

1 Marty Harper (#003416)
 2 mharper@polsinelli.com
 3 Andrew S. Jacob (#22516)
 4 ajacob@polsinelli.com
 5 Jennifer Axel (#023883)
 6 jaxel@polsinelli.com
 7 **POLSINELLI SHUGHART, P.C.**
 8 CityScape
 9 One East Washington St., Suite 1200
 10 Phoenix, AZ 85004
 11 Phone: (602) 650-2000
 12 Fax: (602) 264-7033
 13 *Attorneys for Plaintiffs*

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

16 Don ADDINGTON; *et al.*,

17 *Plaintiffs,*

18 vs.

19 US AIRLINE PILOTS ASS’N, *et al.*,

20 *Defendants.*

CASE NO.

**Statement Of Facts In Support Of
 Motion for a Preliminary Injunction
 Enjoining Defendants (and their
 Successors) From Integrating Pilot
 Seniority Without Using the Nicolau
 Award List to Define the Relative
 Seniority of US Airways Pilots.**

21 Plaintiffs file this file this *Separate Statement of Facts in Support of Motion for a*
 22 *Preliminary Injunction Enjoining Defendants (and their Successors) From Integrating*
 23 *Pilot Seniority Without Using the Nicolau Award List to Define the Relative Seniority of*
 24 *US Airways Pilots.* An appendix of supporting documents and deposition transcripts is
 25 filed concurrently. Abbreviations are used, as indicated in the table that follows.

Abbreviation	Reference
App. xxx	Page in Appendix of Exhibits (at upper right corner) where cited document is reproduced.
Doc.	Document number in a related action otherwise indicated.
Ex. xx	Exhibit number of document admitted into evidence in Case No. 2:08-cv-01633-NVW-PHX.
MP	ALPA Merger Policy.
Nic. Award	The Nicolau Opinion and Award.
RT at xx:xx	Page and line numbers from the reporter's transcript of testimony in case no. 2:08-cv-01633-NVW.
TA	Transition Agreement.

1. In May 2005, two airlines, America West and US Airways, agreed to merge to become a single airline known as US Airways.¹

2. In May 2005, US Airways was in Chapter 11 bankruptcy for the second time in two years.²

3. The US Airways reorganization plan called for it to merge with America West to form a new airline pursuant to a contract referred to as the Transition Agreement.³

4. Pilots who came from Old US Airways are known as East Pilots.⁴

¹ *Nic. Award*, 1 (May 1, 2007) (Ex. 2) [App. 001].

² *Id.* 6 [App. 006] (US Airways “was still in bankruptcy at the time of the merger and was unprepared to present a reorganization plan for its emergence.”); *id.*, 16 [App. 016] (US Airways filed bankruptcy in August 2002 and again in September 2004).

³ *Order Confirming Plan of Reorganization of US Airways*, 50, ¶ 47 (Bankr. E.D. Va. Sep. 16, 2005) [App. 041]; *see also id.*, Ex. E (Transition Agreement excerpts) [App. 044-49].

⁴ Uncontested.

- 1 5. Pilots who came from America West are known as West Pilots.⁵
- 2 6. At the time of the merger, including pilots on furlough, there were about 5,100
- 3 East Pilots and 1,900 West Pilots.⁶
- 4 7. At the time of the merger, all West Pilots were actively flying.⁷
- 5 8. At the time of the merger, approximately 1700 East Pilots were inactive (on
- 6 furlough).⁸
- 7 9. At the time of the merger, Air Line Pilots Association (“ALPA”) represented
- 8 both pilot groups.⁹
- 9 10. Under ALPA governance, each pilot group was represented by a Master
- 10 Executive Council (“MEC”).¹⁰
- 11 11. The US Airways MEC is referred to as “the East MEC” and the America West
- 12 MEC is referred to as “the West MEC.”¹¹
- 13 12. On September 23, 2005, ALPA and the two merging airlines entered into the
- 14 Transition Agreement that was ordered by the Bankruptcy Court.¹²

15
16
17
18
19
20
21
22
23
24
25
26
27
28

⁵ Uncontested.

⁶ *Nic. Award*, 5 [App. 005].

⁷ *Id.* 28 [App. 028] (noting that on West side, “furloughs ceased to exist long before the merger took place.”); *see also id.*, 5.

⁸ *Id.* 4-5 [App. 004-005] (noting that 33% of East Pilots were on furlough at the time of the merger and that the most senior East furlougee was hired in 1988 and went on furlough in 2003).

⁹ *Id.* 1 [App. 001].

¹⁰ ALPA Constitution, art. IV §§ 1 & 2 (Ex. 509) [App. 073].

¹¹ Uncontested.

¹² TA (Ex. 21) [App. 087-113].

1 13. The chairman of each MEC signed the Transition Agreement, witnessed by
2 other union officials.¹³

3 14. The Transition Agreement provides that the pilot groups would integrate their
4 seniority lists according to defined procedures set out in detail in the ALPA constitution
5 and called “ALPA Merger Policy.”¹⁴

6 15. The Transition Agreement also provides: “The Association [ALPA] and US
7 Airways Parties will negotiate a single collective bargaining agreement applicable to the
8 merged operations of America West and US Airways (the ‘Single Agreement’). . . .”¹⁵

9 16. The Transition Agreement also provides: “[T]he airline operations of America
10 West and US Airways, with respect to pilots, shall be merged no later than twelve (12)
11 months following the later of (i) completion of the integrated pilot seniority list and (ii)
12 negotiation of the Single Agreement. . . .”¹⁶

13 17. By the terms of the Transition Agreement and ALPA Merger Policy, airlines
14 play no role in seniority integration arbitration.¹⁷

15 18. By the terms of the Transition Agreement, US Airways agreed (subject to
16 predefined conditions that protected its economic interests) in advance to accept the
17 outcome of the arbitration as the final resolution of this seniority integration dispute.¹⁸

18
19
20 ¹³ TA, at 16-17 [App. 102-103] (The parties bound by the Transition Agreement
21 included the union “by and through the Master Executive Councils of the America West
and US Airways pilots.”).

