PATRICK J. SZYMANSKI (*pro hac vice*)
PATRICK J. SZYMANSKI, PLLC
1900 L Street, NW, Ste 900
Washington, DC 20036
Telephone: (202) 721-6035
szymanskip@msn.com

BRIAN J. O'DWYER (*pro hac vice*)
GARY SILVERMAN (*pro hac vice*)
JOY K. MELE (*pro hac vice*)
O'DWYER & BERNSTIEN, LLP
52 Duane Street, 5th Floor
New York, NY 10007
Telephone: (212) 571-7100
bodwyer@odblaw.com
gsilverman@odblaw.com
jmele@odblaw.com

SUSAN MARTIN (AZ#014226)
JENNIFER KROLL (AZ#019859)
MARTIN & BONNETT, P.L.L.C.
1850 N. Central Ave. Suite 2010
Phoenix, Arizona 85004
Telephone: (602) 240-6900
smartin@martinbonnett.com
jkroll@martinbonnett.com

Attorneys for US Airline Pilots Association

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Don Addington, *et. al.*,

Plaintiffs,

v.

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

Defendants.

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

US Airline Pilots Association's Supplemental Brief in Response to the Supplemental Briefs of Plaintiffs and US Airways on Issues as Directed by the Court at May 14, 2013 Hearing

Defendant US Airline Pilots Association ("USAPA") submits this Memorandum of Law in response to the supplemental briefs of Plaintiffs and US Airways on the issues as directed by the Court at the May 14, 2013 hearing.

I

PLAINTIFFS AND US AIRWAYS ASK THE COURT TO TAKE THE UNPRECEDENTED STEP OF INTERFERING WITH THE EXCLUSIVE JURISDICTION OF THE NMB

The arguments advanced by Plaintiffs and US Airways to allow a different representative for a portion of the pilots represented by USAPA would require the Court to take the unprecedented step of violating USAPA's status as the certified bargaining representative of all US Airways pilots under Section 2, Ninth of the RLA and to interfere with the exclusive jurisdiction of the National Mediation Board (NMB) over representation matters. Such a step is truly unprecedented and Plaintiffs and US Airways do not cite, nor is there, any case decided by the CAB or any Court, that authorizes separate representation for a portion of a craft or class where, as here, an exclusive bargaining representative has been certified by the NMB. As shown in our opening brief on this point, Doc. 95 at 8, the McCaskill-Bond Amendment explicitly contemplates that its seniority integration protections will be administered by the employees' collective bargaining representative. The CAB decisions cited by US Airways have no application to this case in that those decisions either involved unrepresented employee groups or the certified representative's consent to the involvement of an interest group. As such, Plaintiffs' and US Airways' arguments have no merit and should be rejected.

The authority of the NMB to resolve questions of representation among employees covered by the RLA is exclusive and cannot be exercised by the district courts. Indeed, over the years, the CAB consistently deferred to the NMB's exclusive authority over representation questions. Decisions under Section 3 of the CAB's Labor Protective Provisions ("LPPs"), which adopted a regime of collective bargaining to establish a fair and equitable integrated seniority list, uniformly recognized the exclusive bargaining

representative of the craft or class as the proper party. Even though the McCaskill-Bond process is contained in a *bargained for* contingent collective bargaining agreement in which the *bargained for* position of US Airways to remain neutral is likewise contained, US Airways nevertheless makes the remarkable claim that seniority integration is somehow not a matter of collective bargaining. Doc. 98 at 7-8. Aside from the obvious fact that the entire subject of seniority integration is and was *bargained for* in the MOU negotiation process, courts do not acquire RLA jurisdiction on an *ad hoc* basis depending on positions taken by an employer. The seniority integration process clearly implicates USAPA's status as the US Airways pilots' exclusive representative. Indeed, there is uniform authority that seniority itself is not some kind of abstract right but rather is a creature of collective bargaining agreements.

