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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.

No. CV-13-00471-PHX-ROS

**PLAINTIFFS’ RESPONSE TO  
US AIRWAYS’ MOTION FOR  
SUMMARY JUDGMENT (Doc. 212)**

Plaintiffs respond in support of US Airways’ Motion for Summary Judgment (Doc. 212) and clarify the nature of relief sought on Claim Four. This response is supported by the *Memorandum of Points and Authorities* that follows and by *Plaintiffs’ Separate Statement of Facts in Response to Motions for Summary Judgment* (“PSOF”) filed concurrently.

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**MEMORANDUM OF POINTS AND AUTHORITIES****I. FACTUAL BACKGROUND<sup>1</sup>****A. Nicolau Award**

The Nicolau Award, which sets out East/West pilot seniority order, was created according to the seniority integration provisions in the 2005 Transition Agreement. [PSOF at ¶¶ 1-14 (explaining creation of Nicolau Award).] A neutral arbitrator determined that this seniority order was fair and equitable. [*Id.* at ¶ 12.] And he determined that the order advocated by the East Pilots was neither because it put pilots who were furloughed in 2005 above pilots who were active. [*Id.* at ¶¶ 13-14.] On December 14, 2007, ALPA presented the Nicolau Award to US Airways in accordance with the Transition Agreement. [*Id.* at ¶ 15.] A week later, on December 20, 2007, US Airways accepted the Nicolau Award as the single seniority list that would be used to integrate pilot operations. [*Id.* at ¶ 16.]

**B. Creation of USAPA**

USAPA was created in 2007 primarily to ensure that the East Pilots would have the political power to prevent implementation of the Nicolau Award both in the 2005 merger of US Airways and America West and in any future merger with a third airline. [*Id.* at ¶¶ 19-21, 23.] Indeed, USAPA is constitutionally committed to that end. [*Id.* at ¶¶ 21, 23.] And its Board of Pilot Representatives (“BPR”), unless directly ordered by this Court, will not use the Nicolau Award seniority order in the pending seniority integration with the American pilots. [*Id.* at ¶ 28.] The East Pilots that control USAPA’s BPR have stated they would not support an amendment to USAPA’s Constitution to make it “neutral” and have on many occasions blocked any efforts by the West Pilots on the BPR to amend the Constitution to allow the Nicolau Award to be considered by the BPR. [*Id.* at ¶ 29.]

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<sup>1</sup> The West Pilots concur with US Airways’ separate statement of uncontroverted facts filed in support of its motion. [Doc. 215.]

### C. Prior Litigation

1  
2 Litigation between USAPA and the West Pilots began in September 2008 and has  
3 continued to date. [*Id.* at ¶¶ 30-31.] This Court, in its October 2012 order in the  
4 declaratory judgment action, cautioned USAPA that “[d]iscarding the Nicolau Award  
5 places USAPA on dangerous ground.” [*Id.* at ¶ 33.] It stated that USAPA must have a  
6 legitimate union purpose if it makes a contract that abandons the Nicolau Award. [*Id.* at  
7 ¶ 34] And it cautioned USAPA that it must give reasonable and fair consideration to  
8 implementing the Nicolau Award in negotiations with US Airways. [*Id.* at ¶ 35.]

9 For whatever reason, USAPA’s East Pilot leaders and attorneys grossly  
10 misinterpreted those rulings, telling East Pilots that “USAPA is free to use whatever  
11 seniority list we want.” [*Id.* at ¶ 36.] USAPA also prevented the West Pilots on the BPR  
12 from disseminating any contradicting viewpoint on the import of the Court’s October  
13 2012 rulings. [*Id.* at 37.] This has further strengthened the belief among many East Pilots  
14 that USAPA has an unrestrained legal right to impose a date-of-hire seniority list on the  
15 West Pilots, that USAPA is free to disregard any and all commitments and obligations to  
16 implement the Nicolau Award. [*Id.* at ¶¶ 38-43.] In other words, USAPA may have made  
17 it politically impossible to use anything other than date of hire.

### D. Merger with American Airlines and Negotiation of MOU

18 In November 2011, AMR Corp. (the parent company for American Airlines) filed  
19 bankruptcy. [*Id.* at ¶ 44.] Soon thereafter, US Airways and AMR began discussions that  
20 led to a merger agreement. [*Id.* at ¶¶ 45-46.] By April 2012, US Airways had negotiated  
21 and agreed to a Conditional Labor Agreement (or “Term Sheet”) with APA, the union  
22 representing the pilots of American Airlines. [*Id.* at ¶¶ 47-48.] USAPA was not involved  
23 in these discussions. [*Id.* at ¶ 49.]