22 ¹⁴ *Id.* at § IV.A [App. 092] (“The seniority lists of America West pilots and US
23 Airways pilots will be integrated in accordance with ALPA Merger Policy and submitted
to the Airline Parties for acceptance.”).

24 ¹⁵ *Id.* § V [App 093].

25 ¹⁶ *Id.* § VI.A [App 094].

26 ¹⁷ *See, e.g., id.*, 1 [App 001] (no mention of Airline as party).

27 ¹⁸ TA, § IV.A [App 092].
28

1 19. Pursuant to ALPA Merger Policy, the single integrated seniority list would be
2 created by two Merger Committees, appointed by each MEC and representing the pilot
3 group governed by that MEC.¹⁹

4 20. In accordance with the Transition Agreement and ALPA Merger Policy, the
5 two Merger Committees began negotiating the creation of a single integrated seniority list
6 in August 2005.²⁰

7 21. Pursuant to ALPA Merger Policy, the Merger Committees would conduct
8 arbitration that would be final and binding on the pilots (East and West) if they were
9 unable to agree on seniority integration.²¹

10 22. ALPA Merger Policy stated: “The Award of the Arbitration Board shall be
11 final and binding on all parties to the arbitration and shall be defended by ALPA.”²²

12 23. ALPA Merger Policy stated: “The purpose of arbitration shall be to reach a
13 fair and equitable resolution consistent with ALPA policy.”²³

14 24. Both pilot groups hired independent outside counsel to represent their interests
15 and eventually proceeded to arbitration.²⁴

16 25. In the course of the Nicolau Arbitration, there were 18 days of hearings, 20
17 witnesses, and 14 volumes of exhibits.²⁵

18 26. The two Merger Committees filed comprehensive post-hearing briefs.²⁶

19
20 ¹⁹ MP, pt.1 ¶ D.3 (Aug. 10, 2005) (Ex. 3) [App. 116].

21 ²⁰ RT, 395:24 to 396:7 (West Pilot Ken Stravers) [App. 292-293].

22 ²¹ MP, pt.1.H.1.b & c [App. 119].

23 ²² *Id.* pt.1.H.5 [App. 121].

24 ²³ *Id.* pt.1.H.1.b [App. 119].

25 ²⁴ *Nic. Award*, 1 [App. 001].

26 ²⁵ *Id.* 3 [App. 003].

27 ²⁶ *Id.*

1 27. The East Merger Committee's position was that East Pilots were entitled to
2 seniority rights based upon their dates of hire, including approximately 1700 East Pilots
3 who were on furlough at the time of the merger.²⁷

4 28. The West Merger Committee's position was that approximately 1700 East
5 Pilots who were on furlough at the time of the merger should be placed below all West
6 Pilots because all West Pilots were actively working for America West at the time of the
7 merger.²⁸

8 29. The Nicolau Arbitration board issued its award (the "Nicolau Award") on or
9 about May 1, 2007.²⁹

10 30. The Nicolau Award placed about 500 senior East Pilots at the top of the list
11 because at the time West Pilots were not operating the wide-body international aircraft
12 generally flown by the most senior East Pilots.³⁰

13 31. The Nicolau Award placed the approximately 1700 East Pilots who were
14 furloughed at the time of the merger at the bottom of the list.³¹

15 32. The Nicolau Award expressly found that the date-of-hire list put forward by
16 the East Pilots was inequitable because "merging active pilots with furlougees, despite
17 the length of service of some of the latter, is not at all fair or equitable under any of the
18 stated criteria."³²

19
20
21 ²⁷ *Id.* 4 [App. 004]; *id.*, 8 [App. 008]

22 ²⁸ *Id.* 14 App. 014].

23 ²⁹ *Nic. Award*, 35 [App. 035]; *see also id.*, 3 (explaining the procedures followed
24 by the arbitration) [App. 008].

25 ³⁰ *Id.* 31 & 32, n.5 [App. 031-032].

26 ³¹ *Id.* 31 (placing "those who brought jobs to the merger" above those who did not)
[App. 031].

27 ³² *Id.* 28 [App. 028].
28

1 33. The Nicolau Award blended the remainder of the East Pilot list with the West
2 Pilot list according to relative positions on the separate seniority lists.³³

3 34. On December 20, 2007, US Airways accepted the Nicolau Award.³⁴

4 35. Soon after Mr. Nicolau announced his decision, the East MEC appealed to
5 ALPA's Executive Committee to overturn the Nicolau arbitration.³⁵

6 36. In a letter dated October 1, 2007, John Prater, the President of ALPA, wrote to
7 Jack Stephan, the Chairman of the East MEC, "[T]he Executive Council has determined
8 that there is no ground under ALPA Merger Policy to set aside the seniority award, the
9 MEC should also adopt a resolution recognizing that the award is to be included in the
10 single agreement to be negotiated under the Transition Agreement and Merger Policy."³⁶

11 37. Mr. Prater also stated that it was "time for the [East] MEC to comply with its
12 representational and legal obligations under the Constitution & Bylaws, ALPA Merger
13 Policy, the Transition Agreement, and implementing resolutions of the Executive
14 Council" and "adopt a resolution . . . reversing all prior efforts to bar or precondition the
15 continuation of joint negotiations."³⁷

16 38. On October 19, 2007, Mr. Prater wrote to Jack Stephan stating "The Executive
17 Council has directed that the Nicolau award be submitted and defended. While input from
18 both MECs is welcome, the office of the President will comply with the Executive
19 Council's determinations and submit the award in a way that is consistent with the
20 negotiating timeline outlined and in accordance with ALPA's past practice."³⁸

21 ³³ *Id.* 31-32 [App. 031-032].

22 ³⁴ Doug Parker (Airline's CEO), *Letter to US Airways Pilots* (Dec. 20, 2007) (Ex. 9)
23 [App. 130].

24 ³⁵ Minutes, *MEC Special Meeting Resolutions Passed*, (July 25, 2007) [App. 131].

25 ³⁶ J. Prater, *Letter to J. Stephan*, 2 (Oct. 1, 2007) (Ex. 19) [App. 134-135].

26 ³⁷ *Id.* 1 [App. 134].

