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14 **IN THE UNITED STATES DISTRICT COURT**
 15 **FOR THE DISTRICT OF ARIZONA**

16 Don ADDINGTON; *et al.*,
 17 *Plaintiffs,*
 18 vs.
 19 US AIRLINE PILOTS ASS’N, *et al.*,
 20 *Defendants.*

CASE NO. 2:13-CV-00471-PGR

**Plaintiffs’ Motion for Entry of Default
 Judgment by the Court Pursuant to
 Rule 55(b)(2)**

21 Plaintiffs file this *Motion for Entry of Default Judgment by the Court Pursuant to*
 22 *Rule 55(b)(2)*. Plaintiffs demonstrate that they are entitled to such relief and that the
 23 Court should exercise its discretion to grant such relief in the *Memorandum of Points and*
 24 *Authorities* that follows. Plaintiffs support this motion with a contemporaneously filed
 25 declaration of counsel.

26 Dated this 8th day of April, 2013.

POLSINELLI SHUGHART, PC

/s/ Andrew S. Jacob

By _____

Marty Harper
 Andrew S. Jacob
 Jennifer Axel
Attorneys for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

I. Overview

The factual and procedural background of this dispute is set out in Plaintiffs’ *Opposition to USAPA’s Motion for Extension of Time (Doc. 9)* and is incorporated here by reference. [Doc. 19.]

II. Legal Argument

A. Plaintiffs are entitled to the entry of default judgment.

On March 6, 2013, Plaintiffs filed their complaint against Defendants US Airline Pilots Association (USAPA) and US Airways, Inc. [Doc. 1.] In their complaint, Plaintiffs seek “[a]n injunction requiring Defendants to conduct seniority integration according to the MOU procedures but using the seniority order in the Nicolau Award list to order the US Airways pilots.” [Id. at ¶ 123.] In their motion for a preliminary injunction, Plaintiffs asked the Court to enjoin USAPA “from integrating pilot seniority without using the Nicolau Award list to define the relative seniority of the US Airways pilots.” [Doc. 13 at 18:23 to 18:25.] This seniority integration will occur after the New York bankruptcy court approves the plan of reorganization of American Airlines, which will involve its merger with US Airways.

USAPA was properly served with the Complaint on March 14, 2013. [Doc. 18-1.] USAPA, therefore, had until April 4, 2013, to file a responsive pleading. Fed. R. Civ. P. 12(a)(1)(A)(i). On March 22, 2013, USAPA filed a motion to extend its time to file a responsive pleading. [Doc. 9.] But it did not take any steps to obtain an expedited ruling on that motion. On March 27, 2013, Plaintiffs filed their opposition to such an extension. [Doc. 19.]

As of the date of this motion, USAPA has not filed an Answer or a motion allowed by Rule 12. USAPA, therefore, has not served a “responsive pleading” or a motion that automatically extends the time to do so. Fed. R. Civ. P. 12(a).¹ The contemporaneously

¹ US Airways filed a Rule 12 motion on April 4, 2013. [Doc. 28.] Plaintiffs do not seek default judgment against US Airways.

1 filed declaration of counsel establishes the procedural elements required by Fed. R. Civ.
2 P. 55(b)(2). Plaintiffs, therefore, are entitled to have the Court enter default judgment
3 against USAPA as “demanded in the pleadings.” Fed. R. Civ. P. 54(c) and 55(b)(2).

4 Because there is an outstanding claim for the same relief against US Airways and a
5 claim for attorney’s fees against USAPA, the Court should make Rule 54(b) findings in
6 its default judgment against USAPA. (See proposed Order.)

7 **B. The Court should exercise its discretion to enter a default injunction**
8 **as sought in the Complaint.**

9 The district court’s decision whether to grant or deny a default judgment is
10 discretionary in nature. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). The court
11 may consider a variety of factors in the exercise of such discretion, including:

12 (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff’s
13 substantive claim, (3) the sufficiency of the complaint, (4) the sum of money
14 at stake in the action, (5) the possibility of a dispute concerning material facts,
15 (6) whether the default was due to excusable neglect, and (7) the strong policy
16 underlying the Federal Rules of Civil Procedure favoring decisions on the
17 merits.

18 *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

19 “In applying this discretionary standard, default judgments are more often granted
20 than denied.” *PepsiCo v. Triunfo-Mex, Inc.*, 189 F.R.D. 431, 432 (C.D. Cal. 1999).
21 Default judgments are granted where the pleadings set out a sufficient basis for such
22 relief and the opposing party (as here) has defaulted. *AFL Telecommunications LLC v.*
23 *Fiberoptic Hardware, LLC*, No. 11-cv-01081, 2012 WL 1956629, at *2 (D. Ariz. May
24 31, 2012) (Lanham Act claims); *Fitness Together Franchise Corp. v. Higher Level*
25 *Health and Fitness, Inc.*, 09-cv-0890, 2009 WL 2753026, at *2 (D. Ariz. Aug. 27, 2009)
26 (non-compete clause).

