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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE DISTRICT OF ARIZONA**

10 Don ADDINGTON; *et al.*,

Case No. CV-13-00471-PHX-ROS

11
12
13 Plaintiffs,

**PLAINTIFFS’ STATEMENT OF
FACTS, RESPONDING TO
SUMMARY JUDGMENT MOTIONS**

14 vs.

15 US AIRLINE PILOTS ASS’N, *et al.*,

16
17 Defendants.

18
19 Plaintiffs file *Plaintiffs Separate Statement of Facts, Responding to Summary*
20 *Judgment Motions.*

21 **I. Nicolau Award**

22 1. In May 2005, two airlines, America West and US Airways, agreed to merge to
23 become a single airline known as US Airways (the “2005 Merger”). [Stipulated Fact, ¶1
24 (Doc. 206-1) (“SF”).]

25 2. At the time of the 2005 Merger, including pilots on furlough, there were about
26 5,100 pilots employed by US Airways (“East Pilots”) and 1,900 pilots employed by
27 America West (“West Pilots”). [SF at ¶ 2.]
28

1 3. At the time of the 2005 Merger, no West Pilots were on furlough. [SF at ¶ 3.]

2 4. But, approximately 1700 East Pilots were on furlough. [SF at ¶ 4.]

3 5. The Air Line Pilots Association (“ALPA”) represented both pilot groups. [SF
4 at ¶ 5.]

5 6. On September 23, 2005, ALPA and the two merging airlines entered into a
6 contract referred to as the Transition Agreement. [SF at ¶ 6.]

7 7. Pursuant to the Transition Agreement [Trial Exhibit 113 “Ex.”], until certain
8 conditions are satisfied, US Airways will conduct separate pilot operations according to
9 the pre-merger collective bargaining agreements (“CBAs”) and seniority lists for the two
10 pilot groups. [SF at ¶¶ 8-9.]

11 8. The Transition Agreement provided, however, that US Airways would
12 integrate its pilot operations within 12 months of the occurrence of the last of these three
13 events: (a) obtaining a single operating certificate (which occurred in 2007); (b) creating
14 a single seniority list according to ALPA Merger Policy (which also occurred in 2007
15 with the issuance of the Nicolau award); and (c) negotiation of the “Single Agreement.”
16 [SF at ¶ 19; Ex. 113 at § VI.A.]

17 9. The Transition Agreement defines the “Single Agreement” as a “single
18 collective bargaining agreement applicable to the merged operations of America West
19 and US Airways.” [Ex. 113 at V.]

20 10. ALPA Merger Policy provided, if it was necessary to arbitrate the single
21 seniority list, that “[t]he Award of the Arbitration Board shall be final and binding on all
22 parties to the arbitration and shall be defended by ALPA.” [SF at ¶ 21; Ex. 116.]

23 11. In this instance, it was necessary to arbitrate a single seniority list because the
24 two pilot groups tried but failed to create such a list through negotiation and mediation.
25 [SF at ¶¶ 22-23.]

26 12. The arbitration board issued its award (the “Nicolau Award”) on May 1, 2007,
27 determining that it was a fair and equitable integration. [SF at ¶ 24; Ex. 114.]
28

1 13. The Nicolau Award placed the approximately 1700 East Pilots who were
2 furloughed at the time of the 2005 Merger at the bottom of the list. [SF at ¶ 27.]

3 14. The Nicolau Award explained that “merging active pilots with furlougees,
4 despite the length of service of some of the latter, is not at all fair or equitable.” [SF at
5 ¶ 28.]

6 15. On December 14, 2007, ALPA presented the Nicolau Award to US Airways
7 in accordance with the Transition Agreement and ALPA Merger Policy. [Tab 17
8 (USAPA001737) to USAPA’s Statement of Facts, Doc. 213-9].

9 16. On December 20, 2007, US Airways accepted the Nicolau Award as the single
10 seniority list that would be used to integrate its pilot operations according to the
11 provisions in the 2005 Transition Agreement. [SF at ¶ 30.]