27 ³⁸ J. Prater, *Letter to J. Stephan* (Oct. 19, 2007) (Ex. 18) [App. 137].
28

1 39. On June 6, 2007, the East MEC challenged the validity of the Nicolau
2 arbitration in court.³⁹

3 40. On May 7, 2008, the parties to that litigation jointly stipulated to have the
4 matter dismissed.⁴⁰

5 41. On May 16, 2007, East Pilot Stephen Bradford wrote an email letter to the
6 ALPA Executive Board stating that it was necessary for East Pilots to replace ALPA so
7 that they could “write our own merger policy into our bylaws” and “just to protect what
8 little we have left.”⁴¹

9 42. In this email, Mr. Bradford stated that the East Pilots’ majority status in a new
10 union would enable them “to protect what they [the East Pilots] have left.”⁴²

11 43. In June 2007, Mr. Bradford and other East Pilots formed a committee to
12 explore whether they could use the device of a new union to repudiate ALPA’s duty to
13 use the Nicolau Award.⁴³

14 44. On June 9, 2007, this committee received advice from a lawyer to take care
15 with “the language you use in setting up your new union” and not to “give the other side
16 a large body of evidence that the sole reason for the new union is to abrogate an
17

18 ³⁹ *US Airways Master Executive Council vs. America West Master Executive*
19 *Council*, Case No. 2007-CA-004358-B, Docket [App. 139-140].

20 ⁴⁰ *Id.*

21 ⁴¹ S. Bradford, *Letter to Capt. Weber*, 1 (May 16, 2007) (“We must leave ALPA if
22 this award stands . . . [and] [m]ake no mistake, we don’t not want to leave ALPA, but we
just to ensure we can have some say in the next merger.”) (Ex. 107) [App. 141].

23 ⁴² *Id.* 2 (“The current wording, interpretation and application of ALPA merger
24 policy will force the US Airways pilots, and by default, the America West Pilots, because
25 we have a two to one majority that is increasing, into an independent or other collective
bargaining agent condition.”) [App. 142].

26 ⁴³ *See* S. Bradford Depo., 154:8 to 154:21 (Mar. 19, 2009) (admitting that he was a
27 member of a committee using the name “AAApilots4fairness”) [App. 264]; *see also*
28 ¶¶ 44-46, *infra.*, (showing purpose of committee).

1 arbitration, the Nicolau award, that in the opinions of most judges, should be allowed to
2 stand due to no gross negligence or fraud.”⁴⁴

3 45. On June 14, 2007, this group met with another law firm to inquire whether
4 “formation of a new bargaining agent” could prevent implementation of the Nicolau
5 Award. A report of this meeting explained how they could use a new union (USAPA) to
6 evade honoring the Nicolau arbitration.⁴⁵

7 46. In August 2007, USAPA’s counsel provided an opinion letter that USAPA
8 published to the East Pilots, stating

9 You have asked us to provide our legal opinion concerning whether
10 Arbitrator Nicolau’s seniority integration arbitration award could be
11 overturned or otherwise modified via litigation or subsequent
12 negotiation. Federal case law supports the conclusion that any effort to
13 overturn the Nicolau award via litigation would be fruitless. By contrast,
14 we believe that a successor union would be free to negotiate with US
15 Airways concerning the terms of any seniority integration.⁴⁶

16 47. During the election wherein USAPA challenged ALPA for the position of
17 bargaining representative, USAPA’s campaign materials gave a clear message that
18 equated ALPA (but not USAPA) with the Nicolau arbitration.⁴⁷

19 ⁴⁴ Aapilots4fairness committee member, *A Conversation with an Attorney* (Ex. 14)
20 [App. 143-144]; *see also Order*, 1-2 (Doc. 386, 2:08-cv-01633-NVW) (Apr. 23, 2009)
21 (denying motion to exclude as privileged) [App. 145-146]; S. Bradford Depo., 161:7 to
22 161:16 (admitting that he interviewed law firms in June 2007) [App. 271].

23 ⁴⁵ Aapilots4fairness Leadership Committee, *Lawyer Meeting* (June 14, 2007)
24 [App. 147-150]; *see also* S. Bradford, Depo., 158:6 to 158:22 (admitting he authored this
document) [App. 268].

25 ⁴⁶ L. Seham, *Letter to Interim President*, 1 (Aug. 20, 2007) [App. 151].

26 ⁴⁷ D. Mowrey, *Letter to “Gentlemen”* (Mar. 6, 2008) (Ex. 20) (“‘Separate
27 Operations’ is not possible if we stick with ALPA. If we vote ALPA in, we will be forced
28 to eat the Nicolau award in the not too distant future. ALPA=Nicolau.”) [App. 154-56].

1 48. In the course of the representation election, USAPA circulated messages that
2 referred to its “goal of utilizing DOH [date-of-hire] as the lodestar for seniority
3 integration.”⁴⁸

4 49. During the election, USAPA stated that it would negotiate for a date-of-hire
5 seniority integration rather than the Nicolau Award.⁴⁹

6 50. In a letter to East Pilots, addressed to “Fellow US Airways Pilots” and dated
7 February 2, 2008, Mr. Bradford (by then the President of USAPA) wrote, “the question
8 of East West will be decided by a vote for ALPA or USAPA. If USAPA becomes the
9 bargaining agent, there is no west and a simple majority can re-negotiate the Nicolau
10 award.”⁵⁰

11 51. On December 8, 2007, USAPA’s website stated as follows:

12 Will electing a new bargaining agent enhance our ability to redress the
13 inequities of the Nicolau award?

14 Yes. The Nicolau is the product of an ALPA-mandated process and
15 ALPA is bound to defend that process. The ALPA-US Airways MEC
16 cannot prevail in its current litigation because it voluntarily submitted to
17 the ALPA mandated process.

18 ⁴⁸ S. Bradford, *USAPA, President’s Message* (Mar. 20, 2007) [sic, proper date is
19 2008] (Ex. 29)] (“By voting for USAPA, you vote for a Constitution with . . . a merger
20 policy based on a pilot’s date of hire with conditions and restrictions to protect all pilot’s
pre-merged career expectations.”) [App. 157-58].

