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19 **IN THE UNITED STATES DISTRICT COURT**
20 **FOR THE DISTRICT OF ARIZONA**

21 Don Addington; John Bostic; Mark
22 Burman; Afshin Iranpour; Roger Velez;
23 Steve Wargocki; Michael J. Soha;
24 Rodney Albert Brackin; and George
25 Maliga, on behalf of themselves and all
26 similarly situated former America West
27 Pilots,

28 Plaintiffs,

vs.

US Airline Pilots Ass'n, an
unincorporated association,

Defendant.

US Airways, Inc.

Intervenor.

Case No. 2:13-cv-00471-ROS

**US AIRWAYS, INC.'S
CONTROVERTING STATEMENT OF
FACTS IN RESPONSE TO USAPA'S
ADDITIONAL STATEMENT OF
UNDISPUTED FACTS AND IN
SUPPORT OF US AIRWAYS, INC.'S
MOTION FOR SUMMARY
JUDGMENT - CLAIM REGARDING
MCCASKILL-BOND STATUTE**

1 In Paragraphs 20-34 of Defendant US Airline Pilots Association’s (“USAPA’s”)
2 Controverting Statement of Facts and Additional Statement of Undisputed Facts (Doc.
3 No. 269 at 9:12-11:10), USAPA sets forth 15 paragraphs of additional facts which it
4 contends are undisputed (the “Additional Undisputed Facts”).¹ Most of USAPA’s
5 Additional Undisputed Facts relate to USAPA’s representation of the West Pilots and,
6 accordingly, have been disputed by Plaintiffs. Consistent with its neutrality regarding the
7 merits of Plaintiffs’ duty of fair representation (“DFR”) claim against USAPA (*see, e.g.*,
8 Doc. No. 197 at 3:18-20), Intervenor US Airways, Inc. (“US Airways”) wishes to clarify
9 the record regarding the disputed nature of most of USAPA’s Additional Undisputed
10 Facts without taking a position on the proper resolution of the underlying factual disputes.
11 US Airways therefore responds to each paragraph of USAPA’s Additional Undisputed
12 Facts as follows:

13
14 **[USAPA’S] ADDITIONAL UNDISPUTED FACTS**

15 “20. USAPA has never proposed a strict date-of-hire seniority system. Pauley
16 Dep., 94:23-95:8 (Ex. “5” to Szymanski Decl.).”

17 **Response:** This statement is disputed by Plaintiffs. (*See* Plaintiffs’ Statement of
18 Facts, Responding to Summary Judgment Motions [“Plaintiffs’ MSJ SOF”] [Doc.
19 No. 268] at ¶¶ 25-26) (“USAPA proposed a date-of-hire seniority list to US Airways in

20 ¹ In Paragraphs 1-19 of USAPA’s Controverting Statement of Facts and Additional
21 Statement of Undisputed Facts, USAPA responds to the facts set forth in US Airways’
22 Separate Statement of Undisputed Facts (Doc. No. 215) and contests many of them, at
23 least in part. (*See* Doc. No. 269 at 1:7-9:11.) Although US Airways disagrees with
24 USAPA’s characterization of many of these facts as disputed, none of USAPA’s
25 responses undermine the core undisputed facts that form the basis for US Airways’
26 Motion For Summary Judgment (Doc. No. 212), *i.e.*, that USAPA will not propose that
27 the unmodified Nicolau Award be used to determine the relative ordering of US Airways
28 (East and West) pilots in the upcoming McCaskill-Bond seniority-integration process (*see*
Doc. No. 269 at ¶¶ 12-16), and that the West Pilots, if allowed to participate separately in
the McCaskill-Bond process, will advocate that the relative order of East and West Pilots
be determined exclusively according to the unmodified Nicolau Award seniority list. (*See*
id. at ¶ 17). Accordingly, even to the extent US Airways and USAPA disagree on some
of the facts in the summary-judgment record, there is no factual dispute in that record
which would preclude granting US Airways’ Motion.

1 September 2008,” and “USAPA’s September 2008 seniority proposal combines the
2 existing East and West lists by date-of-hire, without regard to whether a pilot was on
3 furlough at the time of the merger”) (*quoting from* the Stipulations and Undisputed Facts
4 set forth in the Proposed Final Pretrial Order for Bench Trial [“Stipulated Facts” or “SF”]
5 [Doc. No. 206-1] at ¶¶ 54 & 59).)

