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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Don ADDINGTON; *et al.*, *Plaintiffs*, vs. US AIRLINE PILOTS ASS'N, *et al.*, *Defendants.*	CASE NO. 2:13-CV-00471-PGR **Opposition to USAPA's Motion for Extension of Time (Doc. 9)**

Plaintiffs oppose USAPA's motion to extend the time to respond to the motion to transfer case and to extend the time to answer. (Doc. 9.) Plaintiffs do so because USAPA is seeking only to forestall a decision on the merits of the breach of the duty of fair representation claim and the pending motion for a preliminary injunction (Doc. 13). Plaintiffs explain their objection further in the *Memorandum of Points and Authorities* that follows.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Overview

A. The 2005 Merger of America West and US Airways

In 2005, US Airways (then a bankruptcy debtor) and America West Airlines merged to form a new airline also called US Airways, one of the defendants in this action. *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1176 (9th Cir. 2010). This is the third round of litigation addressing whether the US Airline Pilots Association ("USAPA"), the union representing US Airways pilots, is bound by its duty of fair representation ("DFR") to use the pilot seniority list ("Nicolau Award list") that was created in 2007 by binding arbitration between the pilots from the old US Airways ("East Pilots") and those from America West ("West Pilots").

B. Breach of Duty of fair Representation

As soon as the Nicolau Award was issued in May 2007, the East Pilots repudiated their agreement to treat it as final and binding. *Id.* at 1177-78. Within months, they formed a single-airline union, USAPA, and used their majority power to have it oust the Airline Pilots Association ("ALPA"), the multi-airline union that was representing these pilots and was requiring implementation of the Nicolau Award. *Id.* at 1178. Now under East Pilot control, USAPA is firmly and unequivocally continuing to repudiate its duty to honor the Nicolau Award. *Id.*

C. First Round of Litigation

In September 2008, the West Pilots filed the first round of litigation, a DFR class action. *Addington v. US Airline Pilots Ass'n.*, 588 F. Supp. 2d 1051 (D. Ariz. 2008). This matter was heard by Judge Wake here in the District of Arizona. USAPA sought to delay those proceedings with unreasonable discovery demands. Judge Wake tempered those demands, quickly certified the class, and expedited to litigation so that the time between the filing of the Complaint and the jury's decision after a 10-day jury trial in May 2009 was only nine months. Thereafter, the Court ruled that the West Pilots were "entitled to a union that will not abrogate the Nicolau Award without a legitimate purpose." *Addington*

v. US Airline Pilots Ass'n, No. 2:08-CV-1633-NVW, 2009 WL 2169164, at *28 (D. Ariz. Jul. 17, 2009). After the jury found in May, 2009 that USAPA had no legitimate union purpose for repudiating its duty to implement the Nicolau Award, *id.* at *7, the Court enjoined USAPA from entering into a collective bargaining agreement ("CBA") that did not implement the Nicolau Award.

USAPA appealed. The Ninth Circuit vacated the judgment on the basis of lack of ripeness because USAPA had not entered a new collective bargaining agreement with US Airways. *Addington*, 606 F.3d at 1184. But in so doing, it cautioned USAPA that unless it "bargain[ed] in good faith pursuant to its DFR, with the interests of all members—both East and West—in mind," there would be "an unquestionably ripe DFR suit, once a contract is ratified." *Id.*, at 1180 n.1. (As explained below, a contract is now ratified.)

D. Second Round of Litigation

On July 27, 2010, US Airways filed the second round of litigation, a declaratory action in the District of Arizona that named these Plaintiffs to represent the West Pilots as a defendant class. *US Airways, Inc. v. Addington*, No. 10-CV-01570-ROS (D. Ariz. Jul. 26, 2010). US Airways sought a ruling as to whether it would be liable if it entered into a CBA with USAPA that did not implement the Nicolau Award. Again, USAPA tried to delay. It opposed class certification and demanded unwarranted discovery.