12 **II. Creation of USAPA**

13 17. East Pilots opposed the Nicolau Award. [SF at ¶ 35.]

14 18. In May 2007, East Pilot Stephen Bradford and other East Pilots formed a
15 committee to consider forming a new union to take over representation of all US Airways
16 pilots (East and West). [SF at ¶ 36.]

17 19. From the start, this committee was focused on creating a single airline union
18 that East Pilots, as the majority faction, could control and use to prevent implementation
19 of the Nicolau Award. [Trial Exhibit 36 (“Ex.”) (Bradford email to R. Weber, referring to
20 the “next merger”); Ex. 41 (Bradford telling East Pilots, “If ALPA is not there, the
21 [Nicolau] award is not there.”); Ex. 40 (Bradford telling East Pilots, “[T]he Nicolau
22 Award won’t die until ALPA dies”).]

23 20. This committee then proceeded to form USAPA with the goal of having a
24 single-airline union that could replace ALPA, be controlled by the East Pilot majority,
25 and prevent implementation of the Nicolau Award. [SF at ¶ 39.]

26 21. Indeed, USAPA was created with a Constitution, which to this day does not
27 allow it to use the Nicolau Award single seniority list. [SF at ¶ 50; Pauley (depo.), 49:14
28 to 49:22 (Sep. 18, 2013) (Merger Committee Chairman); Diorio (depo) at 46:13-47:13

1 (Nicolau Award does not comply with date of hire principles in USAPA’s Constitution)
2 (BPR Domicile Chairman from Philadelphia/Former Chairman of the NAC); Pauley at
3 395:1 to 395:12 (acknowledging that USAPA constitutional mandate precludes
4 conducting a neutral arbitration of East/West seniority); Crimi (depo) at 19:2-16 (USAPA
5 Constitution does not allow use of Nicolau Award) (former BPR member from Charlotte
6 domicile); Koontz at 47: 9 to 47:15 (USAPA constitution constrains BPR to using date-
7 of-hire for East/West integration).]¹

8 22. An election contest between ALPA and USAPA followed. [SF at ¶ 40.]

9 23. In the course of that election campaign, Mr. Bradford and other USAPA
10 supporters made it very clear that the “centerpiece” of USAPA’s policy would be to
11 promote the date-of-hire seniority integration that put East Pilots, who were furloughed in
12 2005, ahead of West Pilots who were active in 2005 – something that Mr. Nicolau found
13 was neither fair nor equitable. [SF at ¶ 51; Bradford (depo.), 75:4 to 75:22 (Sep. 18,
14 2013) (date-of-hire is USAPA’s “centerpiece”); *id.* at 82:7 to 82:20 (“date-of-hire is a
15 founding principal of this union”).]

16 24. USAPA won the election and, on April 18, 2008, the National Mediation
17 Board certified USAPA as the collective bargaining representative for the entire pilot
18 craft or class (East and West Pilots); “Craft or class” is the Railway Labor Act term for a
19 “bargaining unit.” [SF at ¶¶ 43-44.]

20 25. USAPA proposed a date-of-hire seniority list to US Airways in September
21 2008. [SF at ¶ 54.]

22 26. USAPA’s seniority proposal combines the East and West seniority lists by
23 date-of-hire, without regard to whether a pilot was on furlough at the time of the merger
24 (or had prolonged periods of furlough prior to the merger). [SF at ¶ 59.]

25 27. For more than five years, USAPA has refused to take any steps towards
26 implementing the Nicolau Award and the West Pilots have steadfastly maintained that

27
28 ¹ Reference by surname is to trial testimony unless otherwise indicated to be to
deposition testimony.

1 USAPA has no legitimate union purpose to use a date-of-hire seniority list to integrate
2 pilot operations. [SF at ¶¶ 51-52.]