21 ⁴⁹ USAPA, *Letter* (undated) (“Concerning future mergers with USAPA there is no
22 Nic [Nicolau Award], it does not exist.”) [App. 159]; S. Bradford, *AAA-AWA MEC Joint*
23 *Chairman’s Msg.* (Jan. 31, 2008) (Ex. 33) [App. 161] (stating that the Nicolau Award
24 “can be negotiated away by USAPA whether the West agrees or not! It really is that
simple.”) (emphasis in original); see Bradford Depo., 89:12 to 90:9 (authenticating and
25 establishing foundation) [App. 260-261].

26 ⁵⁰ S. Bradford, *Letter to “Fellow US Airways Pilots,”* (Feb. 2, 2008) (Ex. 34)
27 (stating, “the question of East West will be decided by a vote for ALPA or USAPA. If
28 USAPA becomes the bargaining agent, there is no west and a simple majority can re-
negotiate the Nicolau award.”) [App. 173].

1 USAPA, however, is not bound by ALPA's Constitution and cannot be
2 subjected to ALPA's political control. USAPA will assert its right under
3 the Railway Labor Act to negotiate over the terms of any seniority
4 integration. Under the RLA, seniority is a mandatory subject of
5 bargaining.⁵¹

6 52. In addition to a single seniority list, integration of flight operations required a
7 single collective bargaining agreement for pilots. The TA referred to this as a "Single
8 Agreement." Pursuant to ALPA Merger Policy, each MEC appointed a single Joint
9 Negotiating Committee ("JNC") charged with negotiating with US Airways the Single
10 Agreement needed to integrate pilot operations.⁵²

11 53. The Single Agreement had to be ratified by a majority of pilots in each of the
12 two pilot groups before it could be implemented.⁵³

13 54. In May 2007, the JNC received a comprehensive CBA proposal from US
14 Airways known as the Kirby proposal.⁵⁴

15 55. On August 10, 2007, USAPA circulated information to East Pilots
16 encouraging them to take steps to prevent implementation of the Nicolau Award by
17 refusing to ratify any CBA that might come out of the JNC negotiations.⁵⁵

18
19
20
21 ⁵¹ USAPA, *Freq. Asked Questions*, Q#16 (Dec. 8, 2007) (Ex. 104) [App. 164-165];
22 see RT at 712:16 to 713:16 (John Bostic authenticating) [App. 296-97]; Bradford Depo.,
23 33:11-34:11 (authenticating) [App. 296-97].

24 ⁵² MP, pt.1.N.1 & 2 (Ex. 3) [App. 119]; see also ¶¶ 15-16, *supra.*; RT, 295:2 to
25 295:12 (West Pilot Douglas Dotter) [App. 286].

26 ⁵³ RT, at 452:15 to 452:17 (West Pilot Ken Stravers) [App. 294].

27 ⁵⁴ *Company Comprehensive Proposal* (May 8, 2007) (Ex. 98) [App. 174-178]; RT
28 315:11 to 315:21, 317:1 to 317:14 (West Pilot Douglas Dotter) [App. 287, 289].

⁵⁵ USAPA, open letter, 2 (Aug. 10, 2007) (Ex. 44) [App. 180].

1 56. On August 15, 2007, the East MEC formally resolved to boycott joint contract
2 negotiations: “BE IT FURTHER RESOLVED that our members of the JNC will not
3 reengage in Joint Contract Negotiations. . .”⁵⁶

4 57. On August 15, 2007, the East MEC withdrew its representatives from the
5 JNC.⁵⁷

6 58. Soon after the withdrawal of the East representatives from the JNC, the CEO
7 of US Airways stated: “[T]he resolution passed by the East MEC yesterday . . . states that
8 East ALPA is withdrawing from joint contract negotiations (JNC) and does not intend to
9 return unless the company immediately increases East pilot pay to West pilot rates
10 (actually their proposal goes above West pilot rates in many cases).”⁵⁸

11 59. The East MEC never returned to negotiations.⁵⁹

12 60. On January 23, 2008, the National Mediation Board certified a single
13 transportation system and an election contest between ALPA and USAPA followed.⁶⁰

14 61. USAPA won the election.⁶¹

15 62. The National Mediation Board certified USAPA as the East and West Pilots’
16 collective bargaining representative on April 18, 2008, with Mr. Bradford as its
17 president.⁶²

18
19
20 ⁵⁶ East MEC, *Resolution*, at 3 (Aug. 15, 2007) [App. 183]; Jack Stephan Depo.,
21 100:19 to 101:4 (identifying document) [App. 311-312].

22 ⁵⁷ RT, at 635:4 to 635:14 (West Pilot Russell Payne) [App. 295].

23 ⁵⁸ D. Parker, *Letter* (Aug. 16, 2007) (Ex. 5) (parentheticals in original) [App. 184].

24 ⁵⁹ RT at 635:21 to 635:23 (West Pilot Russell Payne) [App. 295]; *id.*, at 341:10 to
25 342:19 (West Pilot Douglas Dotter) [App. 290-91].

26 ⁶⁰ US Airways/America West Airlines, 35 NMB 65 (2008).

27 ⁶¹ Uncontested.

28 ⁶² *Id.*

1 63. In September 2008, USAPA proposed a date-of-hire seniority list to US
2 Airways (the “USAPA List”).⁶³

3 64. The USAPA List combines the existing East and West lists by date of hire,
4 making no adjustment for whether a pilot was on furlough at the time of the merger.⁶⁴

5 65. On the USAPA List, a majority of West Pilots are at or close to the bottom of
6 the list.⁶⁵

7 66. The USAPA List includes certain conditions and restrictions that provide
8 some protection to West Pilots.⁶⁶

9 67. These so-called protections in the USAPA List would disappear if US
10 Airways were to reduce the total number of pilot positions by 25% or more.⁶⁷

11 68. Moreover, the USAPA List offers no West Pilot protections against furloughs
12 because US Airways would implement all furloughs and recalls on a date-of-hire basis.⁶⁸

13 69. USAPA’s constitution includes a commitment “to maintain uniform principles
14 of seniority based on date of hire and perpetuation thereof, with reasonable conditions
15 and restrictions to preserve each pilot’s un-merged career expectations.”⁶⁹

16 70. USAPA officers consider themselves “bound” by the USAPA constitution.⁷⁰
17
18

19 ⁶³ RT, at 1607:7 to 1607:13 (USAPA Vice President Randal Mowrey) [App. 305]
20 (identifying USAPA, *US Airways Seniority Integration* (Ex. 329) [App. 186-95]); *see*
21 *also id.*, at 1606:10 to 1601:23 (explaining exhibit) [App. 304].