24 At some point in July 2012, US Airways did begin negotiations with USAPA and  
25 APA to create a collective bargaining agreement, referred to as the “Memorandum of  
26 Understanding Regarding Contingent Collective Bargaining Agreement” (“MOU”). [*Id.*  
27 at ¶¶ 50-72.] The MOU (itself and by reference to other documents) fixes one set of  
28

1 wages, benefits and other working conditions that would apply to pilots from US Airways  
2 and American once the merger of their airlines is consummated. [*Id.* at ¶¶ 70-72.]  
3 USAPA assigned its Negotiating Advisory Committee (“NAC”) the task of negotiating  
4 the MOU. [*Id.* at ¶ 51.]

5 The baseline for these negotiations was the April 2012 Term Sheet, which USAPA  
6 had no part in negotiating. [*Id.* at 99.] An initial draft, (known as MOU I), was tentatively  
7 approved by the NAC and presented to the BPR in August 2012. [*Id.* at ¶ 54.] This draft  
8 did not have any language that purported to nullify the seniority integration provisions in  
9 the 2005 Transition Agreement. [*Id.* at 53.] The BPR rejected MOU #1, but expressed no  
10 concern with its seniority language. [*Id.* at ¶¶ 55-56, 59.]

11 Further negotiations between the NAC and US Airways were delayed until  
12 December 2012 by matters that are not at issue here. [*Id.* at 57.] From December 10,  
13 2012, through January 2, 2013, US Airways, USAPA and APA negotiated a tentative  
14 agreement titled “Memorandum of Understanding Regarding Contingent Collective  
15 Bargaining Agreement” (the “MOU”). [*Id.* at ¶ 58.] Without benefits offered in exchange  
16 by the other parties to the MOU, USAPA put language into the MOU (that ended up as  
17 ¶ 10.h) that serves no purpose other than to give USAPA a basis to argue that the MOU  
18 wiped the slate clean on East/West seniority by nullifying the seniority integration  
19 procedures in the 2005 Transition Agreement. [*Id.* at ¶¶ 61-64, 67-69.] In discovery and  
20 during trial, USAPA refused to explain its reasons for putting ¶ 10.h into the MOU,  
21 claiming this was privileged or that only Mr. Szymanski (who refused to testify under  
22 oath at deposition or during trial) knew the reasons for this provision. [*Id.* at ¶ 65.]

23 To be clear, it is uncontroverted that USAPA did not receive any beneficial  
24 economic terms in the MOU from the airlines (or APA) in exchange for USAPA agreeing  
25 to ¶ 10.h. [*Id.* at ¶ 67.] Indeed, when Dean Colello, Chairman of the NAC, was asked  
26 “was there any economic benefit for the parties to agree to include 10H?,” he answered,  
27 “I would say the answer was no.” [*Id.*]

28

1           **E. USAPA is using ¶ 10.h to evade its duty of fair representation.**

2           USAPA did not fairly disclose to the West Pilot members of the NAC or to the  
3 West Pilot membership at-large that it intended to use ¶ 10.h to claim that it had a “clean  
4 slate” to ignore the seniority integration provisions in the 2005 Transition Agreement.  
5 [*Id.* at ¶¶ 73-87.] Consequently, when West Pilots voted on MOU ratification they neither  
6 knew of this nor intended to waive their right to be fairly represented in the context of  
7 East/West seniority integration. [*Id.* at ¶¶ 89-92.]

8           But, USAPA intends to use the MOU as a basis to ignore the seniority integration  
9 provisions in the 2005 Transition Agreement. [*Id.* at ¶¶ 94-96.] It intends to use a process  
10 that will allow it to impose the date-of-hire East/West seniority order that Mr. Nicolau  
11 rightly found was neither fair nor equitable. [*Id.* at ¶¶ 14, 94.] It would use a single  
12 committee (in which East Pilots outvote West pilots by two to one) and a single counsel  
13 (who is here defending USAPA) to represent both East and West Pilots when they are  
14 integrated with the American pilots. [*Id.* at ¶ 94.]<sup>2</sup> And all decisions and actions taken in  
15 this regard would be subject to approval by the BPR (in which East Pilots outvote West  
16 pilots by eight to three). [*Id.*]