3 28. USAPA's governance is heavily weighted in favor of the East Pilot majority
4 such that there is no likelihood that USAPA will amend its date-of-hire constitution
5 provision or implement an unmodified Nicolau Award in the course of this merger with
6 American Airlines. [SF at ¶¶ 50-59.]

7 29. The East Pilots that control USAPA's BPR have stated they would not support
8 an amendment to USAPA's Constitution to make it "neutral" and have on many
9 occasions blocked any efforts by the West Pilots on the BPR to amend the Constitution to
10 allow the Nicolau Award to be considered by the BPR. [Diorio (depo) at 48:12-21 (would
11 not support amending the USAPA Constitution to take out provision that requires it to
12 comply with date of hire principles) (BPR Member and former NAC Chairman); Scherff
13 at 149:14-153:2].

14 **III. Prior Litigation**

15 30. In 2008, six West Pilots sued USAPA claiming that USAPA breached its duty
16 of fair representation by repudiating the commitment to use the Nicolau Award. The case
17 was certified as a class action and proceeded to trial where the West Pilots prevailed. On
18 appeal, however, the case was dismissed as not presenting a ripe controversy. But in so
19 doing, the Ninth Circuit indicated that there would be a ripe claim if and "[w]hen the
20 collective bargaining agreement is finalized." *Addington v. US Airline Pilots Ass'n*, 606
21 F.3d 1174, 1180 n.1 (9th Cir. 2010).

22 31. On July 27, 2010, US Airways filed a declaratory judgment action, alleging
23 that it required guidance, *inter alia*, as to whether it would be liable if it entered into a
24 collective bargaining agreement with USAPA that did not implement the Nicolau Award.
25 [SF at ¶ 61.]

26 32. Although in its ruling the Court did not fully resolve the East/West pilot
27 seniority dispute at US Airways, it did provide substantial guidance as to what was
28 required of USAPA. [Ex. 115.]

1 33. In its order on summary judgment in that action, the Court stated, among other
2 things: “Discarding the Nicolau Award places USAPA on dangerous ground.” [*Id.*]

3 34. The Court cautioned USAPA that it must have a legitimate union purpose if it
4 makes a contract that abandons the Nicolau Award. [*Id.*]

5 35. It also cautioned USAPA that it must give reasonable and fair consideration to
6 implementing the Nicolau Award in negotiations with US Airways. [*Id.*]

7 36. For whatever reason, USAPA’s leaders and attorneys grossly misinterpreted
8 the Court’s ruling, thereby further strengthening the belief among many East Pilots that
9 USAPA had an unrestrained legal right to impose a date-of-hire seniority list on the West
10 Pilots—meaning that USAPA is free to disregard any and all commitments and
11 obligations to implement the Nicolau Award. [Hummel (depo.), 100:24 to 101:19 (Sep.
12 17, 2013) (“as a result of Judge Silver’s . . . ruling, USAPA is free to use whatever
13 seniority list we want”); *see also id.* 103:15 to 104:24 (same); Crimi (depo.), 122:13 to
14 123:1 (Sep. 19, 2013) (same); Bradford (depo.) at 108:4 to 108:21 (same); Ex. 19
15 (same).]

16 37. USAPA also prevented the West Pilots on the BPR from disseminating any
17 contradicting viewpoint on the import of the Court’s October 2012 rulings. [Scherff at
18 156:3-157:6; *Compare* Exhibit 20 *with* Exhibit 45].

19 38. After meeting with counsel to discuss the October Order, Mr. Bradford wrote
20 to Mr. Pauley that the order establishes that “USAPA’s [sic] free to use any seniority list
21 it wants . . . provided that there’s a legitimate union purpose for deviating from the Nic.”
22 [Ex. 20.]

23 39. And in an October 16, 2012, email he wrote: “I attended a special meeting
24 between our lawyers and the Officers last week after the decision. We have left
25 NOTHING OUT! The win is conclusive and complete.” [Ex. 140 (emphasis in original).]