The District Court, this time Judge Silver, denied USAPA's demands for irrelevant discovery and also quickly certified the class. It held that USAPA would breach its DFR if it entered into such a CBA without "a legitimate union purpose." Amend. Judgment, 1 (Dec. 4, 2012) (Doc. 206). But, out of deference to the Ninth Circuit, the Court held, in theory, that it was possible that something might arise in future CBA negotiations that could provide a legitimate purpose. (As explained below, that is no longer a concern.)

E. Third (and present) Round of Litigation

During the course of the second round of litigation, US Airways began entertaining a merger with American Airlines, a Chapter 11 debtor. Shortly after the December 4, 2012, final judgment in the second round of litigation, US Airways and USAPA entered

into a contract with American Airlines and the Allied Pilots Association ("APA"), the union representing the American pilots. This contract is called the "Memorandum of Understanding Regarding Contingent Collective Bargaining Agreement" ("MOU"). (Doc. 5-2.) The MOU was ratified by a majority of US Airways pilots on February 8, 2013.

The MOU fixes all material terms for the CBA that will apply to US Airways pilots if and when the merger with American Airlines is finalized as anticipated as early as September/October of this year. The MOU does not implement the Nicolau Award. As such, the DFR suit is now ripe. USAPA claims (wrongly) that the MOU allows it to continue to repudiate the Nicolau Award. Importantly, the MOU does not (by any means) provide a legitimate reason for USAPA to do so. Yet, USAPA has repeatedly and unquestionably (but wrongly) stated that it can and will do so—that it will treat the Nicolau Award as a nullity.

After the merger is completed with the approval of AMR's Plan of Reorganization (POR), the next big event for the pilots is the commencement of the process of integrating the American pilots and the USAPA pilots. This process can and in fact may start immediately after the POR, assuming certain other conditions are satisfied.

So, with perhaps as little as five or six months remaining before the pilot integration process officially begins, Plaintiffs bring this action on behalf of all West Pilots to establish that USAPA and US Airways (and their successors) must use the seniority of the US Airways pilots (East and West) established by the Nicolau Award seniority list in that process. In so doing, Plaintiffs rely on the same law and substantially the same evidence that was material in the first two rounds of litigation because the MOU and the American Airlines merger eliminate all concerns about ripeness. So it appears at long last that a final resolution of the DFR claim is within reach, a result everyone wants (West Pilots, US Airways and the Allied Pilot Association (the Union representing the American pilots)). That is everyone but USAPA. Instead it wants more delay.

F. USAPA Efforts to Delay

In an initial flawed effort to delay the instant litigation, USAPA filed an adversary proceeding in the American Airlines bankruptcy case in the Southern District of New York (the "New York Adversary"). That action is nothing more than a needless distraction here.

First, in the New York Adversary, USAPA does not name as a Defendant these Plaintiffs or any West Pilot. Rather, it names an entity—Leonidas, LLC—that exists merely to collect contributions to defray the expenses of defending the Nicolau Award. Leonidas has no standing to stop anything.

Second, the Bankruptcy Court does not have jurisdiction to decide the New York Adversary if there are no claims involving the Debtor. *See*, *generally*, *Stern v. Marshall,* 564 U.S. ___, 131 S.Ct. 2594 (2011). The Debtor American Airlines ("AMR") is making no claims. Indeed, there is no reason to think that AMR wants to delay the pilot seniority integration process between the American and US Airways pilots.

Third, as a non-debtor, USAPA does not have standing to assert, as it does in the New York Adversary, that someone is violating the automatic stay. The right to make an automatic stay claim is property of the debtor's estate. It belongs to AMR. It cannot be asserted by someone else without express authorization by the bankruptcy court. Consequently, by asserting such a claim, USAPA is violating the automatic stay itself. *Cf. In re Curry & Sorensen, Inc.*, 57 B.R. 824, 827 (B.A.P. 9th Cir. 1986) (asserting avoidance claim violates stay).

