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 Motion for Summary Judgment

(Oral Argument Requested)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

Defendant US Airline Pilots Association ("USAPA") moves for summary judgment dismissing all claims against USAPA pursuant to Rule 56 of the Federal Rules of Civil Procedure and LR Civ. 56.1. This motion is supported by USAPA's Local Rule 56.1 Separate Statement of Facts in Support of USAPA's Motion for Summary Judgment (specific citations referred to herein as "56.1 ¶ __") and the record before this Court.

POINT I
LEGAL STANDARD ON A MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate if the record demonstrates no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. If the moving party carries its initial burden "of identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issues of material fact," the burden then shifts so that "the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, *specific facts* showing that there is a genuine issue for trial." *T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (emphasis in original). "Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. " *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

POINT II
PLAINTIFFS' DFR CLAIM SHOULD BE DISMISSED BECAUSE USAPA WAS NOT OBLIGATED TO ADHERE TO THE NICOLAU AWARD

A. Plaintiffs Cannot Show That USAPA's Conduct Was "Irrational" Or "Arbitrary"

The principal claim in this case is that:

> USAPA breached the duty of fair representation when it entered into the MOU because the MOU does not require USAPA use the Nicolau Award in the McCaskill-Bond process.

Order, Doc. 122, at 4.

A union breaches its duty of fair representation when its conduct toward a member is "arbitrary, discriminatory or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). "The Supreme Court has long recognized that unions must retain wide discretion to act in what they perceive to be their members' best interests." *Peterson v. Kennedy*, 771 F.2d 1244, 1253 (9th Cir. 1985) (citing *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38 (1953)). "Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." *Air Line Pilots Ass'n Intern. v. O'Neill*, 499 U.S. 65, 78 (1991). The Ninth Circuit has "stressed the importance of preserving union discretion by narrowly construing the unfair representation doctrine." *Johnson v. United States Postal Service*, 756 F.2d 1461, 1465 (9th Cir. 1985, as amended May 3, 1985). Thus, "the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a 'wide range of reasonableness,' . . . that it is wholly 'irrational' or 'arbitrary.'" *O'Neill*, 499 U.S. at 78 (quoting *Huffman*, 345 U.S. at 338). The rationality of a union's decision must be evaluated "in light of both the facts and the legal climate that confronted the negotiators at the time the decision was made." *Id.* at 78.

As the certified bargaining representative, USAPA is "vested with broad statutory authority extending to matters of seniority between groups of employees." *Int'l Longshoremen's & Warehousemen's Union v. Kuntz*, 334 F.2d 165, 171 (9th Cir. 1964). "[D]ifferences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees." *Huffman*, 345 U.S. at 338. However, "[t]he mere existence of such differences does not make them invalid" . . . [and] [t]he complete satisfaction of all who are represented is hardly to be expected." *Id.* Recognizing the wide range of reasonableness afforded to unions in serving the unit it

represents, the Supreme Court in *Humphrey v. Moore*, 375 U.S. 335, 349-50 (1964), stated:

> Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and the grievance processes.

Accordingly, Plaintiffs' claim must be dismissed unless Plaintiffs can show that USAPA's decision to enter into the seniority-neutral MOU[1] that provides for a seniority integration process in the upcoming merger with American Airlines ("AA") consistent with the McCaskill-Bond amendment to the FAA is "wholly 'irrational' or 'arbitrary.'" *O'Neill*, 499 U.S. at 78.

Because, as shown below, Plaintiffs cannot sustain this burden, the DFR claim fails as a matter of law.

B. The Transition Agreement Does Not Require Inclusion of the Nicolau Award in the MOU

There is no basis for Plaintiffs' apparent claim that the MOU constitutes the "Single Agreement" referred to in the Transition Agreement and therefore no basis for Plaintiffs' claim that USAPA was required to include the Nicolau Award in the MOU.[2] *See* Plaintiffs' Amended Complaint, Doc. 134, at ¶¶ 107-112, 135.