US Airways asserts the illogical negative inference that "[b]ecause McCaskill-Bond expressly incorporates Sections 3 and 13 of the Allegheny- Mohawk LPPs and specifically cites the CAB's decision, *it is appropriate to infer that, absent statutory text to the contrary*, Congress intended for those provisions of the LPPs to be implemented in a manner consistent with the CAB's prior decisions thereunder." Doc. 98 at 4 (emphasis added). US Airways' position is untenable in that the meaning of a statute cannot be based upon words that are *absent* therefrom. "Absent a clearly expressed legislative intention to the contrary, the statutory language must be regarded as conclusive." *Tulalip Tribes of Washington v. F.E.R.C.*, 732 F.2d 1451, 1455 (9th Cir. 1984) (citing *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051 (1980)).

Moreover, as USAPA noted in its initial brief, the Seventh Circuit rejected use of CAB decisions to interpret McCaskill-Bond. *See Concerned Comm. of Midwest Flight Attendants v. Int'l Brotherhood of Teamsters*, 662 F.3d 954 (7th Cir. 2011). Nothing in the language of the statute supports reliance on CAB precedent to interpret its meaning. Even if US Airways had not incorrectly read and applied CAB policy, it would still be improper to import the decisions of an agency Congress abolished thirty years before

adopting McCaskill-Bond, especially if such decisions impinge upon the exclusive authority of the NMB over questions of representation.

US Airways makes the further unsubstantiated assertion that Congress intended for the federal courts to effectively stand in the shoes of the CAB in enforcing the McCaskill-Bond Amendment. Doc. 98 at 4-5. Nothing in the statute supports vesting regulatory authority in the federal courts over airline merger transactions, and US Airways unsurprisingly cites no authority for this extraordinary assertion, except a rote reference to an inapposite case holding that the federal courts are to enforce federal laws. This truism throws no light on whether the Court may assume an effective regulatory role over the airline industry through the McCaskill-Bond Amendment.

US Airways misapprehends the CAB decisions it submitted to the Court with its initial brief. Those decisions confirm that the CAB uniformly recognized the exclusive bargaining representative of a craft or class as the employees' Section 3 representative. In *National Airlines Acquisition*, 97 C.A.B. 565 (1982), two unions, the IBT and the IAM, petitioned the CAB to order Pan Am and a third union, the TWU, to participate in an arbitration concerning what rights former National Airlines station agents at Pan Am could exercise under the integrated seniority list the TWU negotiated with Pan Am to cover ramp services employees, as well as what rights former National stock clerks had under the integrated seniority list for Pan Am cleaners that the TWU also negotiated. At National, all of these employees were in the same craft or class, and on the same seniority lists, as the ramp employees and cleaners, respectively, but were placed into separate crafts or classes from those employees at Pan Am by the NMB. The IBT represented the agents and stock clerks at Pan Am as a result of the merger and the NMB's craft or class determination. The IAM had represented stock clerks at National. The TWU represented ramp agents and cleaners.

Significant to this case, the CAB questioned "IAM's standing to pursue LPP arbitration for employees now represented by another union at the merged carriers." 97 CAB at 569. The CAB allowed the IAM to participate because the IBT, the employees'

representative at Pan Am, did not object to IAM's participation. *Id.* It was only the consent of the exclusive bargaining representative that permitted this former premerger representative to participate in the Section 13 arbitration process. This shows the CAB's deference to the exclusive representative established by the NMB; deference that should be accorded USAPA here.

The dispute raised by the IBT/IAM petition concerned a claim that arose *as a result* of the integrated seniority lists established in bargaining with Pan Am by the exclusive representative, TWU. It did not concern the creation of those lists as is the issue here. The dispute was presented to the CAB by the affected employees' exclusive representative. That the CAB ordered arbitration upon a petition by an exclusive bargaining representative to resolve a dispute arising from the integrated seniority list established by another exclusive representative under Section 3 provides no support for US Airways remarkable claim that the court may ignore USAPA's exclusive representative status for the US Airways craft or class at the outset of the Section 3 process involving the American pilot group and US Airways pilot group.