6 Moreover, this statement (even if found to be true by the Court) is immaterial to the
7 decision on US Airways’ motion for summary judgment, because it is undisputed that
8 whatever seniority system has been proposed by USAPA, it has not been the unmodified
9 Nicolau Award seniority list demanded by the West Pilots.

10 “21. The USAPA Constitution does not require a date-of hire seniority
11 integration. USAPA Constitution and Bylaws (US Airways Ex. “A” to Szymanski Decl.);
12 Hummel Dep., 24:15-20 (Ex. “4” to Szymanski Decl.); DiOrio Dep., 46:1-12 (Ex. “7” to
13 Szymanski Decl.); Hummel MSJ Decl. ¶13-15.”

14 **Response:** This statement is disputed by Plaintiffs. (*See* Plaintiffs’ Summary of
15 Evidence [“Plaintiffs’ SOE”] [Doc. No. 259] at 2 (“That [date-of-hire] principle is
16 ‘enshrined’ in USAPA’s constitution.”) (citing Bradford Dep. at 75:5-6, 82:12-13 [Doc.
17 No. 218-1]); *see also* Plaintiffs’ MSJ SOF ¶ 21 (“Indeed, USAPA was created with a
18 Constitution, which to this day does not allow it to use the Nicolau Award single seniority
19 list.”) (citing SF ¶ 50; Pauley Dep. at 49:14-49:22; DiOrio Dep. at 46:13-47:13; Pauley
20 Tr. at 395:1-395:12; Crimi Dep. at 19:2-16; Koontz Tr. at 47:9-15); Plaintiffs’ MSJ SOF
21 ¶ 29 (“The East Pilots that control USAPA’s BPR have stated they would not support an
22 amendment to USAPA’s Constitution to make it ‘neutral’”).

23 Moreover, this statement (even if found to be true by the Court) is immaterial to the
24 decision on US Airways’ motion for summary judgment, because it is undisputed that,
25 even if the USAPA Constitution does not require a date-of-hire seniority integration, it
26 does not permit a seniority integration based on the unmodified Nicolau Award seniority
27 list demanded by the West Pilots.

1 “22. The USAPA Constitution gives the organization, the BPR and the Merger
2 Committee wide latitude in proposing and accepting various methods of seniority
3 integration. USAPA Constitution and Bylaws (Ex. “8” to Szymanski Decl.); Pauley Dep.,
4 53:24-56:1, 92:6-15 (Ex. “5” to Szymanski Decl.); Hummel MSJ Decl. ¶13.”

5 **Response:** This statement is disputed by Plaintiffs. Plaintiffs have argued that any
6 decision to negotiate and implement a seniority agreement “would have to pass multiple
7 levels” within USAPA, levels that are each “controlled by the East Pilot majority,” and
8 that the “democratic process” provided by the USAPA Constitution has created a
9 “predetermined result.” These factual contentions by Plaintiffs controvert the assertion
10 that USAPA, the BPR, and the Merger Committee have “wide” latitude in negotiating a
11 seniority-integration agreement. (Plaintiffs’ SOE [Doc. No. 259] at 3-4; *see also*
12 Plaintiffs’ MSJ SOF at ¶ 28 (“USAPA’s governance is heavily weighted in favor of the
13 East Pilot majority such that there is no likelihood that USAPA will amend its date-of-hire
14 constitution provision or implement an unmodified Nicolau Award in the course of this
15 merger with American Airlines.”) (citing SF ¶¶ 50-59).)

16 Moreover, this statement (even if found to be true by the Court) is immaterial to the
17 decision on US Airways’ motion for summary judgment, because it is undisputed that,
18 even if the USAPA Constitution gives USAPA, the BPR and the Merger Committee
19 “wide latitude” in the negotiation of a seniority-integration agreement, the Constitution
20 does not permit a seniority integration based on the unmodified Nicolau Award seniority
21 list demanded by the West Pilots.

22 “23. USAPA has fully and fairly represented all US Airways pilots with respect
23 to MOU negotiations, and other issues. Hummel Dep., 158:24-159:25 (Ex. “4” to
24 Szymanski Decl.).”