---

[1] The MOU, which is entitled "Memorandum of Understanding Regarding Contingent Collective Bargaining Agreement," USAPA Exhibit 130, is annexed to the 56.1, at Tab 1.

[2] The Transition Agreement is the agreement among America West Holdings Corporation, America West, US Airways Group, US Airways, ALPA, the US Airways MEC and the America West MEC that established how various employment terms and merger-related conditions of employment would be affected by the merger between US Airways and America West. 56.1 ¶5-8. It provides, *inter alia*, that "[t]he pilot workforces . . . will remain separate and covered by their respective collective bargaining agreements" until "Operational Pilot Integration" which would occur only after the

First, the plain wording of the Transition Agreement shows that the MOU cannot be considered the "Single Agreement." Article V of the Transition Agreement explicitly describes the "Single Agreement" as "a single collective bargaining agreement applicable to the merged operations of America West and US Airways." 56.1 ¶6-7. It is undisputed that the Single Agreement would include the results of the ALPA seniority integration proceeding and would be subject to separate ratification by the former US Airways Pilots and the former America West Pilots. *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1179-80 (9th Cir. 2010).

The MOU is plainly not "a single collective bargaining agreement applicable to the merged operations of America West and US Airways." The MOU is a four-party agreement (US Airways, American, USAPA and APA) which is applicable to the merged operations of US Airways and American. 56.1 ¶44, Tab 1. Nor does the MOU include the results of the ALPA seniority integration proceeding. 56.1 ¶ 48, 49, 52. Indeed, exactly to the contrary, the MOU does not contain any reference to the ALPA seniority integration result (the Nicolau list). *Id.*; *see also* 56.1 Tab 1. The MOU is therefore clearly not the Single Agreement referred to in the Transition Agreement.[3]

Second, the parties to the MOU explicitly provided that the MOU was not to be considered the "Single Agreement" under the Transition Agreement that would include the Nicolau Award. They did so in paragraph 10.h, which provides in full as follows:

> US Airways agrees that neither this Memorandum nor the JCBA shall provide a basis for changing the seniority lists currently in effect at US Airways other than through the process set forth in this Paragraph 10.

---

issuance of a single operating certificate, "completion of the integrated pilot seniority list" and negotiation of a "single agreement." *Id.*

[3] There was no misunderstanding regarding this provision of the MOU. Plaintiffs understood that the MOU was "seniority neutral," did not include the Nicolau list and provided that seniority integration would be accomplished through a process consistent with the McCaskill-Bond amendment. 56.1 ¶74-82, 87-90.

56.1 ¶49.

Third, US Airways confirms that the MOU is not the Single Agreement under the Transition Agreement. In response to a series of grievances and seniority list challenges, US Airways has clearly stated its position that the MOU did not create either a single contract or a single seniority list for US Airways pilots. On February 28, 2013, well after the MOU was ratified on February 8, 2013, 56.1 ¶83-84, US Airways denied a grievance filed by Pilot David Braid in part because "At this point in time we have neither a combined contract nor a combined seniority list." 56.1 ¶99. In addition, by letters dated August 16, 3013, US Airways denied several seniority challenges based upon the Nicolau Award. In response to protests filed by pilots under the West CBA "contend[ing] that the Company is obligated to implement the Nicolau Award as soon as the MTA/MOU becomes effective," the Company wrote: "That contention is meritless." 56.1 ¶ 100-101. The Company explained:

> [Y]our claim that the MTA/MOU amounts to a single labor agreement obligating the Company to apply the Nicolau Award immediately is contrary to the express provision in the Transition Agreement (Section XII.B) that any of the Transition Agreement's provisions "[m]ay be modified by written agreement of the Association and the Airline Parties collectively."
>
> By its terms, the MOU constitutes a written agreement between USAPA and the Company which modifies the provisions of the Transition Agreement relating to implementation of an integrated seniority list. Paragraph 10.h of the MOU specifies that "US Airways agrees that neither this Memorandum nor the JCBA shall provide a basis for changing the seniority list currently in effect at US Airways other than through the process set forth in this Paragraph 10." The Paragraph 10 process provides for seniority-list integration in accordance with the standards and procedures of the federal McCaskill-Bond law, and that process will not even begin until after the merger has been consummated. Modifying the seniority lists immediately, as you have requested, would violate the MTA/MOU.