USAPA cannot prevail in the New York Adversary. At best (and this is what it really wants) all it can do is create a distraction that delays a final resolution of the DFR claim here. That is something USAPA has done for the past five years and plans to continue until stopped.

G. Plaintiffs' Pending Motions

Plaintiffs filed a motion to transfer this case pursuant to LRCiv. 42.1(e), on March 6, 2013, (Doc. 5.) On March 26, 2013, Plaintiffs filed their *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*. (Doc. 13.) Both motions should proceed without delay. But USAPA seeks to delay this proceeding based on the New York Adversary and the fact of the pending merger between US Airways and American Airlines. As discussed, neither are relevant to this suit other than the fact that they have triggered USAPA's DFR obligations.

The essential issues raised in the Complaint and TRO have been pending since May 2007 and have been extensively briefed on numerous occasions by the parties. USAPA's claim that an extension of time is now needed to present arguments is nothing more than another attempt to delay implementation of the Nicolau Award. This request should summarily be denied.

Plaintiffs do not seek to enjoin or delay the process of merging US Airways and American Airlines (as USAPA claims in the New York Adversary). Neither the West Pilots nor Leonidas, LLC have the standing to do so and USAPA knows that. Neither do they seek to enjoin or delay the process of creating a single seniority list for the pilots from US Airways and American Airlines. They merely seek to prevent USAPA from dishonoring its duty to order the seniority of US Airways Pilots using the Nicolau Award list, a list all parties (union, airline, and pilots) agreed in 2007 would be final and binding on that issue.

H. USAPA's answer is due on April 3, 2012; its response to the motion to transfer is due Today - March 27, 2013.

Because USAPA did not waive service, it is required to file a responsive pleading within 21 days of service. Fed. R. Civ. P. 12(a)(1)(A)(i). USAPA was served on March

13, 2013. (Copy of Affidavit of Service attached hereto.) Consequently, USAPA must answer on or before April 3, 2013.

USAPA has 14 days from the date of service to respond to Plaintiffs' LRCiv 42.1(e) motion to transfer (Doc. 5). LRCiv. 7.2(c). That motion was served along with the complaint on March 13, 2013. Consequently, USAPA must respond today to that Motion. US Airways has already responded, so the pending merger it is directly involved in was no impediment to its timely response.

II. Legal Argument

"The district court's denial of an extension of time pursuant to Federal Rule of Civil Procedure 6(b) is reviewed for abuse of discretion. . . ." *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1258 (9th Cir. 2010). "[R]equests for extensions of time made before the applicable deadline has passed should normally be granted in the absence of bad faith on the part of the party seeking relief or prejudice to the adverse party." *Id.* at 1259 (internal quotation and alteration marks omitted). In this instance, USAPA is seeking an extension of time in bad faith, an extension that, if granted, will prejudice Plaintiffs and the West Pilot Class, because it will reduce significantly the time within which the West Pilots have to resolve the DFR before the pilot seniority integration process begins.

A. USAPA seeks an extension in bad faith

USAPA violates its DFR by repudiating the Nicolau Award without a legitimate purpose. *See Laborers & Hod Carriers Loc. No. 341 v. NLRB*, 564 F.2d 834, 840 (9th Cir. 1977). USAPA has never articulated a valid legitimate purpose for doing so. *See Mot. for Prelim. Injctn*, at 12:7 to 14:2 (Mar. 26, 2013) (doc. 13). This Court, therefore, is highly likely to find that USAPA is in breach of its DFR. Consequently, USAPA's strategy is to forestall that decision as long as it can. Indeed, as history shows, that has always been its strategy.