22 ⁶⁴ RT, at 766:9 to 766:11 (West Pilot Brian Stockdell) [App. 301].

23 ⁶⁵ *Id.*

24 ⁶⁶ *Id.* at 763:15 to 764:12 [App. 298-99].

25 ⁶⁷ *US Airways Seniority Integration*, at § VIII (Ex. 329) [App. 191-92].

26 ⁶⁸ *Id.* at § VII [App. 191].

27 ⁶⁹ USAPA Const., art. 1 § 8.D [App. 200].

28 ⁷⁰ RT, at 1584:17 to 1584:20 (USAPA Vice President Randal Mowrey) [App. 303].

1 71. USAPA officers express the view that USAPA will only negotiate for and
2 agree to a CBA that does not implement the Nicolau Award:

- 3 a. A September 25, 2010, update from the Charlotte domicile stated “Our
4 goal to ratify a contract that ensures a date-of-hire seniority solution with
5 conditions and restrictions that protect all US Airways pilots is a
6 USAPA Constitutional mandate.”⁷¹
- 7 b. This Update also states: “Beyond the obvious seniority issues we must
8 realize that we all have a common purpose and cause. That purpose is
9 stated clearly above, an industry standard contract that contains a fair
10 and equitable date-of-hire seniority solution that protects the entire US
11 Airways Pilot Group.”⁷²
- 12 c. The minutes from a meeting of the USAPA Charlotte domicile reflect
13 that on March 31, 2011, USAPA President Michael Cleary “[a]ssured
14 the audience that we will not be distracted from our focus on our goals of
15 completing a contract, fixing seniority and leaving the union in a place to
16 operate after present leadership is gone.”⁷³
- 17 d. The minutes from a meeting of the USAPA Charlotte domicile also
18 reflect that on March 31, 2011, USAPA Vice President Randy Mowrey
19 “reminded everyone why we are fighting this battle and that we should
20 never forget to remember the core values of seniority.”⁷⁴
- 21 e. Former counsel for USAPA stated that USAPA will never voluntarily
22 implement the Nicolau Award.⁷⁵

23 ⁷¹ Charlotte Domicile Update Saturday, at 1 (Sept. 25, 2010) [App. 226].

24 ⁷² *Id.* at 2 [App. 227].

25 ⁷³ Charlotte Domicile Meeting Minutes, at 2 (Mar. 31, 2011) [App. 246].

26 ⁷⁴ *Id.* at 3 [App. 247].

27 ⁷⁵ RT, at 1047:1 to 1047:7 (USAPA attorney Nick Granath) [App. 302].

1 72. On September 4, 2008, six of the Plaintiffs in this action filed a class action in
2 the District of Arizona, alleging that USAPA breached the duty of fair representation
3 (“DFR”) by insisting on date-of-hire seniority list integration for improper reasons.⁷⁶

4 73. After a 10-day trial, a jury found that USAPA breached the DFR because its
5 actions were intended to frustrate implementation of the Nicolau Award and its sole
6 objective was to benefit East Pilots, rather than to benefit the bargaining union as a
7 whole.⁷⁷

8 74. The District Court (Judge Wake) ruled: “The West Pilots remain entitled to a
9 union that will not abrogate the Nicolau Award without a legitimate purpose. Any waiver
10 of that right must be ‘consensual.’”⁷⁸

11 75. The District Court ruled that USAPA did not have a legitimate purpose for
12 abrogating the Nicolau Award and permanently enjoined and ordered USAPA to:

- 13 a. Make all reasonable efforts to negotiate and implement a single CBA
14 that will implement the Nicolau Award without modification;
15 b. Make all reasonable efforts to support and defend the Nicolau Award in
16 negotiations with US Airways; and
17 c. Not negotiate for separate collective bargaining agreements for the
18 separate pilot groups.⁷⁹

19 76. USAPA appealed.⁸⁰

20 ⁷⁶ *Addington v. US Airline Pilots Ass’n*, No. CV 08-1633-PHX-NVW, 2009 WL
21 2169164, at *7 (D. Ariz. Jul. 17, 2009).

22 ⁷⁷ *Id.*

23 ⁷⁸ *Id.* at *28.

24 ⁷⁹ *Id.* (“USAPA will also be required to negotiate for the implementation of the
25 Nicolau Award as part of any single CBA, unmodified by additional conditions and
26 restrictions USAPA would place upon it.”); *id.*, at *30-31 (rejecting each of USAPA’s
27 proffered reasons for dishonoring the Nicolau Award as not legitimate); Doc. 594, *2-3.

28 ⁸⁰ *Addington v. US Airline Pilots Ass’n*, 606 F.3d 1174, 1184 (9th Cir. 2010)

1 77. The Ninth Circuit vacated the District Court order on the basis that the dispute
2 was not ripe.⁸¹

3 78. But, notwithstanding finding lack of ripeness, the Ninth Circuit cautioned
4 USAPA that unless it “bargain[ed] in good faith pursuant to its DFR, with the interests of
5 all members—both East and West—in mind,” there would be “an unquestionably ripe
6 DFR suit, once a contract is ratified.”⁸²

7 79. On Jul 27, 2010, US Airways filed a declaratory judgment action, claiming
8 that it required guidance, inter alia, as to whether it would be liable if it entered into a
9 collective bargaining agreement with USAPA that did not implement the Nicolau
10 Award.⁸³

11 80. The District Court (Judge Silver) re-certified a class comprised of “[a]ll pilots
12 employed by the airline US Airways in September 2008 who were on the America West
13 seniority list on September 20, 2005.”⁸⁴

14 81. The District Court (Judge Silver) found that it was constrained from providing
15 full guidance by the Ninth Circuit’s ripeness ruling: “Pursuant to the Ninth Circuit’s
16 decision, any claim for breach of the duty of fair representation will not be ripe until a
17 collective bargaining agreement is finalized.”⁸⁵

18
19
20
21 ⁸¹ *Id.* at 1184 (explaining, in part, that “in the context of negotiations toward a CBA,
22 the parties could shift positions until negotiations are complete, and the final agreement
23 could be acceptable to Plaintiffs”).