56.1 ¶ 101. [4]

[4] USAPA also asserts that Plaintiff's claim that the MOU is the Single Agreement is a "minor dispute" that must be dismissed for lack of subject matter jurisdiction. *See* USAPA's Motion to Dismiss Doc. 44 pp. 10-11.

For all of these reasons, the MOU is not the Single Agreement referred to in the Transition Agreement and it therefore could not and did not create any obligation to use or implement the Nicolau list. USAPA therefore did not breach its duty of fair representation by failing to include the Nicolau Award in the MOU.

C. The Nicolau List Is Not Part of the RLA Status Quo and Therefore USAPA has No Obligation to Adhere to the Nicolau Award

Nor is there any merit to Plaintiffs' alternate claim that USAPA was required to include the Nicolau Award in the MOU because it was part of the RLA status quo. As stated by Judge Edwards in *Association of Flight Attendants v. USAir ("AFA")*, 24 F.3d 1432, 1433-34 (D.C. Cir. 1994), a newly certified bargaining representative (such as USAPA) is "not contractually bound" by any of the agreements negotiated by the predecessor representative (such as ALPA). Nevertheless, while negotiating for a new agreement, the new representative is require to maintain the "status quo" as defined in Section 6 of the Railway Labor Act, 45 U.S.C. §156. *Id.* at 1434. In *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 150-53 (1969), the Supreme Court explained that the RLA status quo consists of the "actual, objective working conditions and practices, broadly conceived, *which were in effect prior to the time the pending dispute arose*." 396 U.S. at 153 (emphasis added). It is undisputed that with respect to seniority, the "actual, objective working conditions . . . in effect" at all times through the present consist of two separate lists, one for the former US Airways Pilots (and new hires) and one for the former America West Pilots. *See, e.g., Addington v. USAPA*, 606 F.3d 1174 (9th Cir. 2010); Doc. 13 pp. 5-6 (Plaintiffs' Mot. for Preliminary Injunction). It is equally undisputed that the Nicolau list has never been ratified, has never been implemented and has never been in effect. *Id.* That the Nicolau list cannot be part of the RLA status quo is illustrated by *Transport Workers Union v. Hawaiian Airlines, Inc.*, Civ. No. 08-00524 ACK-KSC, 2009 WL 972483 (D.Hawaii, April 8,

2009), *aff'd without opinion*, 344 Fed. App'x 351 (9th Cir. 2009), which directly holds that an agreement between a union and an employer that was never ratified, and therefore never became effective, is not part of the RLA status quo. Here, the result of the ALPA seniority integration process was subject to separate ratification by the former US Airways Pilot and the former America West Pilots. *Addington*, 606 F.3d at 1179-80. No such ratification ever occurred. *Id.* The Nicolau list therefore cannot form any part of the RLA status quo, and the status quo therefore consists of the current two list system that has been in effect since the 2005 merger between US Airways and America West.

D. USAPA Acted Reasonably When It Negotiated the MOU Without Including Any Reference to the Nicolau Award

Plaintiffs have only alleged in the most generalized way that USAPA has breached its DFR to them.[5] 56.1 ¶117 (Plaintiffs' Response to Defendant USAPA's First Set of Interrogatories, Response #7; *see also* Response #11). The record is devoid of any evidence of an "illegitimate reason" for USAPA's decision to enter into an MOU that was seniority neutral. *Id.* (Plaintiffs' Response to Defendant USAPA's First Set of Interrogatories to Plaintiffs, Response # 11). On the contrary, there were substantial economic and non-economic reasons as to why USAPA and US Airways agreed not to include seniority, and thereby the Nicolau Award, in the MOU. 56.1 ¶39-40, 53-58.