US Airways also misstates the *National Airlines Acquisition* case involving pilots and flight engineers. *National Airlines Acquisition, Arbitration*, 95 C.A.B. 584, 1982 WL 35318 (Apr. 15, 1982). US Airways asserts this case stands for the proposition that a committee claiming to represent a subgroup of employees may participate in a Section 3 and 13 proceeding. Doc. 98 at 6, n.3. To the contrary, the CAB earlier twice rejected the request for party status by the Janus Group of furloughed Pan Am pilots because that relief was contrary to the bargaining and representation framework established by the RLA. *National Airlines Acquisition*, 84 C.A.B 408, 1979 WL 49136 (Oct. 24, 1979). As with the IBT's agreement to permit the IAM to participate, only by the consent of the exclusive representatives was The Janus Group permitted a limited role at the arbitration hearing.[1] Again, this case supports that the exclusive bargaining representative is the

[1] At the arbitration hearing, the Janus Group was allowed to present a statement of position and a closing argument. It was not allowed full party status.

"representative" under Sections 3 and 13. *National Airlines Acquisition, Arbitration*, 95 C.A.B. at 584, n.1 (identifying the union representatives as the appropriate representatives of employees under Sections 3 and 13).

US Airways similarly misstates the Pan American/National Airlines case involving maintenance employees. *National Airlines Acquisition*, 97 C.A.B. 570, 1982 WL 35437 (Aug. 16, 1982). That case involved a petition by a group of former National mechanics who formed an organization, MLAC, to challenge the date-of-hire integrated seniority list negotiated by Pan Am and TWU. After Pan Am and TWU agreed on the integrated list, the former group of National mechanics objected and pressed Pan Am and TWU to arbitrate the issue. TWU and Pan Am consented to a private arbitration and to MLAC's participation in that arbitration. 97 C.A.B. at 571 ("Pan Am and TWU consented to arbitrate the question."). US Airways argues that this case supports the conclusion that groups apart from the exclusive representative were accorded party status by the CAB. Again, they are wrong. The case illustrates, as did the other *National Airlines Acquisition* cases, that the CAB recognized the exclusive bargaining representative as the representative of the craft or class and simply acquiesced to the representative's willingness to arbitrate with an employee subgroup. The CAB did not grant party status to the MLAC. Hence, this case supports the appropriateness of deferring to USAPA over how US Airways pilots are to be represented in the Section 3 and 13 process.

Similarly, US Airways' misreading of *Delta Air Lines, Employee Integration*, 63 C.A.B. 700 (1973), stems from its disregard of the CAB's policy favoring the exclusive bargaining representative as the employees' representative in the Section 3 process. There, the CAB rejected TWU's effort to invoke arbitration on behalf of employees it had represented at Northeast Airlines before it was acquired by Delta. The TWU lost its representative status after Delta absorbed Northeast. The CAB denied the petition because TWU could no longer show it represented these Northeast employees in the merged Delta employee group. "[I]t does not appear that TWU's status as collective

bargaining representative of the Northeast employees for Railway Labor Act purposes survived the merger." 63 C.A.B. at 702. This decision again reflects that the CAB recognized the exclusive bargaining representative for Sections 3 and 13 when one existed.

