

28

1 In February 2013, USAPA, the Allied Pilots Association (the union
2 representing the American pilots), US Airways, and AMR (the parent of
3 American Airlines) entered into an agreement called the “Memorandum of
4 Understanding Regarding Contingent Collective Bargaining Agreement”
5 (the “MOU”) that sets the stage for a merger between US Airways and
6 AMR. A. Jacob, *Decl.*, at ¶ 6 (providing copy of MOU).

7 The MOU itself is a breach of the duty of fair representation because
8 it provides substantially better pay to US Airways pilots without
9 requiring pilot integration using the Nicolau Award seniority list. *See*
10 *Addington v. US Airline Pilots Ass’n*, No. 2:08-CV-1633-PHX-NVW, 2009
11 WL 2169164, at *30 (“The duty of fair representation requires USAPA and
12 any successor union to bargain for the implementation of the Nicolau
13 Award.”).

14 Although the MOU allows USAPA to implement the Nicolau Award, it
15 does not require it to do so. Regardless, USAPA is steadfastly refusing to
16 even consider doing so. Indeed, on March 6, 2012, it filed an adversary
17 proceeding, Case No. 11-15463-SHL, in the Southern District of New
18 York against Leonidas, LLC, in a flawed effort to deter the West Pilots
19 from taking action to compel USAPA to adhere to its duty. A. Jacob,
20 *Decl.*, at ¶ 7 (providing copy of complaint). In that flawed action, USAPA
21 seeks to enjoin Leonidas (not these Plaintiffs or the West Pilot class as a
22 whole) from filing such litigation. That action is flawed because Leonidas
23 neither has standing nor intention to file any such litigation. But, the
24 West Pilots have both and they have done so here.

25 The West Pilots bring this action to facilitate, not delay, a timely
26 closing of the US Airways / American Airlines merger. They seek to
27 establish that pilot integration must be done using the Nicolau Award
28 list. They seek to do so before there are missteps in the merger process

1 that would have to be retraced. *See, e.g., Bernard v. Air Line Pilots Assn.,*
2 Int'l, 873 F.2d 213, 217 (9th Cir. 1989) (approving injunctive relief
3 stopping the ongoing implementation of a merged pilot seniority list
4 because it was made in violation of the duty of fair representation).

5 **B. Legal Argument**

6 LRCiv. 42.1(e) permits this Court to transfer this case to Judges
7 Wake or Silver with their consent and with notice to Judge Silver in her
8 capacity as chief judge under the following conditions:

9 (1) If the transferee judge previously adjudicated a case that: (A)
10 arose from substantially the same transaction or event; (B)
11 involved substantially the same parties . . . ; or (D) called for the
12 determination of substantially the same questions of law; . . . or

13 (3) For reasons of judicial economy. . . .

14 LRCiv. 42.1(e).

15 This action raises the same issues between the same parties that
16 were litigated before Judges Wake and Silver. These issues include: (1)
17 ripeness; (2) whether USAPA must have a legitimate union purpose to
18 repudiate the Nicolau Award; and (3) whether USAPA has such a
19 purpose. Because these issues were litigated by these parties before
20 Judges Wake and Silver, Local Rule 42.1(e)(1) surely applies.

21 Plaintiffs will be filing a motion for a temporary restraining order to
22 enjoin USAPA (and US Airways) from taking steps to integrate pilot
23 operations in any manner that does not fully implement the Nicolau
24 Award seniority list. Because this merger is moving quickly (anticipated
25 to close later this year), it is important to all affected parties (other than
26 USAPA) that there be a prompt decision on that motion.

27 It is important, therefore, that the decision be correct as well as
28 timely. Having already invested substantial effort in this dispute, it would
in all likelihood take Judges Wake or Silver less judicial effort to address

1 the material issues of law and fact than it would take this Court who has
2 not made such an investment. There are, therefore, also sound reasons
3 of judicial economy for this Court to transfer this action to Judge Wake
4 or Judge Silver if either will consent to such transfer.

5 **C. Prayer for Relief**

6 The West Pilots respectfully ask that this Court to order this action
7 transferred to Judge Wake or Judge Silver with their consent and with
8 notice to Judge Silver in her capacity as Chief Judge of this District and
9 to do so on an expedited basis.

10 Dated this 7th day of March, 2013.

11 **POLSINELLI SHUGHART, PC**

12 */s/ Andrew S. Jacob*

13 By _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March 2013, I electronically transmitted the foregoing document and attachments to the U.S. District Court Clerk’s Office by using the ECF System for filing and transmittal.

Courtesy copies hand delivered to Judges Rosenblatt, Silver and Wake this same day.

In addition, a copy of the foregoing document and attachments were served this same day by mail and email to the following:

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/s/ Andrew S. Jacob
By _____