It is without dispute that the MOU conferred unprecedented and previously unattainable economic benefits on all US Airways pilots with an estimated value of pay and benefit enhancements of $1.6 billion over six years. 56.1 ¶56-68, 107. In addition, the MOU conferred significant non-economic benefits on all US Airways pilots, including a no furlough guarantee and scope provisions to protect the jobs of US Airways pilots in the event of a merger of US Airways and American. 56.1 ¶58-59.

[5] None of the named plaintiffs or other class members who were deposed could articulate with any specificity their DFR claim against USAPA during depositions: 56.1 ¶118.

Plaintiffs and class members were well aware of the benefits contained within the MOU, and that these benefits were for all US Airways pilots. 56.1 ¶59-60, 74-90. The ratification vote is evidence that they stood ready to reap the benefits of the MOU. 56.1 ¶83-84; *see also* 56.1 ¶107, 106. *See Gullickson v. Southwest Airlines Pilots' Ass'n*, 87 F.3d 1176, 1183-84 (10th Cir. 1996); *Papcin v. Dichello Distributors, Inc.*, 697 F.Supp. 73, 80 (D. Conn. 1988) (in dismissing plaintiffs' hybrid DFR claim, finding that the 1980 agreement modified seniority provisions, and "plaintiffs knew this to be the case when they voted to ratify the 1980 agreement"), judgment aff'd in unpublished decision 862 F.2d 304 (2d Cir. 1988). Plaintiffs' assertion in discovery responses that USAPA somehow acted improperly in agreeing to an MOU that did not include the Nicolau Award because a seniority neutral MOU purportedly did not result in "better wages and benefits than what the company would have offered had there not been such language in the MOU" is mere speculation and the record is devoid of any evidence supporting this claim. 56.1 ¶116 (Plaintiffs' Response to USAPA's First Interrogatories, Response #10).

Plaintiffs' claim that "USAPA has repeatedly announced in connection with the implementation of the McCaskill-Bond provisions in the MOU that it intends to use a date-of-hire seniority order for the US Airways pilots when those pilots integrate seniority with the American Airlines pilots" even if it were true is also not a breach of the DFR as a matter of law. 56.1 ¶117 (Plaintiffs' Response to Defendant USAPA's First Set of Interrogatories to Plaintiffs, Response #9). This circuit has long held that utilizing date-of-hire "to integrate seniority rosters is an equitable arrangement for resolving the inevitable conflicts which arise whenever a merger occurs." *Laturner v. Burlington Northern, Inc.*, 501 F.2d 593, 599 (9th Cir. 1974) (citing *Humphrey v. Moore*, 375 U.S. 335, 347). Indeed, date of hire is how the America West CBA operated and the America West pilots were placed on the Nicolau list by their own date of hire. 56.1¶4, 12-14. However, plaintiffs mislead the Court by repeatedly suggesting that USAPA intends to

utilize a strict date-of-hire system. They deliberately ignore that USAPA has never proposed a strict date of hire system. 56.1 ¶22, 23-26. USAPA's last seniority proposal to US Airways was in fact a date-of-hire system *with* conditions and restrictions that, for example, prevented East Pilots from displacing them from their customary West assignments and allowed them to bid into East flying including wide body aircraft and international routes as vacancies were created as the result of growth, retirements and other normal attrition among East pilots. 56.1 ¶23-26.

