

1 Andrew S. Jacob (#22516)
2 ajacob@polsinelli.com
3 Jennifer Axel (#023883)
4 jaxel@polsinelli.com
5 **POLSINELLI P.C.**
6 CityScape
7 One East Washington St., Suite 1200
8 Phoenix, AZ 85004
9 Phone: (602) 650-2000
10 Fax: (602) 264-7033
11 *Attorneys for Plaintiffs*

Marty Harper (#003416)
mharper@polsinelli.com
Marty Harper, PLLC
One East Washington St., Suite 1200
Phoenix, AZ 85004
Phone: (602) 650-2000
Fax: (602) 264-7033
Attorneys for Plaintiffs

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

11 Don Addington, et al.,
12
13 Plaintiffs,
14 vs.
15 US Airline Pilots Ass’n, et al.,
16 Defendants.

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

**PLAINTIFFS’ RESPONSE TO USAPA’S
MOTION TO STRIKE NEW
ARGUMENTS RAISED IN THE REPLY
MEMORANDUM OF US AIRWAYS
AND PLAINTIFFS’ RESPONSE TO US
AIRWAYS’ MOTION FOR SUMMARY
JUDGMENT**

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18 Once again, USAPA has violated the Court’s order on briefing and submitted a
19 supplemental brief in support of its position that Plaintiffs’ are not entitled to party status
20 in the McCaskill-Bond process of integrating the seniority of the pilots from US Airways
21 and American Airlines (hereinafter, the “McCaskill-Bond process”). Ironically, USAPA’s
22 procedural mechanism for attempting to make new arguments was a motion to strike
23 because it claims that Plaintiffs and US Airways have made new arguments on their
24 respective briefing on the McCaskill-Bond issue, when in fact it is USAPA that asserts a
25 new argument in its Motion to Strike. To date, USAPA’s sole argument against the West
26 Pilots having party status under McCaskill-Bond was that the MOU provides a seniority
27 integration process consistent with McCaskill-Bond, which USAPA has argued since
28 May allowed only the “collective bargaining agents” to participate as parties. For the

1 first time in its Motion to Strike, USAPA argues that McCaskill-Bond does not apply to
2 the East/West dispute because the East/West merger took place prior to the enactment of
3 McCaskill-Bond, therefore divesting the Court of jurisdiction. USAPA never made this
4 argument prior to its Motion to Strike for a simple reason: it would have completely
5 undermined its defense to Plaintiffs' duty of fair representation claim.

6 Throughout the course of this action, one of USAPA's justifications for
7 abandoning the obligation to use the Nicolau Award for East/West integration was that it
8 agreed to a "new process," which USAPA claims is fair because West Pilots have a
9 minority representation on the Merger Committee, to integrate East/West through the
10 McCaskill-Bond process:

- 11 • "The agreement and intention of the parties did not change between the so-
12 called MOU I and the final MOU. Both replaced the TA seniority
13 provisions with a seniority integration process based on McCaskill-Bond.
14 Both terminated the TA. Neither provided for the implementation of any
15 integrated seniority list outside that process." *See* USAPA Response to
16 Plaintiffs' Summary of Evidence, Doc. 264 at pg. 6.
- 17 • "Paragraph 10.h is merely a clarification based on the demand made by US
18 Airways and other parties that seniority be addressed only through a
19 process based on McCaskill-Bond." *Id.*
- 20 • "from the very beginning US Airways, and then later the other parties to the
21 MOU, took the position that the only way to resolve the seniority issues
22 would be to push them into a McCaskill-Bond process." Trial Transcript,
23 Day 1 at 29:16-20 (Pat Szymanski, Opening Argument)
- 24 • "the dispute concerning seniority (between East and West) would only be
25 treated through the McCaskill-Bond process that was associated into the
26 Memorandum of Understanding;" Trial Transcript, Day 1 at 234:24-235:2
(Pat Szymanski, Oral Argument on Directed Verdict Motion)
- 27 • "that's what we signed on to, as I understand it, in the MOU, through this
28 [McCaskill-Bond] process is to finally resolve this dispute that has been
going on a very long time." Trial Transcript, Day 2 at 393:1-3 (Jess
Pauley, USAPA Merger Committee Chairman).
- "we've signed on to a new process with the MOU where we can go to
McCaskill-Bond and through that process, resolve this seniority integration

1 dispute” Trial Transcript, Day 2 at 396:2-4 (Jess Pauley, USAPA Merger
2 Committee Chairman).