As USAPA noted in its initial brief, Doc. 95 at 6-7, the CAB set forth clearly its policy on the proper representatives of employees in Section 3 and 13 proceedings in *National Airlines Acquisition*, 94 C.A.B. 433, 1982 WL 35259 (Mar. 4, 1982). The CAB rejected the effort of the P.A.I.N. group of former National employees to obtain separate party status. Just like US Airways and the Plaintiffs here, the P.A.I.N. group incorrectly relied upon the CAB's earlier *Braniff/MidContinent* and *Delta Air Lines* decisions in support of its claim that it was entitled to separate representation notwithstanding the fact that the Teamsters was the certified representative of the postmerger Pan Am clericals. 94 CAB at 437, 1982 WL 35259, at *3 n.5. In rejecting the P.A.I.N's argument, the CAB stated it would only accord party status to an interest group representing the entirety of a premerger craft or class when there would be no exclusive bargaining representative postmerger - that is, in a nonunion situation like Delta Air Lines where employees were unrepresented or became so after the merger. *Id.* Like the former National employees, the US Airways pilots, however, have a representative as certified by the NMB for the single craft or class. Nothing in CAB precedent supports the extraordinary effort of the Plaintiffs and US Airways to have this Court disregard USAPA's exclusive representative status and impose a separate representative for part of the pilot craft or class.

US Airways' effort to overturn USAPA's exclusive representative status leads it to make the plainly incorrect assertion that seniority integration is not a matter of collective bargaining and does not implicate USAPA's status as certified representative. Doc. 98 at 7-8. It incorrectly asserts that the Section 3 and 13 process is between employee groups and not with the carrier.

It is important to remember that the Section 13 arbitration procedure applied to all of the LPPs, not simply the Section 3 seniority integration procedures. Section 13(a) provided that a party may submit to arbitration under Section 13 "any dispute or controversy (except as to matters arising under section 9) which arises with respect to the protections provided herein." If an airline and a union disagreed on change of residence benefits under Section 8, for example, and could not resolve the dispute by negotiation, they would resort to the Section 13 arbitration process. Section 13 was not a "seniority integration arbitration" solely between groups of employees as US Airways claims, but was part of the collective bargaining regime adhered to by the CAB under its LPPs. As USAPA has shown, the Section 3 seniority integration provision was also part of this collective bargaining regime between the carrier and the representative of its employees. *Allegheny-Mohawk Merger Case,* 1979 CAB LEXIS 48, *23 (1979) ("the LPPs clearly required Allegheny, the surviving company, to treat with ALPA acting in behalf of all pilots affected by the merger for purposes of integrating their seniority. Section 3 furthermore stated that should Allegheny and ALPA fail to agree on an integrated seniority list, the matter could be settled by arbitration.").

Seniority is a central subject of collective bargaining. It is a "creature of contract." *Colbert v. Brotherhood of Railroad Trainmen, 206 F.2d 9, 13* (9th Cir. 1953), *cert. denied,* 346 U.S. 931, 74 S.Ct. 320 (1954). "Seniority systems, reflecting as they do, not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes." *California Brewers Ass'n v. Bryant*, 444 U.S. 598, 608, 100 S.Ct. 814, 820 (1980). Since seniority is a creation of contract, unions may negotiate and renegotiate seniority systems. *Hass v. Darigold Dairy Products*, 751 F.2d 1096, 1099 (9th Cir. 1985). The notion that seniority integration among employee groups is somehow removed from this collective bargaining regime is unsupported by any authority and is contrary to the Section 3 process established by the CAB.

Unquestionably, questions concerning seniority, like any other subject of

collective bargaining, are within the sole province of the exclusive bargaining representative. Accordingly, as there is no merit to US Airways' assertion that the seniority integration proceeding between the US Airways and American pilots does not implicate USAPA's representative status, its argument that there can be different representatives for a part of the US Airways pilot craft or class in the upcoming Section 3 and 13 process, which rests on that false premise, fails of its own weight.

II

THIS COURT HAS NO AUTHORITY TO ORDER PLAINTIFFS' PROPOSED REMEDIES

As further proof that the motion for a preliminary injunction should be denied and this case dismissed is the fact that Plaintiffs, in their Trial Memorandum on Remedy[2], now attempt yet a third formulation of their DFR claim against USAPA. The constantly shifting alleged DFR claim now is that "USAPA breached its DFR by failing to use a fair, neutral process to create an integrated pilot seniority list." Doc. 96 at 3. However, as with the DFR claims asserted in the complaint[3] and in the Motion for a Preliminary Injunction[4], Plaintiffs allege no facts to support this newly minted version, and this DFR claim should likewise be dismissed.