17           USAPA steadfastly refuses to consent to the West Pilots having an independent  
18 voice in the process of integrating seniority with the American pilots. [*Id.* at ¶ 98.]  
19 Rather, USAPA would have a merger committee and legal counsel that are loyal to and  
20 controlled by East Pilots to decide East/West Pilots seniority integration in the course of  
21 that process, free of any constraints from the 2005 Transition Agreement. That is  
22 tantamount to an express abandonment of the Nicolau Award. [*Id.* at ¶ 97 (Jess Pauley,  
23 Merger Committee Chairman, admitted on cross examination “that the end product that  
24

25  
26           <sup>2</sup> Mr. Szymanski apparently sees no ethical or legal problems in acting as counsel for  
27 both East and West pilot seniority interests before they are (in his mind) fully and finally  
28 integrated. *See* Ariz. R. Sup. Ct. 42, ER 1.7 & cmt. 18 (informed consent required for  
conflict waiver).

1 comes through [his] committee and the BPR that is then integrated with the APA pilots  
2 [could not] possibl[y] . . . be the Nicolau list.”.]

### 3 **F. Legitimate Union Purpose (and lack thereof)**

4 USAPA conflates the value of ratifying the MOU with the value of the MOU in its  
5 entirety. That is quite misleading because the majority of the benefits of the MOU would  
6 flow to the US Airways pilots whether or not it was ratified by USAPA’s members. [*Id.*  
7 at ¶¶ 99-100.] That is because most of the benefits in the MOU, about \$1.3 billion, are  
8 also provided by the 2012 APA CBA, which will apply to the US Airways pilots about  
9 18 months into the merger, even if the MOU had not been not ratified. [*Id.*] The  
10 incremental value of ratifying the MOU, therefore, is only the value of the additional  
11 benefits that would come with ratification. That was approximately \$300 million, none of  
12 which was provided in exchange for ¶ 10(h). [*Id.* at ¶ 100.]

13 USAPA also exaggerates the value of the MOU where it calls its economic terms  
14 “unprecedented.” US Airways all along has been willing to provide such economic  
15 benefits to US Airways pilots, in accordance with the Transition Agreement. [*Id.* at 101.]  
16 US Airways’ 2007 Kirby proposal (which was never taken off the table by US Airways)  
17 would have paid hundreds of millions of dollars of additional wages from 2007 to 2013 if  
18 it had been accepted and, in 2014, it would have paid about the same wages that will be  
19 paid as under the MOU. [*Id.* at ¶¶ 101-102] But the Kirby proposal would have been the  
20 Single Agreement that, under the 2005 Transition Agreement, would have triggered  
21 implementation of the Nicolau Award. All that was unprecedented in the MOU,  
22 therefore, is that USAPA saw it as its first opportunity to get on a path to better economic  
23 terms that did not lead to the Nicolau Award.

### 24 **I. LEGAL ARGUMENT**

25 Plaintiffs support US Airways’ motion for summary judgment on Claim Four [Doc.  
26 212], which seeks an order that the West Pilots are entitled to full party status and  
27 representatives of their choosing in the process of integrating pilot seniority with the  
28



1 American pilots.<sup>3</sup> The Court has ample authority to provide such a remedy because it  
2 “has jurisdiction to enforce by injunction petitioners’ rights to nondiscriminatory  
3 representation by their statutory representative.” *Graham v. Bd. of Firemen*, 338 US  
4 232, 240 (1949).

5 The McCaskill-Bond amendment to the Federal Aviation Act, 49 U.S.C. § 42112,  
6 note, § 117, incorporates Section 3 and 13 of the Labor Protective Provisions (“LPPs”)  
7 that controlled airline mergers when the industry was regulated by the Civil Aeronautics  
8 Board. *See Allegheny-Mohawk*, 59 C.A.B. 19, 45 (1972). LPP § 3 required that  
9 “provisions shall be made for the integration of seniority lists in a fair and equitable  
10 manner.” It also provided, if “employees affected” by a merger cannot agree on how to  
11 merge their seniority lists, that “the dispute may be submitted by either party for  
12 adjustment in accordance with section 13.” LPP § 13(a) provided that such adjustment  
13 shall be by neutral arbitration.

14 Without question, the West Pilots are “employees” affected by the merger of US  
15 Airways and American Airlines. As such, they are entitled to be represented in the  
16 seniority integration process from initial negotiation of a protocol all the way through to  
17 neutral arbitration (if needed). And surely, they are entitled to unconflicted  
18 representation. Under any concept of conflict of interest, USAPA’s officers, BPR,  
19 Merger Committee and/or merger counsel are in direct conflict with the West Pilots’  
20 seniority interests and cannot provide or control that representation.