25 **Response:** First, USAPA’s assertion regarding its full and fair representation of
26 the US Airways pilots is a legal conclusion rather than a factual statement. Second,
27 USAPA’s statement is disputed by Plaintiffs. For instance, Plaintiffs state that “USAPA
28 utterly failed to educate the West Pilots about the ramifications of the MOU.” (Plaintiffs’

1 Response to USAPA’s Summary of Evidence [“Plaintiffs’ SOE Response”] [Doc.
2 No. 263] at ¶ 19); *see also id.* at ¶¶ 20-21; Plaintiffs’ MSJ SOF [Doc. No. 268] at ¶¶ 59-
3 67, 73-98 (discussing addition of Paragraph 10(h) to the MOU); Plaintiffs’ SOE [Doc.
4 No. 259] at 10 (discussing MOU negotiations).) Moreover, Plaintiffs dispute the
5 relevance of the quality of USAPA’s representation of the West Pilots in contexts other
6 than seniority integration. (Plaintiffs’ SOE at 4 (“Evidence that USAPA has been fair to
7 West Pilots in other contexts and/or has provided somewhat proportionate representation
8 to West Pilots on the BPR and committees is beside the point.”).)

9 “24. The members of the USAPA Merger Committee fairly represent a
10 crosssection of US Airways pilots with respect to seniority, status, and domicile and are
11 highly knowledgeable and experienced. Hummel Dep., 20:5-15; 107:1-9 (Ex. “4” to
12 Szymanski Decl.); Pauley Dep., 18:18-19:1 (Ex. “5” to Szymanski Decl.); Hummel MSJ
13 Decl. ¶18.”

14 **Response:** This statement (even if found to be true by the Court) is immaterial to
15 the decision on US Airways’ motion for summary judgment, because it is undisputed that,
16 whatever their attributes and qualifications, the members of USAPA’s Merger Committee
17 will not advocate for use of the unmodified Nicolau Award seniority list demanded by the
18 West Pilots. Moreover, Plaintiffs dispute that the composition of USAPA’s Merger
19 Committee is “fair.” (*See* Plaintiffs’ Proposed Findings of Fact and Conclusions of Law
20 [“Plaintiffs’ FOF/COL”] [Doc. No. 218] at ¶ 54 (“Despite the fact that USAPA plainly
21 has a conflict of interest with the West Pilots in regard to implementing the Nicolau
22 Award, it steadfastly refuses to consent to the West Pilots having an independent voice in
23 the process of integrating seniority with the American pilots.”) (citing Bradford Dep.
24 at 93:19-94:16, 97:7-11; Crimi Dep. at 100:14-19, 102:1-15).)

25 “25. Approximately one-third of US Airways pilots are former America West
26 pilots who are assigned to the Phoenix Domicile. Hummel Dep., 107:1-9 (Ex. “4” to
27 Szymanski Decl.).”

28 **Response:** Not contested, but immaterial.

1 “26. One-third of the members of the Merger Committee are West Pilots based in
2 Phoenix, one of whom was the chairman of the ALPA America West merger committee
3 and proponent of the Nicolau award. Bradford Dep., 55:1-3, 23-24 (Ex. “3” to Szymanski
4 Decl.); Hummel Dep., 108:1-109:9 (Ex. “4” to Szymanski Decl.); Hummel MSJ Decl.
5 ¶ 6.”

6 **Response:** Not contested, but this statement (even if found to be true by the Court)
7 is immaterial to the decision on US Airways’ motion for summary judgment, because it is
8 undisputed that, whatever the attributes of a minority of its members, the USAPA Merger
9 Committee will not advocate for use of the unmodified Nicolau Award seniority list
10 demanded by the West Pilots.

11 “27. The members of the Merger Committee, including Ken Stravers and Rocky
12 Calveri, the two West Pilots, unanimously oppose allowing any group of US Airways
13 pilots to separately participate in the seniority integration proceeding. Hummel Dep.,
14 109:5-20 (Ex. “4” to Szymanski Decl.); Pauley Trial testimony, 382:18-23 (Ex. “9” to
15 Szymanski Decl.).”