For example, from the beginning of the first round of litigation, USAPA has "argue[d] that the Plaintiff West Pilots have sued too early and too late." *Addington v. US Airline Pilots Ass'n*, 588 F. Supp. 2d 1051, 1062 (D. Ariz. 2008). Until now, USAPA has

had success using the Ninth Circuit's ripeness ruling to forestall a final ruling on its DFR breach. By filing the New York Adversary and by seeking unneeded delay here, USAPA is using other means of delay to "buy" time to allow it to find a way to integrate seniority with the American Airlines pilots in derogation of the Nicolau Award. Assuming history proves true and if it can delay the process long enough, USAPA will again argue later that it is too late for the West Pilots to sue. That is bad faith.

Putting the evidence of bad faith aside, USAPA must show good cause for delay. Fed. R. Civ. P. 6(b)(1). It has not done so. In its motion papers, for example, USAPA makes a bare claim that its lead counsel has scheduling conflicts. But it fails to identify such conflicts and indeed we understand that USAPA's counsel will participate in a conference call with Judge Lane in the New York Adversary on the morning of April 3. That is, by the way, the same day its Answer is due here. Given USAPA's past practices, the Court should disregard this unsupported claim as disingenuous.

USAPA also admits in its motion papers that it wants to use the requested delay to try and name the Plaintiffs here as Defendants in the New York Adversary and then later file a motion to transfer this DFR action to the New York bankruptcy court. Even if that were a valid tactic (which it is not), it does not justify extending the time to respond now.

USAPA also claims that for unarticulated reasons, it needs more time to formulate a strategy to respond to the DFR claim and the motion to transfer one of two judges who have already addressed this dispute. How much time does it take to decide that question? Considering that USAPA has been litigating these issues for almost five years, the Court should find that this argument is facially disingenuous. Moreover, it is legally unsound. The fact that USAPA might later change its strategy does not justify delay. The Rules provide for that by allowing USAPA to amend its answer. *See Lee v. Electric Products Co.*, 37 F.R.D. 42, 44 (N.D. 1963) ("If the answers to the interrogatories and subsequent discovery proceedings elicit facts not now known to defendant, upon which a defense could be predicated, an amended answer can be filed.").

In sum, USAPA fails to show good cause to extend the time to file a responsive pleading or to respond to the motion to transfer. Indeed, the totality of circumstances shows that it makes such a motion in bad faith. That is more than enough reason for the Court to deny the motion.

B. An extension will prejudice Plaintiffs.

Plaintiffs have filed well-considered motions: (1) to transfer (doc. 5); (2) for class certification (doc. 11); and (3) for a preliminary injunction (doc. 13). That last motion will establish that USAPA must rank the US Airways pilots according to the Nicolau Award in the course of the formal process of integrating the seniority of the pilots from the two merging airlines (the "Seniority Integration Process"). As noted already, the Pilot Seniority Integration Process will begin immediately after the bankruptcy court approves the American Airlines plan of reorganization (the "POR date"), which may come as early as September/October of this year.

The Court should note that US Airways, the entity merging with AMR, does not need additional time. It has already responded to the motion to transfer and has indicated that it will timely respond to this action on April 4, 2013.

It is in the interest of all concerned parties (other than USAPA) to get a decision on the preliminary injunction motion before the start of the Seniority Integration Process. There is not a lot of time to accomplish that, perhaps no more than six months. So, the parties and the Court may have only a short time to fully brief, argue, and decide that motion. It is important, therefore, that there be no unnecessary delay. The one-month delay sought by USAPA at the very start of this litigation, therefore, unduly prejudices the West Pilots.

III. Conclusion

The West Pilots respectfully ask this Court to deny USAPA's motion (doc. 9). The Court should require USAPA to answer and respond to the Motion to Transfer within 10 days.

Dated this 27th day of March, 2013.

POLSINELLI SHUGHART, PC
/s/ Andrew S. Jacob
By _____
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CERTIFICATE OF SERVICE

I hereby certify that on this 27th 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.

/s/ Andrew S. Jacob
By _____