24 ⁸² *Id.* at 1180 n.1.

25 ⁸³ *US Airways, Inc. v. Addington*, No. CV-10-01570-PHX-ROS (D. Ariz. Jul. 26,
26 2010) (Doc. 1, Complaint) [App. 314].

27 ⁸⁴ *Id.* Order, at 10:7 to 10:9 (Nov. 2, 2012) (Doc. 115) [App. 349].

28 ⁸⁵ *Id.* Order, at 7:20 to 7:22 (Oct. 11, 2012) (Doc. 193) [App. 356].

1 82. The District Court provided important guidance nonetheless, ruling “[T]he
2 best ‘declaratory judgment’ the Court can offer is that USAPA’s seniority proposal does
3 not automatically breach its duty of fair representation.”⁸⁶

4 83. The District Court also ruled that USAPA’s date-of-hire “seniority proposal
5 does not breach its duty of fair representation provided it is supported by a legitimate
6 union purpose.”⁸⁷

7 84. The District Court also ruled as follows:

- 8 a. “[D]ecertification of ALPA and the certification of USAPA did not
9 change the binding nature of the Transition Agreement”;⁸⁸
10 b. “Discarding the Nicolau Award places USAPA on dangerous ground;”⁸⁹
11 and
12 c. “When the collective bargaining agreement is finalized individuals will
13 be able to determine whether USAPA’s abandonment of the Nicolau
14 Award was permissible, *i.e.*, supported by a legitimate union purpose.”⁹⁰

15 85. AMR filed a Chapter 11 petition on November 29, 2011.⁹¹

16
17
18
19
20
21 ⁸⁶ *Id.* at 8:5 to 8:7 (emphasis added) [App. 357].

22 ⁸⁷ *Id.* Amended Judgment, at 1:17 to 1:19 (Dec. 4, 2012) (Doc. 206) [App. 359].

23 ⁸⁸ *Id.* Order, at 6:6 to 6:10 (Doc. 193) [App. 355].

24 ⁸⁹ *Id.* at 7:18 to 7:19 [App. 356].

25 ⁹⁰ *Id.* at 8:3 to 8:5 [App. 357].

26 ⁹¹ *In re AMR Corporation, et al.*, Case No. 11-15463 (SHL) (Bankr. S.D.N.Y.).

1 86. At some point thereafter, US Airways began entertaining a merger with
2 AMR.⁹²

3 87. Defendants and AMR entered into an agreement called the “Memorandum of
4 Understanding Regarding Contingent Collective Bargaining Agreement,” (the “MOU”)
5 that sets the stage for a merger between US Airways and AMR.⁹³

6 88. On January 23, 2013, in a message to its members, USAPA stated:

7 The MOU is completely neutral with respect to the Nicolau Award. In
8 fact, Paragraph 10.h of the MOU says explicitly that neither the MOU
9 nor the JCBA “shall provide a basis for changing the seniority lists
10 currently in effect at US Airways” other than through the McCaskill-
11 Bond process. So, no East pilot should vote against the MOU because
12 they fear that ratifying the MOU will implement the Nicolau Award, and
13 no West pilot should vote for the MOU because they believe the MOU
14 will implement the Nicolau Award.⁹⁴

15 89. USAPA also stated that after MOU ratification:

16 USAPA will propose a DOH integration in accord with the USAPA
17 Constitution. At the outset of the McCaskill-Bond process, the parties
18 exchange accurate information about their current seniority lists and with
19 respect to each of the currently employed pilots (DOH, DOB, current bid
20 and so forth). Based on this information, the pilot groups attempt to
21 negotiate a mutually agreeable merged seniority list and, if they are
22 unsuccessful, the issue is submitted to a panel of one or three neutral
23 arbitrators who are required to issue a decision that in[ter]grates seniority
24 “in a fair and equitable manner.” As provided in the MOU, APA and
25 USAPA have agreed that, if there is an arbitration proceeding, it will be
26 a panel of three neutral arbitrators. In accord with the USAPA
27 Constitution, our Merger Committee will propose a DOH method for
28 integrating seniority.⁹⁵

23 ⁹² See *Memorandum of Understanding Regarding Contingent Collective Bargaining*
24 *Agreement* (“MOU”). [App. 367]. See J. Scherff, *Aff.*, at ¶ 9 (authenticating) [App. 360].

25 ⁹³ *Id.*

26 ⁹⁴ USAPA, *Iron Compass*, at 4-5 (Jan. 23, 2013) (“What’s Up on the Line?”) [App.
27 389-90]. [App. 389-90]. See J. Scherff, *Aff.*, at ¶ 11 (authenticating) [App. 360].

28 ⁹⁵ *Id.* at 5 [App. 390].

1 90. On February 7, 2013, USAPA’s Merger Committee stated as follows:

2 West pilots should not vote in favor of the MOU because they believe it
3 will revive the Nicolau Award, and the East pilots should not vote
4 against it because they are concerned it will cause the Nicolau Award to
5 be implemented. Merger Counsel reminds us that no agreement can
6 prevent any person from filing a lawsuit or grievance, but these and other
7 provisions of the MOU clearly negate any claim that ratifying the MOU
8 would provide a basis for implementing the Nicolau Award.⁹⁶

9 91. The MOU was ratified by 75% of USAPA’s membership on February 8,
10 2013.⁹⁷

11 92. From this point forward, all aspects of the new collective bargaining
12 agreement will be determined and implemented whether or not there is favorable
13 ratification by pilots.⁹⁸

14 93. The MOU becomes “null and void in its entirety . . . if the Merger is not
15 consummated,” *i.e.*, if the if bankruptcy court does not approve AMR’s plan of
16 reorganization (“POR”).⁹⁹

17 94. The MOU provides immediate pay benefits to East Pilots:

18 If the MOU is approved and the merger goes forward, all US Airways
19 pilots will receive retrospective pay from the date of ratification
20 (February 8), a \$40 million lump sum payment, American pay rates as of

21 ⁹⁶ USAPA Merger Committee, *Merger Committee Update*, at 1 (Feb. 7, 2013)
22 [App. 391]. *See See* J. Scherff, *Aff.*, at ¶ 12 (authenticating) [App. 360].