- 3 • “And through that process [McCaskill-Bond] we’ll integrate the three lists
4 [East, West and American] together.” Trial Transcript, Day 2 at 393:15-16
5 (Jess Pauley, USAPA Merger Committee Chairman).
- 6 • “The description that was given [at roadshows on the MOU] that we would
7 have two lists and we would be taking two lists. We would have first
8 exchanged data with the APA. And what exists today is two separate
9 seniority lists. And then we would enter into the seniority integration
10 through the McCaskill-Bond process and that would be the – the result
11 would be a single list that represents the new American Airlines pilots.”
12 Trial Transcript, Day 2 at 402:8-14 (Jess Pauley, USAPA Merger
13 Committee Chairman).

14 It is now apparent that this argument was another misrepresentation to the Court
15 and the West Pilots by USAPA, as it now claims that the East/West dispute cannot be part
16 of the McCaskill-Bond process. Motion to Strike at pg. 1 (“That there is no jurisdiction
17 under the McCaskill-Bond Amendment to address the belatedly asserted issue of East and
18 West integration is indisputable.”) In other words, all of the canned testimony that the
19 Court heard regarding USAPA exchanging one process for integration (the Nicolau
20 arbitration conducted pursuant to the Transition Agreement) for another (the McCaskill-
21 Bond process conducted pursuant to the MOU) was a lie.

22 What Plaintiffs’ have been telling the Court has been confirmed: USAPA has
23 abandoned the obligation in the TA to use the Nicolau Award for integrating East/West
24 seniority. It has also been confirmed that USAPA further misled the West Pilots about the
25 MOU. Mr. Pauley, USAPA’s Merger Chairman, told the Court that USAPA told the West
26 Pilots during the roadshows that East/West seniority would be decided by the McCaskill-
27 Bond process. USAPA now tells the Court that is not the case. USAPA’s continued
28 failure to maintain a consistent explanation for its actions with respect to East/West
seniority underscore the need for the Court to order the remedy requested by Plaintiffs:
that USAPA use the Nicolau Award for integrating US Airways pilots with American
Airlines pilots and that the West Pilots be afforded the right to party status during the

1 McCaskill-Bond process.¹ If the Court agrees that Plaintiffs are entitled to party status
2 and representation of their own choosing under McCaskill-Bond then part of that remedy
3 needs to include the same benefits that East Pilots will have: immunity from personal
4 attack and funding proportionate to their members. Contrary to USAPA's assertions,
5 these are not new "arguments"; they are a necessary part of a proposed remedy.

6 It is now apparent that USAPA has no intention of fairly integrating East and West.
7 Instead, it will use the East Pilots' majority power to impose date-of-hire on the West
8 Pilots solely because that is what the East Pilot majority wants. It is also apparent that
9 absent intervention from the Court, USAPA will tell any future McCaskill-Bond panel the
10 same thing it tells the Court in its Motion to Strike: there is no jurisdiction for the panel to
11 resolve the East/West dispute. For the reasons previously briefed to the Court, this is an
12 unequivocal breach of the duty of fair representation and the Court has substantial
13 discretion to remedy this violation, including ordering USAPA to use the Nicolau Award,
14 ordering West Pilots have party status under McCaskill-Bond with representation of their
15 own choosing and ordering that USAPA act like any fair union would, by providing
16 funding and immunity to West Pilots involved in the McCaskill-Bond process.

17 RESPECTFULLY SUBMITTED this 25th day of November, 2013.
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24 ¹ Plaintiffs also request that to the extent that Plaintiffs' claim has changed because of
25 USAPA's constantly changing positions and discovery in this matter, that the Court
26 conform its pleadings to the evidence presented pursuant to Fed.R.Civ. 15(b); *see also*
27 *Catholic Social Services, Inc. v. Ashcroft*, 268 F.Supp.2d 1172 (allowing amendment to
28 complaint to conform to evidence presented at trial by implicit consent or in the interest
of justice). Plaintiffs' ability to state their claim against USAPA has been made nearly
impossible, as evidenced by USAPA's latest pleading, because USAPA cannot maintain
a consistent story and indeed goes so far as to change its position after trial in this matter.

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POLSINELLI, PC

By: /s/ Jennifer J. Axel
Andrew S. Jacob
Jennifer Axel
1 E. Washington Street, Suite 1200
Phoenix, AZ 85004
Attorneys for Plaintiffs

MARTY HARPER, PLLC

By: /s/ Marty Harper
Marty Harper
One E. Washington St., Ste. 1200
Phoenix, AZ 85004
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2013, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing on all parties to this case who are registered participants of the CM/ECF System.

By: /s/ Erika Cano