

1 **PATRICK J. SZYMANSKI** (*pro hac vice*)
2 **PATRICK J. SZYMANSKI, PLLC**
3 1900 L Street, NW, Ste 900
4 Washington, DC 20036
5 Telephone: (202) 721-6035
6 szymanski@msn.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

6 **BRIAN J. O'DWYER** (*pro hac vice*)
7 **GARY SILVERMAN** (*pro hac vice*)
8 **JOY K. MELE** (*pro hac vice*)
9 **O'DWYER & BERNSTIEN, LLP**
10 52 Duane Street, 5th Floor
11 New York, NY 10007
12 Telephone: (212) 571-7100
bodwyer@odblaw.com
gsilverman@odblaw.com
jmele@odblaw.com

13 Attorneys for US Airline Pilots Association

14 **IN THE UNITED STATES DISTRICT COURT**
15 **DISTRICT OF ARIZONA**

18 ADDINGTON et. al.,)
19)
20 *Plaintiffs,*)
21 v.)
22 US AIRLINE PILOTS ASS'N, et. al,)
23 *Defendants.*)
24)
25)

Case No.: 2:13-CV-00471-ROS
**US AIRLINE PILOTS
ASSOCIATION'S MOTION TO
STRIKE PORTIONS OF
PLAINTIFFS' RESPONSE (Doc.
106) TO MEMORANDUM BY
USAPA (Doc. 95) AND US
AIRWAYS (Doc. 98) ON REMEDY
AND MCCASKILL-BOND**

26
27
28

1
2 Pursuant to LR Civ. 7.2(m)(1), Defendant US Airline Pilots Association
3 (“USAPA”) hereby moves to strike portions of Plaintiffs’ Response to Memorandum by
4 USAPA and US Airways on remedy and McCaskill-Bond (Doc. 106), as it contains new
5 arguments not made in their initial Memorandum on Remedy (Doc. 96) and because it
6 argues for a remedy that is not alleged in the Complaint (Doc. 1).

7 MEMORANDUM OF POINTS AND AUTHORITIES

8 BACKGROUND

9 At the preliminary injunction hearing before this Court on May 14, 2013, the
10 parties were asked to submit written briefs on, *inter alia*, what remedy would be
11 appropriate if the Court were to find that USAPA breached its duty of fair representation.
12 The briefing schedule for this issue was as follows: the parties simultaneously submitted
13 opening briefs on May 17, 2013 and responsive briefs on May 24, 2013. In accordance
14 with the Court’s instructions, no replies were allowed. (Doc. 86.) USAPA takes issue
15 with plaintiffs’ assertion of a new proposed remedy for the first time in their responsive
16 brief and respectfully submits such argument should be stricken.

17
18 ARGUMENT

19
20 I. PLAINTIFFS’ ARGUMENTS FOR A NEW PROPOSED REMEDY SHOULD
21 BE STRICKEN

22 In their opening brief on remedy Plaintiffs argued for an order (1) compelling
23 USAPA to use the Nicolau list or, alternatively, (2) an order compelling arbitration, and
24 (3) an award of attorneys’ fees and costs pursuant to the common benefit fund doctrine.
25 There was absolutely no mention of, much less a request for, damages and there is no
26 claim for money damages in the complaint. Nevertheless, in their Response
27 Memorandum to the opening briefs of USAPA and US Airways (Doc. 106), plaintiffs
28 argue for the first time that as a remedy for USAPA’s alleged DFR breach, the Court
should award “substantial damages”, which they assert exceed \$3 million for the

1
2 “substantial litigation expenses and attorneys’ fees” incurred¹ as a result of “responding
3 to USAPA’s ongoing efforts to breach its DFR ...” (Doc. 106, Plaintiffs’ Response, p. 8.)
4 Plaintiffs’ attempt to recast their meritless claim for attorneys’ fees as one for money
5 damages is entirely absent from their opening brief on remedy. (Doc. 96, Plaintiffs’
6 Memorandum on Remedy.) Therein, plaintiffs assert only that attorneys’ fees should be
7 awarded under the common benefit doctrine, and there is no claim for monetary
8 damages for USAPA’s alleged breach of its DFR. (*Id.*, pp. 6-7.)

9
10 Moreover, the claim that monetary damages should be ordered by the Court is also
11 missing from plaintiffs’ Complaint. (Doc. 1, Complaint.) Therein, plaintiffs only allege a
12 right to an attorneys’ fees award through the common benefit theory. (*Id.*, pp. 14-15.)
13 Plaintiffs’ prayer for relief in the Complaint also does not request monetary damages in
14 an amount equivalent to the attorneys’ fees and expenses allegedly incurred since 2008 as
15 a result of USAPA’s alleged breach of the DFR. (*Id.*, p. 15.)

16 Plaintiffs’ attempt to argue for a new remedy is unauthorized as the argument was
17 not raised in their opening brief, or alleged in their Complaint and accordingly, it is
18 proper for the Court to strike the argument: “It is improper for the moving party to ‘shift
19 gears’ and introduce new facts or different legal arguments in the reply brief than
20 presented in the moving papers.” *Cal. Prac. Guide: Fed. Civ. Pro. Before Trial* Ch. 12-
21 C, at 12:107. *See, also E.E.O.C. v. Bashas’, Inc.*, 2010 WL 3724697, *4 (D.Ariz. Sept.
22 16, 2010)(declining to consider an argument made for the first time in a reply brief, and
23 citing additional Ninth Circuit case law supporting this well settled principle); *Salerno v.*
24 *Schriro*, 2007 WL 2153584, *12 (D.Ariz. July 24, 2007)(same). *In E.E.O.C. v. Bashas’,*
25 *Inc.*, the court stated that “[t]he obvious reason for declining to consider this belated
26

27
28 ¹ Plaintiffs admit that they did not pay over \$3 million dollars in attorneys’ fees, as their
litigation was funded by other individuals who voluntarily donated to Leonidas, LLC.
(*See* Doc. 106, p. 9.)

1
2 argument by Bashas' is prejudice to the EEOC given its lack of an opportunity to
3 respond." 2010 WL 3724697, at *4.

4 In the case at bar, plaintiffs' novel argument that they are entitled to monetary
5 damages as a result of USAPA's alleged breach of the DFR in the amount of their
6 asserted legal fees and expenses from 2008 to present should be stricken from the record
7 by the Court for the same reason as in *E.E.O.C. v. Bashas' Inc.* Plaintiffs' failure to
8 assert this argument until their responsive brief is prejudicial to USAPA, as the briefing
9 schedule does not allow USAPA an opportunity to respond to this claim. Moreover,
10 USAPA had no prior knowledge of this argument, as a claim for monetary damages as a
11 result of USAPA's alleged DFR was not requested in the Complaint. Finally, this
12 argument was also not in response to any assertion made by USAPA in its opening brief.
13

14 CONCLUSION

15 For all the foregoing reasons, USAPA respectfully requests that the Court strike
16 the following portions of plaintiffs' Response to Memorandum by USAPA and US
17 Airways on remedy and McCaskill-Bond (Doc. 106) that reference plaintiffs' newly
18 asserted argument for monetary damages:

- 19 1. Page 3 line 14 after "pilots;"
20 2. Page 4 line 13 last sentence, line 15 after "relief" through line 22;
21 3. Page 6 lines 4-5 after "pilots;"
22 4. Page 7 line 3 through "below;"
23 5. Page 8 line 12 through Page 9 line 18 and footnote 9, and
24 6. Page 10 line 5 - 6 after "process."

25 Respectfully submitted this 28th day of May, 2013.
26

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

28 By: s/ Susan Martin

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 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 & Shughart, 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