26 40. In an email copied to USAPA officers, which was written shortly after the
27 October Order, Mr. Bradford wrote as follows: (1) “We won and the company is under a
28 positive duty”; (2) “When Judge Rosslyn Silver said we were free to negotiate for the

1 Nicolau Award she was making a legal order”; (3) “There is no legal basis for USAPA to
2 be forced to use the Nicolau award. NONE”; (4) “There is no basis in law for USAPA to
3 use the NIC”; and (5) “This is a bigger win than you can imagine. It means that the
4 Nicolau award has no special legal standing and that USAPA is free to negotiate
5 something different.” [Ex. 17 (emphasis in original).]

6 41. In another email, Mr. Hummel told the chairman of USAPA’s
7 Communications Committee: “Brief your crew . . . no more legal opinions or debates
8 emanating from USAPA. We won, it’s over and we are moving on. That’s all that needs
9 to be said.” [Ex. 18.]

10 42. A USAPA pilot-to-pilot communication written on October 8, 2012, stated:
11 (1) USAPA “is free to use whatever seniority list we want”; and (2) “Finally, is the NIC
12 gone? President Hummel said that based on Judge Silver’s proposed ruling it is in terms
13 of USAPA not having to use it.” [Ex. 19.]

14 43. In the same time frame, USAPA published a Charlotte domicile update, that
15 stated: (1) “Common sense would dictate that Judge Silver obviously believes there are
16 legitimate union purposes for setting aside the Nicolau award”; (2) “There is no question
17 that USAPA has a legitimate union purpose – in fact many good reasons – for a seniority
18 proposal different from the Nicolau Award”; and (3) “It is legitimate to integrate
19 seniority based on date of hire.” [Ex. 152.]

20 **IV. Merger with American Airlines and Negotiation of MOU**

21 44. On November 29, 2011, AMR Corporation (“AMR”) and its subsidiaries,
22 including American Airlines, Inc. (“American”), commenced a voluntary Chapter 11 case
23 in the United States Bankruptcy Court for the Southern District of New York, In re AMR
24 Corp., Case No. 11-15463. [SF at ¶ 69.]

25 45. On February 13, 2013, US Airways Group, Inc. (the corporate parent of US
26 Airways) and AMR entered into an Agreement and Plan of Merger that contemplated the
27 combination of US Airways and American. [SF at ¶ 70.]
28

1 46. By April 11, 2013, the Bankruptcy Court had approved the merger subject to
2 conditions that are not at issue here. [SF at ¶¶ 71-73.]

3 47. While it was contemplating the merger with American, US Airways began
4 negotiating labor contract terms with the Allied Pilots Association (“APA”), the union for
5 American pilots, that would go into effect if and when there was a merger with
6 American. [SF at ¶ 74.]

7 48. On April 23, 2012, APA and US Airways executed an agreement that has
8 been referred to as the “Conditional Labor Agreement” (“CLA”) or “APA Term Sheet.”
9 [SF at ¶ 75.]

10 49. USAPA was not involved in the negotiations or agreement to the APA Term
11 Sheet and initially US Airways did not want USAPA’s involvement. [SF at ¶ 76;
12 Response to USAPA’s Summary of Evidence, Doc. 263 at ¶ 3].

13 50. US Airways subsequently agreed to negotiate with USAPA concerning terms,
14 conditions, and protections in addition to those stated in the CLA that would be
15 guaranteed to US Airways pilots in the event of a merger, but there is no evidence that
16 USAPA was able to obtain that concession from US Airways, rather it was APA who
17 allowed USAPA to be part of the process. [*Id.*]

18 51. USAPA assigned its Negotiating Advisory Committee (“NAC”) the task of
19 negotiating the labor terms and provisions regarding integration of US Airways and
20 American pilots, in connection with a potential US Airways/American merger. [SF at
21 ¶ 78.]

22 52. The outcome of these negotiations was memorialized in a document entitled
23 “Memorandum of Understanding Regarding Contingent Collective Bargaining
24 Agreement” (“MOU #1”). [SF at ¶ 80; Ex. 7.]