---

[2] The only proceeding currently pending is Plaintiffs' motion for a preliminary injunction on which the Court ordered supplemental briefing. There has been no ruling on Plaintiffs' motion to consolidate, which USAPA has opposed for lack of notice, untimeliness of the request, lack of discovery and because it is premature while two motions to dismiss are pending. There is no basis for Plaintiffs to denominate their two briefs (the Court ordered one) as "trial" memos.

[3] Plaintiffs' claim in their complaint is that "USAPA . . . breached the duty of fair representation by entering into the MOU with the firm intention of using a date-of-hire seniority list rather than the Nicolau Award list." Doc. 1 at ¶99. As discussed in its motion to dismiss, that claim is not ripe for the same reasons that Plaintiffs' first and second DFR claims against USAPA were not ripe – that is, not until there is a final merged seniority integration list with US Airways and American - does Plaintiffs' DFR claim as to USAPA's conduct during negotiations for that list, become ripe.

[4] In their motion for a preliminary injunction, they allege that "USAPA breached its duty of fair representation . . . because the Memorandum of Understanding . . . abandons the Nicolau Award without a legitimate union purpose." Doc. 53, at 6. This version of Plaintiffs' DFR claim also fails because, as this Court recognized, the MOU is: (1)

Plaintiffs propose two alternative remedies: (1) order USAPA to use the Nicolau Award; or (2) order USAPA to conduct an arbitration financed by US Airways to determine whether to use the Nicolau Award or a date-of-hire list. Plaintiffs then suggest that regardless of which remedy, the Court should award Plaintiffs reasonable attorneys' fees and expenses pursuant to the common benefit doctrine. Courts have no authority to order either alternative remedy, and as a matter of law, Plaintiffs are not entitled to attorneys' fees pursuant to the common benefit doctrine.

A. Plaintiffs' First Alternative Remedy

As to their first alternative remedy, the Ninth Circuit's decision in *Addington I* and this Court's judgment in the Declaratory Judgment Action, bar such relief. As this Court made clear, "USAPA does not have to accept the Nicolau Award as the only basis upon which to negotiate a fair seniority agreement." (Transcript of May 14, 2013 Oral Argument on Plaintiffs' Motion for Preliminary Injunction, 42:4-14[5]). Aside from the plethora of legal reasons set forth in USAPA's opening brief and opposition papers that such relief is inappropriate, purely on practical grounds, the requested relief could not advance resolution of this dispute. For starters, even if ordering the Nicolau list could be appropriate, under USAPA's constitution, any agreement with the APA based on such a list would have to be ratified by USAPA's membership. That would simply bring us full circle to where the parties currently stand because such an agreement has no more chance of ratification now than it did when the Ninth Circuit's *Addington I* decision was rendered. (The same is true with respect to an agreement reached with the APA based on a list ordered by an arbitrator under Plaintiffs' proposed second remedy.) Failing agreement with the APA, the law requires a McCaskill- Bond arbitration proceeding. In either event, as the prior litigation established, it is not possible to determine at this juncture what integrated seniority list will ultimately be established or that such a list will

"neutral" as to the Nicolau Award; and (2) sets forth the process for reaching an integrated seniority list.

[5] Referring to transcript page and line numbers.

not be fair and equitable. It is equally speculative that the seniority negotiation process, which has not yet begun, will be so far outside the wide range of reasonableness accorded to USAPA that judicial intervention could be justified. As USAPA made clear, the Merger Committee, which is charged with negotiating with the APA, has not yet even been appointed[6] and no proposals to advance in negotiations with the APA have been presented to the USAPA Board of Pilot Representatives or approved. At this juncture there is nothing about the seniority integration process set forth in the MOU that could justify any remedy, much less either of the remedies Plaintiffs seek.[7]