Given the contentious history of the seniority issue, USAPA perceived that an MOU that was silent on seniority integration would be in the best interests of *all* its members. 56.1 ¶53-56. *Barthelemy v. Air Line Pilots Ass'n*, 897 F.2d 999, 1005 (9th Cir. 1990) (affirming summary judgment in favor of union on DFR claim). Despite repeated efforts by USAPA to work with the West Pilots to resolve the seniority dispute, it has always been plaintiffs' position that they will accept "Nic or Nothing." 56.1 ¶ 109-110, 111-116. Nor can plaintiffs' argument that "East Pilot unwillingness to ratify any collective bargaining agreement that requires the use of the Nicolau Award" serve as the basis for the DFR. The Ninth Circuit acknowledged that it was doubtful that "a single CBA incorporating the Nicolau Award would be ratified if presented to the union membership." *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1180 (9th Cir. 2010). Moreover, US Airways took the position in negotiations over the MOU that any merger agreement would not address seniority other than to provide for its resolution through the McCaskill-Bond process. 56.1 ¶39, 40, 54. US Airways made absolutely clear its position that seniority would be addressed after the merger and through a process consistent with the McCaskill-Bond amendment. *Id.* USAPA's consideration of these realities in the face of the substantial, unprecedented economic and non-economic benefits of the MOU is a "legitimate union purpose." Even assuming plaintiffs could demonstrate that USAPA breached its duty of fair representation to plaintiffs and the

West Pilots through some misrepresentation, "plaintiffs would still need to show a causal connection between the breach and the alleged harm." *Bishop v. Air Line Pilots Ass'n, Int'l*, C-98-359 MMC, 1998 WL 474076, at * 16 (N.D. Cal. Aug. 4, 1998). This they cannot do on the facts of this case. To establish a causal relationship between the union's alleged misrepresentation and plaintiffs' injury requires "proof that (1) the vote to ratify would have been different had the misrepresentations not been made; and (2) that the company would have acceded to union demands had the vote been different." *Acri v. International Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1397 (9th Cir. 1986), *cert. denied*, 479 U.S. 816 (1986).

The Ninth Circuit has already noted that it was at best unlikely that a collective bargaining agreement that includes the Nicolau Award would be ratified. *Addington*, 606 F.3d at 1180. Second, none of the parties to the MOU (US Airways, USAPA, APA, and American Airlines) were willing to tie the MOU to a particular seniority list. 56.1 ¶39-40, 54; 56.1 Tab 3 (USAPA's Response to Plaintiffs' Interrogatories, Response #1 and #2.

Thus, plaintiffs cannot meet their burden of setting forth "*specific facts* showing that there is a genuine issue for trial," and as such, summary judgment should be granted. *T.W. Elec. Service, Inc.*, 809 F.2d at 630.

POINT III
THERE IS NO MERIT TO CLAIM FOUR WHICH SEEKS THE RIGHT BUT NOT THE OBLIGATION TO PARTICIPATE IN THE SENIORITY INTEGRATION PROCESS

In Claim Four of the Amended Complaint, Plaintiffs seek the "right (but not the obligation) to participate fully (with counsel of their own choice) in the MOU Seniority Integration process." Doc 134, ¶132. This claim fails as a matter of law for the reasons set forth below and in USAPA's prior briefings on this subject, which are incorporated by

reference.[6]

In 2008, USAPA was certified by the National Mediation Board ("NMB") as the bargaining representative of the single craft or class of US Airways pilots. 56.1¶20-21. *See* 45 U.S.C. § 152, Ninth. USAPA's status as the exclusive bargaining representative has not changed. The NMB's certification of USAPA under the RLA is "essentially unreviewable in federal court" and, in any event, was not subject to challenge. 56.1 ¶21. *McNamara-Blad v. Assoc. of Prof. Flight Attendants*, 275 F.3d 1165, 1170 (9th Cir. 2002) (*citing Switchmen's Union v. NMB*, 320 U.S. 297, 303-07 (1943)*; see also America West Airlines v. National Mediation Board*, 119 F.3d 772, 775 (9th Cir 1997).