25 53. This draft did not have any language that purported to nullify the seniority
26 integration provisions in the 2005 Transition Agreement. [Ex. 7; Response to USAPA
27 Summary of Evidence, Doc. 263 at ¶¶ 3, 7, 8.]
28

1 54. Negotiators for US Airways and the NAC (on behalf of USAPA) tentatively
2 approved MOU # 1 on August 20, 2012. [SF at ¶ 81.]

3 55. In August 2012, after the NAC presented the MOU I to the USAPA Board of
4 Pilot Representatives (“BPR”), the BPR concluded that there were deficiencies in MOU
5 #1 and directed the NAC to negotiate further to address those deficiencies. [SF MOU ¶
6 83.]

7 56. The BPR, however, did not identify any seniority-related deficiencies in MOU
8 #1I. [Colello (depo.), 35:4 to 38:1 (Sep. 20, 2013) (no mention of seniority concerns in
9 goals for MOU I in a presentation to BPR; *id.* at 39:9 to 39:15 (BPR directed NAC to
10 correct specific deficiencies in MOU I, none of which related to seniority); *id.* at 47:20 to
11 48:7 (same); *id.* at 54:21 to 56:14 (same); Ex. 104 (excerpt of Colello’s presentation to
12 BPR listing only non-seniority deficiencies); Hummel (depo.) at 158:6 to 160:19 (unable
13 to identify anything other than economic terms and insurance needing further
14 negotiation); Crimi (depo.) at 21:12 to 21:25 (same); Scherff at 154:21-155:2; Holmes at
15 75:9-14; .]

16 57. Further negotiations between the NAC and US Airways were delayed until
17 December 2012 by matters that are not at issue here. [SF at ¶¶ 84, 85.]

18 58. From December 10, 2012, through January 2, 2013, US Airways, USAPA and
19 APA negotiated a tentative agreement titled “Memorandum of Understanding Regarding
20 Contingent Collective Bargaining Agreement” (the “MOU”). [SF at ¶¶ 86, 87; Ex. 24.]

21 59. In the course of those negotiations, notwithstanding that the BPR did not
22 direct the NAC to address seniority integration, USAPA inserted seniority language into
23 the MOU that gave rise to this litigation. [Ex. 25, 58, 99; Holmes at 84:12 to 84:16.]

24 60. The MOU (as did MOU #1) provides that pilot seniority integration between
25 pilots of US Airways and American Airlines will be governed by a process consistent
26 with McCaskill-Bond. [SF at ¶ 92; Ex. 7, 24.]

27
28

1 61. In the negotiations for the MOU, US Airways, American and APA asked only
2 that seniority integration be “consistent” with McCaskill-Bond (which all knew did not
3 apply to mergers that occurred prior to 2008). [Holmes at 121:18 to 121:25.]

4 62. In the negotiations for the MOU, USAPA initially proposed this language for
5 what became ¶ 10(h): “This MOU is not intended to nor shall it constitute the ‘Single
6 Agreement’ referred to in Paragraph VI.A. of the September 23, 2005 Transition
7 Agreement.” [SF at ¶ 95.]

8 63. USAPA then proposed in place of that language: “US Airways agrees that
9 neither this Memorandum nor the JCBA [Joint Collective Bargaining Agreement] shall
10 provide a basis for changing the seniority lists currently in effect at US Airways other
11 than through the process set forth in this Paragraph 10.” [SF at ¶ 93.]

12 64. This became ¶ 10(h) in MOU II. [SF at ¶ 93.]

13 65. USAPA refused to provide evidence as to the reasons why it put ¶ 10.h into
14 the MOU. [Pauley (depo.) 80:12 to 80:18 (Szymanski objecting, “the reasons and the
15 discussion about why seem to me to be privileged”).]

16 66. The only person from USAPA that knew the reason for ¶ 10.h was Pat
17 Szymanski, who refused to testify under oath at deposition or during trial. [Trial
18 Transcript at 310:21-311;4; Exhibits 127-130].