23 ⁹⁷ Gary Hummel, *President’s Message* (Feb. 8, 2013) [App. 384]. *See* J. Scherff,
24 *Aff.*, at ¶ 10 (authenticating) [App. 361].

25 ⁹⁸ MOU, at ¶ 27 (providing, in the event that New American and its pilots union
26 cannot complete all negotiations of a joint CBA (“JCBA”) “within 30 days of the NMB’s
27 certification [of single carrier status], New American Airlines will offer final and binding
28 interest arbitration under Section 7 of the RLA, and the organization [the union] will
accept such proffer, to resolve once and for all the terms of the JCBA. The arbitration
decision shall be issued no later than 60 days after the close of the 30-day negotiation
period.”) [App. 378].

⁹⁹ *Id.* at ¶ 18(c) [App. 376]. N.B. AMR has filed a motion to approve the merger.

1 the POR date (estimated to be July 1) and an increase in pension
2 contributions to 14%, also as of the POR date.¹⁰⁰

3 95. The MOU provides that pilot seniority integration will be conducted according
4 to the McCaskill-Bond Amendment to the Federal Aviation Act, 49 U.S.C. § 42112, note,
5 § 117(a).¹⁰¹

6 96. On February 18, 2013, the West Pilots put US Airways and APA on notice
7 that USAPA breached the duty of fair representation because the MOU provides a
8 substantial improvement in wages without requiring implementation of the Nicolau
9 Award list.¹⁰²

10 97. The West Pilots also demanded that APA and US Airways include the West
11 Pilots in any discussion of the seniority integration process and commit themselves to
12 using the Nicolau Award list when integrating pilot seniority lists.¹⁰³

13 98. On February 19, 2013, Plaintiffs sent separate letters to USAPA, US Airways,
14 and APA.¹⁰⁴

15 ¹⁰⁰ USAPA Negotiating Advisory Committee, *NAC Update – Q&A, and PHL*
16 *Roadshow Reminder*, at *1 (Jan. 25, 2013) [App. 393-94]; *see also J. Scherff, Aff.*, at ¶ 13
17 (authenticating) [App. 361].

18 ¹⁰¹ MOU, at ¶ 10(a) (“A seniority integration process consistent with McCaskill-
19 Bond shall begin as soon as possible after the Effective Date. If, on the date ninety (90)
20 days following the Effective Date, direct negotiations have failed to result in a merged
21 seniority list acceptable to the pilots at both airlines, a panel of three neutral arbitrators
22 will be designated within fifteen (15) days to resolve the dispute, pursuant to the
authority and requirements of McCaskill-Bond.”) [App. 372]; *see also Committee of*
Concerned Midwest Flight Attendants v. Int’l Bd. Of Teamsters, 742 F. Supp. 2d 1035,
1040 (E.D. Wis. 2010) (setting out relevant language).

23 ¹⁰² M. Harper, *Letter to E. James and R. Siegel* (Feb. 18, 2013) [App. 413-14]. *See*
24 *P. Szymanski, Decl.*, at ¶ 5 (authenticating) [App. 395-96].

25 ¹⁰³ *Id.* N.B. To date, no one has responded affirmatively to this demand.

26 ¹⁰⁴ M. Harper, *Letter to P. Szymanski* (Feb. 19, 2013) [App. 411-12]; *See P.*
Szymanski, Decl. at ¶ 4 (authenticating) [App. 395]. M. Harper, *Letter to R. Siegel* (Feb.
27 19, 2013) [App. 423-25]; M. Harper, *Letter to E. James* (Feb. 19, 2013) [App. 426-28].
28 *See A. Jacob, Decl.*, at ¶¶ 6-7 (authenticating). [App. 421].

- 1 a. These letters explain that, unless USAPA agrees to use the Nicolau List,
2 Plaintiffs will file an action to enjoin any process of seniority integration
3 that does not implement the Nicolau.¹⁰⁵
- 4 b. The letter to APA also puts it on notice that it may be liable for acting in
5 concert with USAPA by agreeing to a Protocol Agreement that does not
6 recognize the Nicolau Award must control the relative seniority order of
7 the US Airways pilots.¹⁰⁶

8 99. After Judge Silver made her final order, USAPA’s leadership offered seven
9 reasons it claimed were legitimate for using a date-of-hire seniority list rather than the
10 Nicolau Award list:

- 11 a. “USAPA has a duty to fairly represent not only former America West
12 Pilots, but all US Airways pilots.”
- 13 b. “It is legitimate to integrate seniority based on date of hire.”
- 14 c. “It is legitimate to respect pre-merger career expectations.”
- 15 d. “It is legitimate to take into account changed circumstances including the
16 relative economic strength and viability of America West flying vs US
17 Airways flying.”
- 18 e. “USAPA is not required to follow the ALPA Merger Policy in effect at
19 the time of the Nicolau Award, which eliminated length of service as a
20 relevant consideration, but is entitled to pursue a ‘fair and equitable’
21 integration.”
- 22 f. “It is legitimate to place a pilot with 25 years of seniority above a pilot
23 with 9 years, or a pilot with 15-16 years seniority above a pilot still in
24 ground school.”

25
26 ¹⁰⁵ *Id.*

27 ¹⁰⁶ M. Harper, *Letter to E. James*, 2-3 (Feb. 19, 2013) [App. 426-27].