The MOU provides a seniority integration process consistent with the McCaskill-Bond Amendment to the FAA, which in term explicitly refers to the "collective bargaining agents" as the parties to the process. 49 U.S.C. § 42112, note §117(a). The McCaskill-Bond Amendment provides that when two or more air carriers are involved in a "covered transaction" resulting in the combination of crafts or classes that are subject to the RLA, "sections 3 and 13 of the labor protective provisions imposed by the Civil Aeronautics Board in the Allegheny-Mohawk merger . . . shall apply to the integration of covered employees of the covered air carriers." *Id.*; *see also Committee of Concerned Midwest Flight Attendants v. Int'l Brotherhood of Teamsters*, 662 F.3d 954, 956-57 (7th Cir. 2011). The Labor Protective Provisions ("LPPs") require that a carrier make provisions "for the integration of seniority lists in a fair and equitable manner," which includes negotiation with union representatives and binding arbitration. *Allegheny-Mohawk Labor Protective Provisions Section 3 and 13*, as published at 59 C.A.B. 45.

Plaintiffs can cite no authority that permits the Court to ignore the exclusive

[6] USAPA's Brief as Directed by the Court at May 14, 2013 Hearing, Doc. 95, and 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, Doc. 108, are incorporated herein by reference under Fed. R. Civ. P. 10(c) and LR Civ. 7.1(d).

representative status of USAPA as the NMB-certified representative of the single craft or class of US Airways pilots under Section 2, Ninth of the RLA. 45 U.S.C. § 152 Fourth. As that exclusive bargaining representative, USAPA has a duty to represent all of the pilots of the craft in the seniority integration proceedings. The duty of fair representation standard that Plaintiffs argue in Claim One was somehow breached by the seniority-neutral MOU--despite the overwhelming support of West pilots for that MOU--emanates from USAPA's *exclusive* representative status. *McNamara-Blad,* 275 F.3d at 1169 ("The duty of fair representation arises from a union's statutory role as the exclusive bargaining representative for a unit of employees."). Yet, Claim Four seeks to allow representatives at the seniority integration proceeding that (unlike USAPA) have no duty of fair representation to any group. Nor would they be answerable to this Court as Rule 23 Class Representatives. The Plaintiffs seek to grant these "single issue" representatives the power of a bargaining representative with none of the responsibilities. This fact did not escape at least one of the named Plaintiffs who in October 2012 called the notion "ludicrous," stating; "the notion that we as West Pilots can be part of any seniority integration is ludicrous and needs to be put to rest firmly" and explaining at his deposition that he meant "Leonidas is not a union" and has "no position to negotiate a compromise to the Nicolau award on behalf of the West Pilots." 56.1 ¶108. Representation contrary to the NMB's certification of USAPA based on an alleged "conflict" is not permitted under either McCaskill-Bond or the RLA. See *McNamara-Blad,* 275 F.3d at 1170 (holding there was no merit to contention that "despite the fact that they were not in the APFA's statutory bargaining unit before the merger,… the Reno flight attendants contend that the APFA nonetheless had the duty to fairly represent" a separate group of flight attendants in merger proceedings).

Equally without merit are the arguments asserted by Plaintiffs (and US Airways) that the MOU's Section 3 and 13 seniority integration process is not a matter of collective

bargaining and is somehow carved out of the NMB's exclusive authority to determine representation in collective bargaining. Nor does it make any difference that US Airways agreed, in the collectively-bargained MOU between it and USAPA, to remain neutral in the Section 3 and 13 process. Under Section 3, US Airways is a party to the seniority integration process; what position it takes in that process has no bearing on its character as a collective bargaining process. In any event, the seniority integration proceeding is not a pure McCaskill-Bond proceeding but arises under the terms negotiated by the four parties to the MOU and a dispute concerning that process is a minor dispute that must be resolved though the minor dispute process and not in Court.