19 67. Although the MOU contains substantial economic improvements for US
20 Airways pilots [SF at ¶ 98], it did not provide any additional benefit or concession from
21 the airline in exchange for ¶ 10(h). [Holmes at 67:4 to 67:19 (rates of pay and most all
22 aspects of CBA were fixed by negotiations between Allied Pilots Association (“APA”) and
23 US Airways well before the MOU was negotiated between USAPA and other parties);
24 68:21 to 68:25 (same); *id.* at 78:13 to 78:16 (US Airways agreed to \$40 million payment
25 in summer of 2002, months before the MOU negotiations began); *id.* at 94; *id.* at 139:3 to
26 139:3 (retrospective pay was negotiated “the last day,” January 4, 2013); Colello at
27 304:22 to 305:8 (“So was there any economic benefit for the parties to agree to include
28 10H? I would say the answer was no.”).]

1 68. There is no evidence that US Airways, American or APA wanted USAPA to
2 have authority to dictate East/West integration without regard to legitimate union
3 purpose. [Scherff at 176:5 to 176:10.]

4 69. There is no evidence that US Airways, American or APA wanted to exclude
5 the West Pilots from participating in the process of integrating the seniority of the
6 American and US Airways pilots. [Response to USAPA Summary of Evidence, Doc. 263
7 at ¶ 3.]

8 70. If the airline emerging from the US Airways/American merger and its pilots
9 cannot reach agreement on a JCBA, or if the pilots do not ratify a negotiated JCBA, the
10 MOU provides that the terms of the JCBA will be imposed through “final and binding”
11 arbitration and that the arbitrator’s award must be “consistent with the terms of the MTA”
12 and “specifically shall adhere to the economic terms of the MTA and shall not change the
13 MTA’s Scope terms (Paragraph 25 of this Memorandum) or the modifications generated
14 through the process set forth in Paragraph 24 of this Memorandum.” [Ex. 24 at ¶ 27.]

15 71. Accordingly, the material terms and conditions of employment for both the
16 East and West pilots following the merger are now known and fixed by the MOU.
17 [Holmes at 66:25 to 67:11; *id.* at 83:19 to 83:23; Colello at 269:12 to 269:21 (accepting
18 the characterization that MOU negotiations were “collective bargaining negotiations”);
19 *id.* at 272:6 to 272:7 (same); *id.* at 275:24 to 276:18 (the MOU in conjunction with the
20 2012 APA CBA forms the new CBA for the US Airways pilots).]

21 72. The MOU, in other words, sets new compensation levels, new working
22 conditions, new benefits and everything that a collective bargaining agreement provides.
23 [Ex. 24.]

24 **V. USAPA is using ¶ 10.h to evade its duty of fair representation.**

25 73. Mr. Holmes, a West Pilot member of the NAC, objected to the language in
26 ¶ 10.h and asked Mr. Szymanski, USAPA’s merger counsel, why it has to be in the
27 MOU. [Holmes at 88:13 to 88:20.]

28 74. Mr. Szymanski told Holmes only that “it just needs to be in the MOU.” [*Id.*].

1 75. Mr. Szymanski later told Mr. Holmes and others not to be concerned because
2 MOU #2 had a “completely neutral” effect on East/West seniority integration. [*Id.* at
3 95:12 to 95: 19.]

4 76. Mr. Holmes also voiced serious concerns about ¶ 10.h to Mr. Hummel. [*Id.* at
5 88:19 to 88:25.]

6 77. Despite Mr. Holmes repeatedly urging Mr. Hummel to explain ¶ 10.h to the
7 West Pilot BPR members, Mr. Hummel refused to do so. [*Id.* at 88:22 to 89:10.]

8 78. Indeed, after Mr. Hummel missed three opportunities to provide such an
9 explanation, he told Mr. Holmes in an emphatic manner: “We’re done. This is it. I do not
10 want to hear another word about it.” [*Id.* at 89:7 to 89:10.]