16 **Response:** This statement is disputed by Plaintiffs. (*See* Plaintiffs’ Response to
17 USAPA’s MSJ at p. 5 n.2 (“[T]wo of the officers that filed grievances demanding
18 implementation of the Nicolau Award were the two West members of the Merger
19 Committee, James “Rocky” Calveri and Kenneth Stravers. Although USAPA did not call
20 either at trial, it insinuated they supported the efforts of the Merger Committee to come up
21 with undisclosed “solutions” to seniority, which did not include the Nicolau. These
22 grievances show that was untrue.”).)

23 Moreover, this statement (even if found to be true by the Court) is immaterial to the
24 decision on US Airways’ motion for summary judgment, because it is undisputed that,
25 whatever the views of Mr. Calveri and Mr. Stravers may be, USAPA and its officers will
26 not advocate for an unmodified Nicolau Award seniority list as demanded by the West
27 Pilots.

1 “28. The only disagreement between USAPA and the West Pilots is over the
2 unmodified Nicolau Award. Hummel MSJ Decl. ¶19.”

3 **Response:** Immaterial. The question of whether there are any disagreements
4 between USAPA and the West Pilots other than their disagreement over the unmodified
5 Nicolau Award seniority list has no bearing on the decision on US Airways’ motion for
6 summary judgment, because, even if there are no other disagreements, it is undisputed that
7 USAPA will not voluntarily advocate for or propose to use the unmodified Nicolau
8 Award seniority list demanded by the West Pilots.

9 “29. USAPA has made numerous attempts to discuss resolution of the seniority
10 issue with the West Pilots and their representatives. In each case, the West Pilots and
11 their representatives have insisted on the unmodified Nicolau list and have refused to
12 discuss any other resolution. Hummel Dep., 108:14-110:1 (Ex. “4” to Szymanski Decl.);
13 Hummel MSJ Decl. ¶16. See also Doc 206-1, Stipulations and Undisputed Facts, ¶ 52.”

14 **Response:** Immaterial, except to the extent Paragraph 29 addresses the West
15 Pilots’ insistence on use of an unmodified Nicolau Award seniority list and, as to that
16 point, not contested. (*See, generally*, Plaintiffs’ FOF/COL ¶ 25 (citing SF ¶¶ 51-52) (“For
17 more than five years, USAPA has refused to take any steps towards implementing the
18 Nicolau Award and the West Pilots have steadfastly maintained that USAPA has no
19 legitimate union purpose to use a date-of-hire seniority list to integrate pilot operations.”).

20 “30. The status quo at US Airways with respect to seniority is a two list system
21 with the entire pilot group represented by USAPA. Pauley Trial testimony, p 372 (Ex. “9”
22 to Szymanski Decl.).”

23 **Response:** USAPA’s assertion regarding the “status quo” is a legal conclusion
24 rather than a factual statement. Though it is not contested as a factual matter that USAPA
25 is currently the Railway Labor Act (“RLA”) collective bargaining representative for all
26 US Airways pilots, this fact is immaterial to the issue presented by US Airways’ Motion
27 For Summary Judgment — that the West Pilots are entitled to participate through separate
28 representation in the McCaskill-Bond seniority integration proceeding, which does not

1 involve collective bargaining under the RLA. (*See* Doc. No. 212 at 10:16-11:17). And,
2 though it is not contested that the East and West Pilots currently work under two separate
3 seniority lists, Plaintiffs contend that this fact is the direct result of the on-going dispute
4 between USAPA and the West Pilots. (*See, generally*, Plaintiffs’ FOF/COL ¶ 25 (citing
5 SF ¶¶ 51-52) (“For more than five years, USAPA has refused to take any steps towards
6 implementing the Nicolau Award and the West Pilots have steadfastly maintained that
7 USAPA has no legitimate union purpose to use a date-of-hire seniority list to integrate
8 pilot operations.”).

9 “31. The Merger Committee intends to present the two existing seniority lists
10 that comprise the status quo to APA along with additional information for each pilot as
11 the data on which any integration proposal will be based. Pauley trial testimony, p.
12 372:16-24 (Ex. “9” to Szymanski Decl.)”