Plaintiffs incorrectly rely on *Ramey v. Dist. 141, Int'l Ass'n of Machinists*, 378 F.3d 269 (2d Cir. 2004) in support of their claim that "[c]ourts have authority to order a union to use a defined seniority order to remedy a DFR breach." (Doc. 96 at 2) In commenting on *Ramey*, the *Addington I* court noted that there was no requirement for ratification in that case and made clear it was not persuaded by the Plaintiffs' attempt to translate that holding to the circumstances here: "Moreover, because the seniority systems at issue already had been effectuated in both cases, the courts simply were not faced with the possibility of interfering in a union's internal conflict before the conflict manifested as concrete injury to the Plaintiffs." *Addington v. U.S. Airline Pilots Ass'n.*, 606 F.3d 1174, 1183 (9th Cir. 2010). Aside from the fact that the Ninth Circuit has already rejected applicability of *Ramey* here, and there is absolutely no showing or even allegation of retaliatory animus here as was the case in *Ramey*, the district court judgment in *Ramey* did not order IAM or USAir to employ a particular seniority list or method. Instead, it merely required IAM and USAir to use Plaintiffs' Eastern airlines start dates as opposed to their Shuttle start dates. The DFR was not in applying one seniority method

---

[6] The Committee has a Chairman but no members.

[7] In apparent recognition that the CAB decisions foreclose US Airways' meritless suggestion, notably absent from Plaintiffs' brief on remedies is any request that they be made parties to the McCaskill –Bond process. As the only party seeking relief in this matter, the failure to include this request in their brief on remedy renders that inquiry moot.

over another, but in the selection of a specific date of employment from which to measure seniority under the seniority system agreed to. *Ramey*, 378 F.3d at 277 ("[P]laintiffs here do not suggest that IAM acted improperly merely by dovetailing the seniority lists. Rather, they argue that IAM was motivated by retaliatory animus in choosing which seniority dates to apply.").

What Plaintiffs notably ignore from *Ramey* is its discussion on when a DFR claim accrues. *Id.*, at 278-79. In rejecting IAM's contention that the DFR claim accrued when it announced its position that it would use Plaintiffs' Shuttle start dates, the court held that "[w]e have never held that a breach occurs when a union announces an intention, even if it does so unequivocally, to advocate against the interest of its members in the future." *Id.*, at 278. To hold otherwise "would needlessly clog our court system with litigation over whether a union's position is 'final enough' to establish a cause of action." *Id.*, at 278-79. A DFR claim filed when IAM announced its intention "would have been based on conjecture as to whether IAM's position might change during the intervening time period. Faced with these facts, any district court would have been obligated to dismiss as premature a suit brought in 1993 because we do not permit speculative claims." *Id.*, at 278.[8] Indeed, the holding in *Ramey* supports USAPA's position that a DFR claim is not stated on the grounds that USAPA entered "into the MOU with the firm intention of using a date-of-hire seniority list rather than the Nicolau Award list." (Doc. 1 at ¶99)

[8] Plaintiffs cited to *Ramey* in the appeal in *Addington I* in support of their contention that their DFR claim was ripe. However, the Ninth Circuit, in distinguishing *Ramey*, stated that "the policy that the plaintiffs claimed injured them had already been effectuated when the plaintiffs brought the claim. *See Ramey v. Dist. 141, Int'l Ass'n of Machinists & Aerospace Workers*, 378 F.3d 269, 275-76 (2d Cir.2004) (noting that airline had *accepted* union's seniority system and the plaintiffs had been furloughed as a result)." *Addington*, 606 F.3d at 1182. The Ninth Circuit further stated: "[s]ignificantly . . . because the date the union advocated its position in negotiations fell within the six-month period . . . there would have been no need for the plaintiffs to argue that the claim did not accrue until effectuation of the policy. Moreover, because the seniority systems at issue already had been effectuated . . . the courts simply were not faced with the possibility of interfering in a union's internal conflict before the conflict manifested as concrete injury to the plaintiffs." *Id.*, at 1183.