28

1 g. “Each of the other crafts on the property integrated seniority based on
2 date of hire, and no case-precedent holds that DOH integration violates
3 the duty of fair representation.”¹⁰⁷

4 100. On January 22, 2013, Pat Szymanski, counsel for USAPA, stated the
5 following at a public meeting of Charlotte based pilots:

- 6 a. The TA “goes away” on the POR date;
7 b. Only USAPA, APA and the airlines will be parties to seniority
8 negotiations and arbitration conducted pursuant to the MOU; and
9 c. USAPA Merger Representatives will continue to represent the US
10 Airways pilots in any seniority negotiations after APA becomes the
11 bargaining representative and in so doing will be bound to advance, and
12 will advance a date-of-hire seniority integration.¹⁰⁸

13 101. On January 23, 2013, Mr. Szymanski stated at another public meeting of
14 Charlotte based pilots that USAPA will do whatever it takes to see that there is no
15 Nicolau, that he believes the West Pilots will fight for a seat at the merger table, and
16 promised that USAPA will vigorously fight to prevent that.¹⁰⁹

17 102. On February 21, 2013, the President of USAPA, Gary Hummel told the
18 USAPA membership as follows:

19 Our union, our lawyers and our merger counsel have been advised that
20 USAPA will begin the seniority integration process with APA by
21 pursuing what Article I, Section 8 D of our Constitution requires, “To
22 maintain uniform principles of seniority based on date of hire and the
23 perpetuation thereof, with reasonable conditions and restrictions to
24 preserve each pilot’s un-merged career expectations.”

25 ¹⁰⁷ *CLT Domicile Update*, at 3 (Oct. 29, 2012) [App. 365]. See J. Scherff, *Decl.*, at
26 ¶ 8 (authenticating) [App. 360].

27 ¹⁰⁸ J. Scherff, *Aff.*, ¶ 15 [App. 361].

28 ¹⁰⁹ *Id.* ¶ 16 [App. 362].

1 This merger provides substantial and life changing benefits to all
2 USAPA pilots, including those based in Phoenix. USAPA will
3 aggressively oppose any efforts to slow down or stop the merger process
4 and will be equally vigilant in adhering to our constitutionally mandated
5 principles that reject the Nicolau Award in its entirety.¹¹⁰

6 103. In August 2007, West Pilots formed Leonidas, LLC, for the sole purpose of
7 collecting voluntary West Pilot contributions to be used to defray the expense of
8 defending the Nicolau Award in and out of litigation.¹¹¹

9 104. On March 6, 2013, USAPA filed an adversary proceeding against Leonidas,
10 LLC, (not these Plaintiffs or the West Pilot Class) in the AMR Chapter 11 proceedings in
11 a flawed effort to deter the West Pilots from taking action here to compel USAPA to
12 adhere to its duty.¹¹²

13 105. USAPA claims that Leonidas, LLC, is threatening litigation.¹¹³

14 106. Leonidas, LLC, has never been a party to litigation.¹¹⁴

15 107. Leonidas, LLC, has never sent a letter to USAPA, US Airways, APA, or their
16 counsel.¹¹⁵

17 108. Leonidas, LLC, has never threatened to instigate any litigation itself.¹¹⁶

18 109. The Bankruptcy Court has scheduled a telephonic “CourtCall Telephonic
19 Appearance” hearing for April 3, 2013, at 11:00 AM, to determine whether it is necessary
20 for Leonidas, LLC, to file a motion to dismiss the adversary proceeding.¹¹⁷

21 ¹¹⁰ G. Hummel, *President’s Message*, at 2 (Feb. 21, 2013) [App. 457] (self-
22 authenticating).

23 ¹¹¹ A. Jacob, *Decl.*, at ¶ 5 (Mar. 14, 2013) [App. 421-22].

24 ¹¹² *Id.* at ¶ 8 [App. 422].

25 ¹¹³ *Id.* at ¶ 9.

26 ¹¹⁴ *Id.* at ¶ 10.

27 ¹¹⁵ *Id.* at ¶ 11.

28 ¹¹⁶ *Id.* at ¶ 12.

¹¹⁷ *Id.* at ¶ 13.

1 110. A preliminary hearing is scheduled for April 23, 2013, in New York.¹¹⁸

2 111. APA, the union that will represent the US Airways pilots after the merger,
3 recently stated that it “takes no position on the merits of the dispute between the former
4 East and former West pilots” but “has no wish to inherit this dispute in the event of a
5 merger and will push to have it resolved.”¹¹⁹

6 112. The MOU provides that any disputes over interpretation of its provisions shall
7 be resolved by expedited arbitration between the parties.¹²⁰

8 113. The MOU provides that the first step in pilot seniority integration will be to
9 make a “Protocol Agreement [that] will set forth the process and protocol for conducting
10 negotiations and arbitration, if applicable, and will include a methodology for allocating
11 the reimbursement provided for in Paragraph 7.”¹²¹

12 114. The MOU provides that a total sum of \$5.5 million will be available to defray
13 the expenses incurred by pilot merger representatives and unions.¹²²

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

¹¹⁸ *Id.* at ¶ 14 [App. 423].

¹¹⁹ APA, *Legal Update* (Mar. 12, 2013) (self-authenticating) [App. 460].

¹²⁰ MOU, ¶ 20 (providing that “any dispute over the interpretation or application of this Memorandum shall be . . . arbitrated on an expedited basis directly before a specially-created one-person System Board of Adjustment.”) [App. 377].

¹²¹ *Id.* at ¶ 10(f) [App. 374].

¹²² *Id.* at ¶ 7 (“US Airways shall reimburse USAPA for expenses incurred after May 1, 2012, as well as for all flight pay loss, incurred in developing and carrying out the functions specified in this Memorandum. The reimbursement provided to USAPA pursuant to the preceding provisions shall not be more than \$1.5 million. In addition, New American Airlines and US Airways shall reimburse the merger representatives involved in the seniority integration process in an aggregate not to exceed \$4 million.”) [App. 369].

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

Dated this 26th day of March, 2013.

POLSINELLI SHUGHART, PC

s/ Andrew S. Jacob

By _____

Marty Harper

Andrew S. Jacob

Jennifer Axel

CityScape

One East Washington St., Ste. 1200

Phoenix, AZ 85004

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March 2013, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the ECF System for filing and transmittal.

By *s/ Andrew S. Jacob*