11 79. Mr. Holmes, therefore, was not given sufficient information to make an
12 informed decision whether to withhold his recommendation for the MOU based on
13 ¶ 10.h. Consequently, he reasonably believed that the MOU “amend[ed] certain aspects
14 of the Transition Agreement” but did not modify provisions that control “merging the
15 East and West pilots.” [*Id.* at 140:8 to 140:16.]

16 80. Mr. Holmes and Mr. Scherff attended all the meetings where Mr. Szymanski
17 explained the MOU to USAPA members (East and West) prior to MOU ratification. [*Id.*
18 at 95:20 to 95:21; Scherff at 164:7 to 164:10.]

19 81. At those meetings they both heard Mr. Szymanski tell a predominately East
20 Pilot audience that “the Nic. is dead.” [Holmes at 123:2 to 123:5; Scherff at 164:22 to
21 164:25.]

22 82. Contemporaneous personal notes made by Mr. Holmes confirm the “Nic is
23 dead” comment.[Ex. 131] as does a contemporaneous email [Ex. 123] written by East
24 Pilot Glynn, a strong date-of-hire advocate.

25 83. Neither Mr. Szymanski nor anyone else from USAPA told the West Pilots that
26 all they meant by labeling the MOU as neutral on seniority was that the words “Nicolau”
27 and “date-of-hire” do not appear. [Holmes at 140:24 to 142:6 (never heard the
28 explanation of “neutral” that was used by Bradford at his deposition).]

1 84. Mr. Szymanski nor anyone from USAPA told the West Pilots that USAPA
2 intended to use the MOU “to take away the requirement to use the Nicolau.” [*Id.*]

3 85. Neither Mr. Szymanski nor anyone else at USAPA informed West Pilots how
4 they should vote if they wanted to preserve their claims to implement the Nicolau Award.
5 [Colello at 311:16 to 312:9; Owens at 343:4 to 343:13 (NAC did not “put out any
6 materials whatsoever about the Nicolau Award being waived by the MOU); Ex. 78.]

7 86. Rather, USAPA repeatedly gave a grammatically obtuse instruction, drafted
8 by Mr. Szymanski, advising pilots to disregard their position on implementation of the
9 Nicolau Award when they voted: “MOU is completely neutral with respect to the Nicolau
10 Award. . . . So no East pilot should vote against the MOU because they fear that ratifying
11 the MOU will implement the Nicolau Award, and no West pilot should vote for the MOU
12 because they believe the MOU will implement the Nicolau Award.” [Ex. 78, 124, 125.]

13 87. In contrast USAPA used clear language to ensure that its members knew that
14 the MOU waived the change-of control provision in the East CBA. [Ex. 96.]

15 88. On the eve of the MOU ratification, West Pilot leaders encouraged “West
16 Pilots to consider voting to ratify the MOU in light of the fact that we do not believe it
17 harmful to our mission of protecting and enforcing the Nicolau award.” [Ex. 158.]

18 89. These West Pilot leaders stated that the MOU “moves us towards ripeness” of
19 the DFR claim because it “appear[s] to allow USAPA . . . to amend (abandon) our TA
20 which demands the Nic.” [Ex. 159.]

21 90. A substantial majority of the USAPA rank-and-file voted in favor of ratifying
22 the MOU. [SF at ¶ 115.]

23 91. Mr. Holmes voted to ratify because he hoped to get a new bargaining agent in
24 the American merger. [Holmes at 99:2 to 99:12]

25 92. Mr. Scherff voted to ratify to obtain the pay raises. [Scherff at 163:23 to
26 164:2]

27 93. Approximately 500-600 West Pilots were not eligible to vote on the
28 ratification issue because they did not belong to USAPA. [Scherff at 167:25 to 168:6].