Plaintiffs' claim that the Court can order use of the Nicolau list has already been litigated and rejected. Even if the circumstances now could escape the prior rulings, courts do not have the authority to substitute their judgment for that of the union or to interfere in the union's internal affairs. If it turned out that the final product was the result of discrimination or fraud and was not otherwise fair and equitable, the remedy would have to be to order the parties back to negotiate further, not to dictate a specific seniority system to be used. Plaintiffs' claim that courts have authority to order a union to use a particular seniority integration method to integrate seniority lists or establish a particular order of seniority among employees is antithetical to the proper role of the courts in internal union disputes and should be rejected.

B. Plaintiffs' Second Alternative Remedy

Plaintiffs' second alternative remedy should also likewise be rejected. Supreme Court precedents mandate that "a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*." *Granite Rock Co. v. International Broth. of Teamsters*, __ U.S. __, 130 S.Ct. 2847, 2856 (2010) (emphasis in original). The Supreme Court has never held that the presumption of arbitrability "overrides the principle that a court may submit to arbitration 'only those disputes . . . the parties have agreed to submit,' *First Options*, *supra* at 943, 115 S.Ct. 1920, nor that courts may use policy considerations as a substitute for party agreement, *see*, *e.g.*, *AT&T Technologies*, *supra*, at 648, 651-652, 106 S.Ct. 1415." *Id.*, at 2851. There is no agreement between USAPA and Plaintiffs to submit the issue of the Nicolau list to arbitration. Indeed, to the extent Plaintiffs submit the "agreement" is the ALPA Merger Policy or the Transition Agreement which references it, the Transition Agreement was modified by USAPA and US Airways, as was their right to do[9], when they entered into the MOU with American and the APA. As to the MOU, Plaintiffs are not a party,

[9] "But being 'bound' by the Transition Agreement has very little meaning in the context of the present case. It is undisputed that the Transition Agreement can be modified at any time 'by written agreement of [USAPA] and the [US Airways].'" Doc. 193 at 7.

and thus have no standing in any dispute resolution procedures set forth in the MOU. As a matter of law, this Court has no authority to order USAPA to conduct an intra-union arbitration to determine whether to use the Nicolau list or a date-of-hire list.

As with *Ramey*, Plaintiffs' reliance on *Bernard v. Air Line Pilots Ass'n, Int'l*, 873 F.2d 213 (9th Cir. 1989), also fails to support their remedy. The court in *Bernard* merely ordered ALPA to follow its own merger policy, which ALPA admittedly failed to do resulting in a DFR. It did not order ALPA to conduct a Section13 arbitration.

Plaintiffs' attempt to equate ALPA merger policy with Section 13 arbitration has no merit. They are not the same, and the ALPA merger policy is not the *sine qua non* of either "a fair, neutral process" or a Section 3 "fair and equitable manner" for the integration of seniority lists. The ALPA merger policy in *Bernard* required the participation of the former Jet America pilots in negotiations to reach an integration agreement because once the merger of Jet America and Alaska Airlines became effective, ALPA became the recognized bargaining agent for the former Jet America pilots, and therefore ALPA's merger policy governing mergers in which ALPA was the recognized bargaining agent for *both* pilot groups involved governed. *Id.* at 214-15. However, there is no case law supporting a proposition that the procedures set forth in the ALPA merger policy is the only "fair and equitable manner" for reaching seniority integration.[10]

USAPA has consistently maintained it will protect and represent the interests of the entire bargaining unit. Regardless, as the Ninth Circuit made clear in *Addington I*, mere statements of future intentions do not state a claim for DFR. *Addington*, 606 F.3d at 1181 n. 5. The record is clear that USAPA has never advocated for strict date-of-hire seniority and it has never renounced its duty to negotiate in good faith for fair and equitable seniority integration. Given the uncertainties of the timing and effectuation of the merger process, the fact that USAPA will need to evaluate and respond to proposals it

[10] Indeed, the Nicolau Award was based on an ALPA policy that had never been adopted or approved by the membership, that did not consider date-of-hire as a factor, and has since been amended to include it.

will receive from the APA (which has a significantly larger pilot group), USAPA needs to have the "wide range of reasonableness" and the wide latitude necessary for the effective performance of their bargaining responsibilities. *See Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67, 78, 111 S.Ct. 1127, 1130, 1135 (1991).