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 (1954). It is necessarily a collectively-bargained right since employees exercise it against other employees. "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." *Cal. Brewers Ass'n v. Bryant*, 444 U.S. 598, 608 (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 CAB characterized the Section 3 and 13 process as a collective bargaining process. *See, e.g., Allegheny-Mohawk Merger Case*, 1979 CAB LEXIS 48, *23 (1979). For this reason, the CAB deferred to the NMB's exclusive authority to determine employee representatives. *See National Airlines Acquisition, National Airlines Acquisition*, 97 C.A.B. 565, 1982 WL 35436, at *1 (Aug. 13, 1982). And the CAB uniformly refused to invest in subgroups of a craft or class the status of parties in the Section 3 and 13 process, even where those subgroups complained they had no effective representation in the process due to the dominance of their union representative by

employees from the opposing airline. *See National Airlines Acquisition*, 94 C.A.B. 433, 436, 1982 WL 35259, at *3 (Mar. 4, 1982). Courts similarly do not interfere with NMB certifications—rather they enforce them under Section 2, Ninth of the Act. *See America West Airlines*, 119 F.3d 772**.** The McCaskill-Bond Amendment assumes the nature of the Section 3 and 13 process as one of collective bargaining when it established the exceptions to the statute based on the existence of either a collective bargaining agreement providing adequate procedures for a fair and equitable seniority integration or the internal policies of the collective bargaining agent that provide such fair and equitable procedures. *See* 49 U.S.C. §42112, note, §117(a)(1) and (2) ("if the same collective bargaining agent represents the combining crafts or classes… the requirements of any collective bargaining agreement that may be applicable to the terms of integration involving covered employees"). Seniority, as a central subject of collective bargaining, is therefore within the sole province of the exclusive bargaining representative, here, USAPA on behalf of US Airways pilots, whether in negotiating a collective bargaining agreement or in the Section 3 and 13 process.

The seniority integration process contained in the MOU clearly implicates USAPA's status as the exclusive representative of the entire craft or class of US Airways pilots. The fact is that USAPA alone has a duty to represent all US Airways pilots in the seniority integration process with the pilots of American Airlines, and consistent with its obligations is preparing to do so if the merger goes forward despite the DOJ action. To assist in that endeavor, two members of the Plaintiff class have been selected to participate on USAPA's behalf as members of the USAPA Merger Committee. The relief requested for a separate group of West representatives would severely prejudice USAPA's efforts to represent all US Airways pilots by putting great pressure on the West pilots who have joined the USAPA Merger Committee to abandon that effort. Ironically, this claim for unprecedented injunctive relief from the Court in a labor - dispute

designating representatives in collective bargaining - would undermine USAPA's ability to do the very thing the Court is concerned about—ensuring that West pilots are fairly represented in the Section 3 and 13 process.[7] Claim Four must be dismissed.

POINT IV

PLAINTIFFS ARE NOT ENTITLED TO ATTORNEYS FEES

Plaintiffs' application for attorneys' fees for *Addington I* (and appeals), the Declaratory Judgment Action, and the instant matter under the "common benefit doctrine" has no merit and must be dismissed. Under the "common benefit" doctrine, fee-shifting is permitted in exceptional cases where the litigation "confers 'a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them.'" *Ackley v. W. Conference of Teamsters*, 958 F.2d 1463, 1478-79 (9th Cir. 1992), citing *Hall v. Cole*, 412 U.S. 1, 5 (1973). The doctrine "permits *successful* individuals who have benefited fellow members of a class to compel those members to share the costs of obtaining the benefits they have received." *Hall*, 412 U.S. at 1479 (emphasis added); *see also Southerland v. Int'l Longshoreman's Union*, 845 F.2d 796, 798 (9th Cir. 1988) ("substantial benefit" principle is based on the premise that a successful plaintiff should be able to spread the costs of his litigation among those who benefited from *successful* outcome). For the purposes of attorney's fee awards, a prevailing party is defined as "a party which 'succeed[s] on any significant issue in litigation which achieves *some* of the benefit the parties sought in bringing the suit.'" *Park, ex rel. Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1034 (9th Cir. 2006) (citations omitted).