1 94. USAPA's officers and committee chairmen all agree that the MOU operates to
2 allow the USAPA BPR to dictate that the seniority of US Airways pilots will be ordered
3 by date-of-hire and not by the Nicolau Award when they are integrated with the seniority
4 of the American pilots according to the procedures in the MOU. [Pauley (depo.) at 18:18
5 to 20:16 (East Pilot dominated merger committee that is overseen by the East Pilot
6 dominated BPR will decide East/West seniority integration); Ciabatonni (depo.) 50:7 to
7 50:15 (Sep. 17, 2013) (USAPA will submit date-of-hire list because it is required by the
8 union's Constitution); Crimi (depo.) at 94:18 to 94:24 (recent effort to eliminate date-of-
9 hire provision in union Constitution failed); Bradford (depo.) at 52:23 to 53:6 (USAPA
10 will present date-of-hire seniority order for its pilots), *id.* at 126:2 to 126:7 (it will be up
11 to the BPR to decide); *id.* at 162:2 to 162:19 (effect of ¶ 10(h) is to "take away the
12 requirement" to use the Nicolau Award by amending the Transition Agreement).]

13 95. Indeed, there are those at USAPA who read ¶ 10(h) as providing the "clean
14 slate" that this Court told USAPA in October 2012 it did not have. [Colello (depo.) at
15 85:24 to 86:9; Colello at 305:9 to 305:25 (admitting no one told this to West Pilots).]

16 96. USAPA intends to integrate the East and West seniority lists with the
17 American list in a three-list process. [Pauley at 406:23 to 408:1; Davison at 414:24 to
18 415.]

19 97. Indeed, Mr. Pauley, the Chairman of the Merger Committee testified "that the
20 end product that comes through [his] committee and the BPR that is then integrated with
21 the APA pilots [could not] possibl[y] . . . be the Nicolau list." [Pauley at 404:13 to
22 404:21.]

23 98. USAPA steadfastly refuses to consent to the West Pilots having an
24 independent voice in the process of integrating seniority with the American pilots.
25 [Bradford (depo.) at 93:19 to 94:16, 97:7 to 97:11; Crimi (depo.) at 100:14 to 100:19,
26 102:1 to 102:15; Pauley at 399:23 to 400:18; *id.* at 402:5 to 402:14.]

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A. MOU #2 Did Not Have Unprecedented Benefits

99. Most of the benefits of the MOU were actually provided by the 2012 CBA that APA had already negotiated with American Airlines. [DeVicq at 203:3 to 203:23.]

100. The incremental value of ratifying the MOU was more in the order of \$300 million because \$1.3 billion of the benefits would have flowed to the US Airways pilots by operation of the 2012 APA contract, even if the ratification failed. [Id.]

101. Since 2007, US Airways has had the “Kirby” proposal on the table. [SF at ¶ 63; Diorio at 7:19-8:3; 9:4-9].

102. Moreover, the 2007 Kirby proposal would have paid increased wages from 2007 to 2013 and, in 2014, would have paid about the same wages as under MOU #2. [Bradford (depo.) at 158:4 to 159:10 (conceding that “USAPA didn’t gain at the end much over the Kirby” and the pay rates of the Kirby and MOU #2 are “probably close”).]

103. By turning down a comparable contract offer made back in 2007 because it would have led to implementation of the Nicolau Award, USAPA caused its members to lose many hundreds of millions of dollars in income. [Id.]

104. The properly discounted value of the change-of-control provision was only \$120 million. [Devicq at 201:22 to 202:15.]

VI. Union Funding

105. USAPA presently assesses an additional 0.5% of pilots income for merger-related expenses and keeps separate accounting of those funds to ensure that they are expended only on such matters. [Streble (Depo.) at 11:13 to 11:20 (USAPA Secretary-Treasurer).]

106. USAPA presently has approximately \$7 million in its bank accounts. [Id. at 8:10 to 8:12.]

Dated this 13th day of November, 2013.

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CERTIFICATE OF SERVICE

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.

By: /s/ Andrew S. Jacob