Marty Harper (003416)
marty.harper@asualumnilawgroup.org
Kelly J. Flood (019772)
kelly.flood@asualumnilawgroup.org
ASU ALUMNI LAW GROUP
Two North Central, Ste. 1600
Phoenix, AZ 85004
Telephone: 602-251-3620
Fax: 602-251-8055

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Don Addington; *et al*, *Plaintiffs*, vs. US Airline Pilots Ass'n; and US Airways, Inc., *Defendants.*	CASE NO. 2:13-CV-00471-ROS **REPLY TO US AIRWAYS IN SUPPORT OF MOTION FOR RULE 25(C) JOINDER OF ALLIED PILOTS ASSOCIATION (APA) AND FOR ISSUANCE OF PERMANENT INJUNCTION**

US Airways' Response, Doc. 326, is a collateral attack on the Ninth Circuit's opinion, and a stunning reversal of the positions it took 76 days before its Response here, when it argued *against* the appointment and participation of a new East Pilots Merger Committee in the SLI proceedings. Additionally, US Airways has asked this Court again to make a business decision for it, a request that this Court properly declined several years ago. This Court should disregard US Airways' arguments, and decline again to make US Airways' business decision for it.

What a Difference 76 Days Make.

On June 30, 2015, US Airways (1) opposed the appointment and participation of a New East Merger Committee in the SLI Proceedings; (2) argued that if one were appointed it would be bound by the Ninth Circuit Mandate[1]; and (3) stated that it disfavored any attempt by the East Pilots to fashion a work-around that would allow it to ignore the Ninth Circuit's mandate. (See Ex. A: Excerpt of June 30, 2015 Transcript of Pre-Hearing Meeting before the SLI Board, at pages 37 – 40.) On June 30, therefore, US Airways stated that it was willing to live with whatever might result from precluding East Pilots from any further participation the SLI proceedings. Today, US Airways frets about the potential delay in implementing the new SLI list when it issues, worrying that if the new East Merger Committee is enjoined from ignoring the Night Circuit's mandate it will throw yet another tantrum and walk out of the SLI.[2]

In arguing that the West Pilots would cause delay by properly seeking enforcement of the Ninth Circuit's mandate through an appropriately-worded injunction, US Airways fails to acknowledge that delay caused by future litigation brought *by the East Pilots* is already inevitable. The East Pilots have already evinced their intent to later appeal the

---

[1] US Airways misleads the Court regarding what the SLI Board held about the effect of a court decision on the Board. [Doc. 323, page 2, lines 12-15.] The Board actually declined to predict what injunction might issue and, instead, indicated that it understood the new East Committee would likely be bound by whatever a court of competent jurisdiction ultimately decides: "The precise question whether, or to what extent, any injunction ultimately issued by the District Court on remand will limit advocacy in this proceeding by a newly formed East Merger Committee is a legal question for the court itself to resolve. The response to that question will depend upon the precise wording of the injunction, when issued… [We] decline to answer Question No. 2 to the extent that it seeks to have us opine on the applicability of a judicial restriction on advocacy by any newly appointed East Merger Committee." (See Ex. C, excerpts of July 5 SLI Board decision, at pages 17-19.)

[2] Ironically, if the West Pilots had withdrawn from the SLI process US Airways would have happily proceeded without them, without seeking a court's permission first. (See Ex. A at page 37, lines 2 – 9.)

Preliminary Arbitration Board ("PAB") determination that gave the West Pilots a seat at the table in the SLI proceedings. (See Ex. B, Excerpt of USAPA's April 3, 2015, Supplemental Brief filed with the Ninth Circuit, page 5. "[T]he [PAB] order is still open to challenge and the [McCaskill-Bond] process has yet to run its course.") Delay will be once again caused by the East Pilots who – starting in 2008 when they threw a tantrum and formed USAPA to abrogate the final and binding arbitration that resulted in the Nicolau Award – ultimately prevented the integration of East and West after America West and US Airways merged. If the East Pilots walk again, this will be consistent with their MO of refusing to participate in or accept of the results of final and binding rulings when those rulings don't go their way.

The More Things Change, the More They Stay the Same.

In reality, if delay in implementing the SLI list occurs it will be fault of US Airways if it fails, once again, to implement an integrated seniority list that results from SLI proceedings based upon agreements (to which it was a party) that facilitated a merger among the airlines and their pilots (the 2005 Transition Agreement, *and* the 2013 MOU) in the first place. The MOU states "[t]he integrated seniority list resulting from the McCaskill-Bond process shall be final and binding on APA and USAPA (and/or the certified bargaining representative of the combined pilot group), the company(ies) and its(their) successors (if any), and all of the plots of American/New American Airlines and US Airways." (See MOU at para. 10(c).) It does not say that the integrated seniority list will not be binding until all legal challenges have run their course.

US Airways, rather than make that business decision on its own because of a potential threat by the East Pilots, has asked this Court once again to make a decision for it and force it to comply with its own contract. As Yogi Berra would say, it's déjà vu all over again. This Court previously declined to make US Airways' business decision for it when this Court declined to issue a declaratory judgment about what course of action US

Airways should make in light of competing threats by the pilot groups in *US Airways, Inc. v. Addington, et al*., 2:10-CV-01570-ROS ("Addington II"). As this Court noted years ago, that is a business decision for the carrier to make, rather an issue to bring to this Court. US Airways goes to great lengths to remind the Court that neither it, nor APA, were party to USAPA's breach and that they should therefore be unaffected by its wrongdoing. In so doing, US Airways ignores that USAPA did not insert the improper paragraph 10(h) into the MOU without the agreement of US Airways, APA and American's agreement to the offending provision, on which USAPA capitalized in its breach of the duty of fair representation to the West Pilots. Having agreed to the improper language that codified USAPA's breach, US Airways (and APA) would nevertheless like to remain unaffected by the harm that resulted therefrom, leaving the West Pilots to continue to fight for their rightful seniority positions on multiple fronts. Surely, this is not equitable.