Finally, Plaintiffs' remedy will impermissibly interfere with USAPA's role as the exclusive bargaining representative of all US Airways pilots. *See Hendricks v. Airline Pilots Ass'n Int'l*, 696 F.2d 673, 677 (9th Cir. 1983) ("Under the collective bargaining system, selection of a union as the bargaining representative substantially reduces the ability of individual employees to deal directly with their employer. Hence, federal labor policy 'extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.'") (quoting *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180, 87 S.Ct. 2001, 2006 (1967)).

The only remedy available to this Court is to allow the McCaskill-Bond process to proceed without judicial intervention and without this Court substituting its judgment for that of USAPA. If negotiations with the American pilots are fruitful, the agreement reached must be ratified by USAPA members. If the matter proceeds to a tri-partite arbitration, that decision will be final and binding. Until the process is finalized, there is no way of knowing what the final seniority integration list will be, and thus no way of knowing whether USAPA has breached its DFR to Plaintiffs.

C. Plaintiffs' Claim for Attorneys' Fees Under the Common Benefit Doctrine

As discussed in its Motion to Dismiss, there is no merit to Plaintiffs' claim for attorneys' fees. Doc. 44 at 19-20; Doc. 65 at 11. Plaintiffs' claim that "USAPA has failed to use a neutral process because it has allowed the East Pilot majority to control its position on seniority integration" Doc. 96 at 3, contradicts their later claim that "the entire craft . . . benefited from this litigation" and thus Plaintiffs are entitled to attorneys' fees under the common benefit doctrine. Doc. 96 at 6. As the losing party in *Addington I* and the Declaratory Judgment Action, Plaintiffs achieved no benefit to the West Pilots

whose interests they represented, and certainly not to the East Pilots who Plaintiffs concede reject the Nicolau Award. There is simply no definition of "prevailing" that encompasses the rejection of Plaintiffs' claims in those actions and to argue otherwise is plainly ludicrous. Should Plaintiffs prevail on the merits in this action, any remedy would certainly not benefit the entire class, as it is undisputed that the majority of the pre-merger US Airways pilots disagree with the Nicolau list. Accordingly, Plaintiffs' claim for attorneys' fees should be dismissed.

Respectfully submitted this 24th day of May, 2013.

Martin & Bonnett, P.L.L.C.

By: s/Susan Martin
Susan Martin
Jennifer L. Kroll
Martin & Bonnett
1850 N. Central Ave., Suite 2010
Phoenix, AZ 85004

Patrick J. Szymanski (*pro hac vice*)
Patrick J. Szymanski, PLLC
1900 L Street, NW, Suite 900
Washington, DC 20036

Brian J. O'Dwyer (*pro hac vice*)
Gary Silverman (*pro hac vice*)
Joy K. Mele (*pro hac vice*)
O'Dwyer & Bernstien, LLP
52 Duane Street, 5th Floor
New York, NY 10007

Attorneys for US Airline Pilots Association

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2013, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Marty Harper
Andrew S. Jacob
Jennifer Axel
Polsinelli, PC
CityScape
One East Washington St., Ste. 1200
Phoenix, AZ 85004

Attorneys for Plaintiffs

US Airways, Inc.
Karen Gillen
111 West Rio Salado Parkway
Tempe, AZ 85281

Robert A. Siegel
Chris A. Hollinger
400 South Hope Street, Suite 1500
Los Angeles, CA 90071-2899

Attorneys for US Airways, Inc.

s/T. Mahabir