---

[7] This injunctive relief would not be in furtherance of the duties established under the RLA, but contrary to its scheme of resolving representation disputes exclusively through the National Mediation Board. The relief is therefore improper under the jurisdictional restraints of the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*

Plaintiffs were not "prevailing" parties in either *Addington I* or the Declaratory Judgment Action and conferred no benefit on anyone. *See* Order Denying Plaintiff's Request to Transfer a Related Case, Doc. 666, *4 No. CV-08-01633-PHX-NVW (D. Ariz. Oct 18, 2010) (noting following Ninth Circuit's vacatur of judgment, "both cases would now write on clean slates."). That litigation afforded no benefit to the plaintiffs or anyone because, as Judge Wake states, it was as if *Addington I* never took place. Plaintiffs were also not awarded any of the relief they sought in the Declaratory Judgment Action. *See US Airways Inc. v. Addington*, No. CV-10-01570-PHX-ROS Doc. 206 (Dec. 4, 2012). *See Kollsman v. Cohen*, 996 F.2d 702, 706 (4th Cir. 1993) ("A dismissal of an action, … generally means the defendant is the prevailing party.").

Furthermore, plaintiffs never pursued their claims for attorneys' fees under the common benefit doctrine in *Addington I* or the Declaratory Judgment Action, despite including these claims in their pleadings in those respective actions. "Verified Complaint", Doc 1, *Addington v. US Airline Pilots Ass'n*, 2:08-CV-1633-NVW (Filed Sept. 4, 2008), at p. 21; "Addington Pilots Answer & Cross Claim", Doc. 34 *US Airways v. US Airline Pilots Ass'n*, 2:10-cv-01570-PHX-ROS (Filed Sept. 10, 2010). Had they done so, the motions would have surely been denied as plaintiffs were not successful or "prevailing" parties in either litigation. Plaintiffs also have not produced any evidence of the amount of fees, hours or costs expended or any evidence that any fees or that plaintiffs owe any attorneys' fees. *Fox v. Vice*, ___ U.S. ___, 131 S. Ct. 2205, 2216 (2011) ("The fee applicant (whether a plaintiff or a defendant) must, of course, submit appropriate documentation to meet 'the burden of establishing entitlement to an award.'") (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)).

Moreover, the common benefit doctrine allows for the *reimbursement* of plaintiff's attorneys' fees to prevailing litigants. *See Southerland v. Int'l Longshoremen's & Warehousemen's Union, Local 8*, 845 F.2d 796, 798 (9th Cir. 1987); *see also Se. Legal*

Def. Grp. v. Adams, 657 F.2d 1118, 1122 (9th Cir. 1981) ("The litigant is entitled to recover attorneys fees from the benefitted class."). In the case at bar, as a matter of fact, Plaintiffs have not individually paid for attorney's fees or even collectively borne the costs of litigation. It is uncontroverted that the attorneys' fees have been paid by Leonidas. 56.1 ¶102-103, 105. While Leonidas may have been described as a "fundraising mechanism" for the litigation, Leonidas is a distinct entity that accepts contributions from anyone without restriction, including non-class members and organizations, and plaintiffs are not entitled to fees paid by Leonidas. 56.1 ¶102-103, 105-106. *See Unification Church v. I.N.S.*, 762 F.2d 1077, 1082 (D.C. Cir. 1985) (upholding denial of attorneys' fees to individuals where church paid attorneys' fees for individuals). Leonidas's objectives also far exceed the claims in this litigation, and include "demanding all of our legal rights, in their entirety, within the new US Airways, or any successor airline." 56.1 ¶104.

CONCLUSION

For the foregoing reasons, USAPA respectfully requests that the Court grant summary judgment in favor of USAPA on all issues and dismiss the Complaint.

Respectfully submitted this 11th day of October 2013.

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

By: s/Jennifer Kroll
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 October 11, 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