21 This Court can remedy conflict of interest in a manner analogous to that used by the  
22 CAB when it considered whether to allow subgroups like the West Pilots to be  
23 independently represented in seniority integration proceedings. *E.g., National Airlines*  
24 *Acquisition, Arbitration Request*, 94 C.A.B. 433 (1982). In *National Airlines Acquisition*,

25 <sup>3</sup> Far too much is being made of the phrase “but not the obligation” used in Plaintiffs’  
26 prayer for relief. [Doc. 134 at ¶ 137.] Plaintiffs used that language merely to not waive  
27 their right to object to participating in a process that would purport to adjudicate their  
28 DFR claim (without their consent) or that had pre-conditions that did not provide them a  
fair opportunity to protect their rights. So far, that has not materialized.

1 for example, the CAB recognized that subgroups could have independent representation.  
2 The CBA denied such relief in that decision, however, because it found “no indication  
3 that the interests of former National employees were subordinated to those of premerged  
4 Pan American employees.” *Id.* at 436. That is not the situation here. The interests of the  
5 West Pilots here will be subordinated to those of the East Pilots if they are represented by  
6 the East Pilot dominated USAPA Merger Committee and by USAPA’s equally partisan  
7 merger counsel. [PSOF at ¶ 94.]

8 There is no question that USAPA and its counsel (past and present) have grossly  
9 subordinated the seniority interests of the West Pilots to those of the East Pilots. [*Id.* at  
10 ¶¶ 21, 23, 25, 27-29, 36-43, 59, 62-66, 73-87, 94-98.] There is no question that USAPA  
11 exists for that purpose, no question that it has been effectively used for that purpose since  
12 it was created. [*Id.*] By design, USAPA decides seniority issues by majority rule that is  
13 dominated by the East Pilot majority. [*Id.* at ¶¶ 21, 28, 94] Even worse, USAPA’s leaders  
14 and counsel intentionally misinform this majority that they have a legal right to decide  
15 seniority integration by majority rule, thus raising their expectations that they have a  
16 legitimate basis to prevent implementation of the Nicolau Award. [*Id.* at ¶ 36-43.]

17 History (most recently USAPA’s attempt to introduce the untimely Hummel  
18 declaration into evidence) shows that the Court cannot rely on USAPA to abide by any  
19 order from this Court in good faith. [*See* Doc. 256, 257.] USAPA will look for ways to  
20 circumvent the remedy that the Court provides on Claim One to the detriment of the West  
21 Pilots. Separate and apart from such remedy, therefore, the West Pilots must be afforded  
22 a full opportunity to participate in the process of integrating with the American pilots.

23 USAPA will use its dues assessment authority to funds the East Pilots’ merger  
24 representatives. Those representatives will be protected by federal law from personal  
25 liability. *See, generally, Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 249 (1962). In  
26 order to engage in meaningful participation the West Pilots’ representatives must have  
27 commensurate funding and personal immunity. In addition, to avoid any  
28 misunderstanding, the remedy on Claim Four must expressly and unequivocally state that

1 the West Pilots have the right to compel arbitration if they do not accept an integration  
2 that might be negotiated between USAPA and the American pilots. *See* LPP § 3  
3 (recognizing the right to compel arbitration).

4 **II. CONCLUSION**

5 The West Pilot Plaintiffs support US Airways' motion for summary judgment on  
6 Claim Four. That said, now that the Court has heard the evidence and had the opportunity  
7 to weigh credibility of witnesses, the West Pilots prefer that the Court provide relief on  
8 that basis and not as a pure matter of law. The West Pilots respectfully ask that the Court  
9 enter judgment on Claim Four that declares (1) that the West Pilot class, through  
10 representatives and counsel of its choosing, has the right to fully participate in the process  
11 of integrating the seniority of the US Airways and American pilots, including the right to  
12 compel arbitration according to the provisions of the MOU; and (2) that these  
13 representatives will have the personal immunity ordinarily afforded to union committee  
14 members. In addition, the Court should order that USAPA must provide funding to the  
15 West Pilot representatives comparable to what it provides to its merger committee.

16 Dated this 13th day of November, 2013.

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**CERTIFICATE OF SERVICE**

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I hereby certify that on this 13th day of November 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 \_\_\_\_\_