13 **Response:** This statement (even if found to be true by the Court) is immaterial to
14 the decision on US Airways’ motion for summary judgment, because it is undisputed that,
15 whatever the USAPA Merger Committee’s current intentions as to the McCaskill-Bond
16 process, the Committee does not intend to present, and will not present, an unmodified
17 Nicolau Award seniority list as demanded by the West Pilots. Moreover, this statement is
18 disputed by Plaintiffs. (*See* Plaintiffs’ SOE Response at ¶ 27 (“Although USAPA
19 indicates in the Summary of Evidence that it intends to use Date of Hire for purposes of
20 integration with the American pilots, the Chairman of its Merger Committee would not
21 answer this question on the stand and stated that USAPA would go into McCaskill-Bond
22 process with two lists: East and West. [Pauley]. . . . [I]t is obvious to all that USAPA will
23 go into McCaskill-Bond process with its pilots organized by date of hire list(s).”).)

24 “32. Starting with the existing two seniority lists gives the Merger Committee
25 and USAPA more options concerning the proposals that will best serve the interests of all
26 US Airways pilots in the seniority integration proceeding with APA. Pauley Trial
27 testimony, pp. 406:23-407 (Ex. “9” to Szymanski Decl.)”

28

1 **Response:** This statement is disputed by Plaintiffs. Plaintiffs’ SOE Response
2 states: “Other than saying that two lists offer ‘flexibility’ to USAPA, no one from
3 USAPA can articulate how this is the case or offered to share with the Court (or West
4 Pilots) any of the ‘various scenarios’ the Merger Committee is currently contemplating.”
5 (Plaintiffs’ SOE Response at ¶ 39.)

6 “33. The Merger Committee is committed to representing the entire US Airways
7 pilot group effectively and fairly. Pauley Trial testimony, p. 383:15-23 (Ex. “9” to
8 Szymanski Decl.); Hummel MSJ Decl. ¶¶18-19.”

9 **Response:** This statement is disputed by Plaintiffs. (*See* Plaintiffs’ FOF/COL
10 [Doc. No. 218] at ¶ 54 (“Despite the fact that USAPA plainly has a conflict of interest
11 with the West Pilots in regard to implementing the Nicolau Award, it steadfastly refuses
12 to consent to the West Pilots having an independent voice in the process of integrating
13 seniority with the American pilots.”) (citing Bradford Dep. at 93:19-94:16, 97:7-11; Crimi
14 Dep. at 100:14-19, 102:1-15); *see also* Plaintiffs’ MSJ SOF at ¶ 28 (“USAPA’s
15 governance is heavily weighted in favor of the East Pilot majority such that there is no
16 likelihood that USAPA will amend its date-of-hire constitution provision or implement an
17 unmodified Nicolau Award in the course of this merger with American Airlines.”) (citing
18 SF ¶¶ 50-59).)

19 Moreover, this fact (even if found to be true by the Court) is immaterial to the
20 decision on US Airways’ motion for summary judgment, because it is undisputed that,
21 whatever commitments are felt by the USAPA Merger Committee, the Committee does
22 not intend to and will not advocate for an unmodified Nicolau Award seniority list as
23 demanded by the West Pilots.

24 “34. USAPA and its officers understand the obligations imposed by the duty of
25 fair representation and are committed to representing the entire pilot group effectively and
26 fairly. Hummel MSJ Decl., ¶¶ 18-19.”

27 **Response:** First, this statement (even if found to be true by the Court) is
28 immaterial to the decision on US Airways’ motion for summary judgment, because it is

1 undisputed that, whatever the understandings and commitments of USAPA and its officers
2 may be, USAPA and its officers will not advocate for an unmodified Nicolau Award
3 seniority list as demanded by the West Pilots. Second, Plaintiffs dispute that USAPA and
4 its officers are committed to representing the entire pilot group effectively and fairly. For
5 example, Plaintiffs have stated: “When USAPA officers campaign, they promise
6 unconditional support for date-of-hire and suppression of the Nicolau Award.” (Plaintiffs’
7 SOE [Doc. No. 259] at 4; *see also id.* at 2 (“East Pilot BPR members regularly meet with
8 USAPA’s merger counsel, Mr. Szymanski to discuss seniority issues out of the presence
9 of West Pilot members. USAPA provides no corresponding legal advice to the West
10 Pilots. And perhaps most importantly, its merger counsel, Mr. Szymanski, has long been
11 vigorously defending USAPA’s asserted right to use whatever seniority list it wants to
12 integrate East and West Pilots and is leading the defense in this action.”).

13 ***

14 Respectfully submitted,

15 Dated: November 18, 2013.

For O’Melveny & Myers LLP

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