27 The *Eitel* factors strongly favor granting default judgment here.
28

1 **1. Possibility of Prejudice to the Plaintiff**

2 USAPA sought to enjoin this Arizona proceeding in the New York bankruptcy
3 court handling the Chapter 11 proceedings of the American Airlines bankruptcy. At a
4 recent hearing on that matter, Debtor American Airlines stated that its interest was that
5 this “matter is resolved on the merits in a timely way so that the parties can proceed
6 without any hindrance with the seniority integration process that would need to take place
7 in order to effectuate the merger that we are all hoping to effectuate.” *Id.* at 13:18 to
8 13:22.

9 It explained further:

10 We’re looking at it from afar hoping that the parties to the Arizona litigation
11 can figure out some sort of way to get an expedited result that everybody can
12 live with so that when we get to the point where there's a seniority integration
13 process as contemplated by the memorandum of understanding that the parties
14 have entered into, we can do that without any hindrance.

14 *Id.*, at 14:10 to 14:16.

15 The New York bankruptcy court agreed and observed, from the viewpoint of
16 avoiding interference with the American – US Airways merger, “that it’s in the parties’
17 best interest to get these matters resolved promptly” in the Arizona District Court. *Id.* at
18 17:12 to 17:13.

19 USAPA, however, does not want a prompt resolution of this dispute. It wants to
20 delay until the merger between US Airways and American Airlines goes far enough that
21 it can remove this litigation to the New York bankruptcy court and argue that the relief
22 sought here would improperly interfere with the merger. It is absolutely clear, therefore,
23 that USAPA is using delay here as a tool to prejudice Plaintiffs. That must not be
24 allowed.

25 **2. Merits of Plaintiffs’ Substantive Claim**

26 The sound merits of Plaintiffs’ substantive claim are well set out in their motion for
27 a preliminary injunction and are incorporate here by reference. [Doc. 13.]
28

1 **3. Sufficiency of the Complaint**

2 The sufficiency of the complaint is also established by Plaintiffs’ motion for
3 preliminary injunction.

4 **4. Sum of Money at Stake in the Action**

5 No sum of money is directly at stake. Plaintiffs will file a motion for attorney’s fees
6 after final judgment is entered, pursuant to Fed R, Civ. P. 54(d)(2).

7 **5. Possibility of a Dispute Concerning Material Facts**

8 No material facts are in genuine dispute. This was established in two prior actions,
9 as explained in Plaintiffs’ motion for preliminary injunction. [Doc. 13.]

10 **6. Whether the Default Was Due to Excusable Neglect**

11 Where, as here, default is intentional—where delay is used as a litigation strategy—
12 there is no excusable neglect. It is also inexcusable where the defaulting party fails to
13 take reasonable steps to preserve its position. Rather than serve a responsive pleading,
14 USAPA moved for additional time to answer. [Doc. 9.] It also filed a meritless motion to
15 transfer this case to the New York bankruptcy court. [Doc. 26.] USAPA could have asked
16 for an expedited ruling on its motion for additional time, but it chose not to do so.
17 USAPA’s litigation plan is clear: it wants to delay as long a possible a ruling on its
18 motion for additional time to answer as part of its overall strategy to delay this Arizona
19 litigation as long as possible. There is no basis, therefore, to excuse USAPA’s failure to
20 serve an answer.

21 **7. Strong Policy Favoring Decisions on the Merits**

22 Ordinarily, the policy favoring a decision on the merits weighs against entering a
23 default judgment. But it hardly does so here due to the unusual posture of this matter.
24 Unlike most matters, there already is a decision on the merits. Were it not for the Ninth
25 Circuits concerns on ripeness (not merits), *Addington v. US Airline Pilots Ass’n*, 606 F.3d
26 1174, 1184 (9th Cir. 2010), that decision would stand and there would be an injunction
27 on the merits, *Addington v. US Airline Pilots Ass’n*, No. 2:08-CV-1633W, 2009 WL
28 2169164, at *28 (D. Ariz. Jul. 17, 2009). Four years later, Judge Silver found no basis to

1 question the merits underlying that injunction. *See* Plts.’ *Opposition to USAPA’s Mot. for*
2 *Extension of Time*, 5:13 to 5:24 [Doc. 19]. This Court should find, therefore, that there is
3 ample basis to predict that a decision on the merits would result in the requested relief.
4 Consequently, the policy favoring a decision on the merits would not be offended by
5 entering default judgment here.

6 **III. Conclusion**

7 Plaintiffs satisfy the procedural requirements for entry of default set out in Fed. R.
8 Civ. P. 55(b)(2). In addition, the seven *Eitel* factors weigh strongly in favor of granting
9 the relief sought here. Plaintiffs, therefore, respectfully ask this Court to enter default
10 judgment against USAPA, issuing an injunction requiring USAPA to conduct seniority
11 integration in the American – US Airways merger using the seniority order in the Nicolau
12 Award list to order the US Airways pilots. A proposed form of order is attached.

13 Dated this 8th day of April, 2013.

14 **POLSINELLI SHUGHART, PC**

15 */s/ Andrew S. Jacob*

16 By _____

17 Marty Harper

18 Andrew S. Jacob

19 Jennifer Axel

20 *Attorneys for Plaintiffs*

21 **CERTIFICATE OF SERVICE**

22 I hereby certify that on this 8th day of April 2013, I electronically transmitted the
23 foregoing document to the U.S. District Court Clerk’s Office by using the ECF System
24 for filing and transmittal.

25 */s/ Andrew S. Jacob*

26 By _____