If and when the SLI Board issues its seniority list, it will be up to US Airways to decide whether to implement the SLI list while litigation is threatened by the East Pilots, or to fall back and wait it out. The West Pilots will have nothing to do with the decision US Airways ultimately makes in that regard.

The Ninth Circuit's Mandate Must Be Implemented.

The Ninth Circuit held that USAPA's abandonment of the Nicolau Award violated its duty of fair representation. It directed this Court to enter an injunction that would require USAPA to advocate for the Nicolau Award if it were to participate in the McCaskill-Bond proceedings. Yet, in its Response here, US Airways argues that "[e]ach pilot merger committee should be free to present any position it wishes in the SLI Arbitration." Doc. 326 at 4:3 to 326:4. That is directly contrary to the mandate which plainly constrains what can be advocated.

US Airways might not like it, but the law of the case here is that USAPA *cannot* "present any position it wishes in the SLI Arbitration." If USAPA is to participate in those proceedings, it must advocate for the Nicolau Award. There should be no question then that the East Pilots cannot participate in the SLI Arbitration (the McCaskill-bond proceedings) unless they advocate for the Nicolau Award.

Contrary to US Airways' argument, Plaintiffs have not proposed an injunction that limits the "authority" of the Arbitration Board. Doc. 326 at 3:24 to 326:26. Plaintiffs' proposed injunction only constrains the merger committee representing the East Pilots, which is precisely what was envisioned by the Ninth Circuit. The Court, therefore, should join APA pursuant to Rule 25(c) for the reasons stated in Plaintiffs' Reply to APA, which is being filed concurrently. It should enter an injunction as proposed, using the language from Rule 65(d)(2).

The only open question is whether the East pilots, by reforming their merger committee as an Allied Pilots Association ("APA") committee, can evade the intent of the Ninth Circuit's opinion. Rule 65(d)(2), the common law upon which it is based, and common sense tell us that they cannot.[3] Whether APA is joined under Rule 25(c) or not, when it created an East Merger Committee and engaged the experts and attorneys used by the USAPA merger committee, it acted in active concert with USAPA and, thus, is bound by the injunction. Plaintiffs merely ask that the injunction be stated in language that makes this point crystal clear.

In the end, it is up to this Court to decide the scope of the injunction. Regular practice is to include the Rule 65(d)(2) language. The West Pilots respectfully suggest that there is no good reason to deviate from the norm. Indeed, there are particularly good

[3] All references to "Rules" are to the Federal Rules of Civil Procedure.

reasons to use the precise language of the rule given the East Pilots' long history of feeling free, and finding ways, to ignore court and arbitration rulings. It is time to shut the door on any opportunity for the East Pilots to disrespect and disregard yet another court order.

Respectfully submitted this 16th day of September, 2015.

/s/ Kelly J. Flood _____
Marty Harper
Kelly J. Flood
ASU Alumni Law Group
Two North Central, Suite 600
Phoenix, AZ 85004
(602) 251-3621
(602) 251-3622
marty.harper@asualumnilawgroup.org
kelly.flood@asualumnilawgroup.org

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2015, I electronically filed the foregoing with the Clerk of the Court and electronically served a copy of the same upon all parties by using the CM/ECF system. In addition, I transmitted the foregoing via email and US Mail Service to the following:

Susan Martin
Jennifer Kroll
MARTIN & BONNETT, PLLC
1850 N. Central Ave., Ste. 2010
Phoenix, AZ 85004
smartin@martinbonnett.com
jkroll@martinbonnett.com
Attorneys for US Airline Pilots Association

Patrick J. Szymanski
PATRICK J. SZYMANSKI, PLLC
1900 L Street, NW, Ste. 900
Washington, DC 20036
szymanskip@msn.com
Attorneys for US Airline Pilots Association

Brian J. O'Dwyer
Gary Silverman
Joy K. Mele
O'DWYER & BERNSTIEN, LLP
52 Duane Street, 5th Floor
New York, NY 10007
bodwyer@odblaw.com
gsilverman@odblaw.com
jmele@odblaw.com
Attorneys for US Airline Pilots Association

Roland P. Wilder, Jr.
BAPTISTE & WILDER, PC
1150 Connecticut Avenue, NW, Ste. 315
Washington, DC 20036
rpwilderjr@bapwild.com
Attorney for US Airline Pilots Association

Karen Gillen
US AIRWAYS INC.
111 West Rio Salado Parkway
Tempe, AZ 85281
karen.gillen@usairways.com
Attorneys for Intervenor US Airways, Inc.

Robert A. Siegel
O'MELVENY & MYERS LLP
400 South Hope Street, Ste. 1500
Los Angeles, CA 90071-2899
rsiegel@omm.com
Attorneys for Intervenor US Airways, Inc.

Edgar N. James
JAMES & HOFFMAN, PC
1130 Connecticut Avenue, NW Suite 950
Washington, DC 20036-3904
www.jamhoff.com
Attorneys for Allied Pilots Association

Stanley Lubin
Lubin & Enoch, P.C.
349 North 4th Avenue
Phoenix, Arizona 85003-1505
stan@lubinandenoch.com
Local counsel for Allied Pilots Association

By: s/*Kelly J. Flood*