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18 **IN THE UNITED STATES DISTRICT COURT**  
19 **DISTRICT OF ARIZONA**

20 Don Addington, *et. al.*,

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

21 *Plaintiffs,*

**US Airline Pilots Association's  
Motion to Dismiss**

22 v.

23 US Airline Pilots Association, *et. al.*,

24 *Defendants.*

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1 Defendant US Airline Pilots Association (“USAPA”) moves to dismiss all claims  
2 against USAPA pursuant to Federal Rules of Civil Procedure Rules 12(b)(1) and  
3 12(b)(6).

#### 4 MEMORANDUM OF POINTS AND AUTHORITIES

5 For the third time in five years, plaintiffs have filed a breach of duty of fair  
6 representation (DFR) claim against USAPA arising out of the same seniority list  
7 integration dispute. The prior claims were dismissed by the Ninth Circuit in 2010 and by  
8 this Court in 2012 on grounds of ripeness, because, as the Court stated, “it is not possible  
9 to determine the viability of any claim for the breach of the duty of fair representation  
10 until a particular seniority regime is ratified.” *US Airways v. USAPA*, No. 2:10-cv-01570-  
11 ROS, Doc. 193 p. 8 (D. Ariz. Oct. 11, 2012), citing *Addington v. U.S. Airline Pilots*  
12 *Ass’n*, 606 F.3d 1174, 1181-82 (9th Cir. 2010). *See also US Airways v. USAPA*, No. 2:10-  
13 cv-01570-ROS, Doc. 85 pp. 9-10 (D. Ariz. June 1, 2011) (order dismissing West Pilots’  
14 cross-claim on ripeness grounds). No new seniority regime has been ratified and nothing  
15 has happened since this Court issued its decision last October that makes plaintiffs’ DFR  
16 claim ripe.

17  
18 To the contrary, the only two things that have happened since plaintiffs’ DFR  
19 claim was dismissed in June 2011 and summary judgment was granted in October 2012  
20 make this claim even more speculative than before: (1) a merger between US Airways  
21 and American Airlines was negotiated and is moving forward subject to approval by  
22 various regulatory agencies and, ultimately, the Bankruptcy Court for the Southern  
23 District of New York, and (2) as part of that merger, four parties (US Airways, American  
24 Airlines, USAPA and the Allied Pilots Association (“APA”)<sup>1</sup>) negotiated and USAPA  
25 members ratified a Memorandum of Understanding Regarding Contingent Collective  
26 Bargaining Agreement (“MOU”) that continues the current two list seniority system at  
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28 <sup>1</sup> The APA is the bargaining representative for the American Airlines pilots.

1 US Airways unchanged unless the merger is approved and then until completion of the  
2 seniority integration process between by the pilots of both carriers as mandated by the  
3 McCaskill-Bond Amendment to the Federal Aviation Act, 49 U.S.C. § 42112.

4 This Court made clear that “USAPA’s seniority proposal does not automatically  
5 breach its duty of fair representation”, No. 2:10-cv-01570-ROS, Doc. 193 p. 8, and that  
6 “there is no obvious impediment to USAPA and US Airways negotiating and agreeing  
7 upon any seniority regime they wish.” *Id.* p. 7. Plaintiffs did not appeal from this Court’s  
8 judgment. Nothing in the complaint asserts that the issues of seniority have now been  
9 finally determined. Accordingly, under this Court’s judgment and principles of ripeness  
10 and issue and claim preclusion, the complaint must be dismissed.<sup>2</sup>

### 11 **FACTS<sup>3</sup>**

12 American Airlines/US Airways Merger. On November 29, 2011, AMR  
13 Corporation and its subsidiaries (the “Debtors”) commenced a voluntary Chapter 11 case  
14 in the United States Bankruptcy Court for the Southern District of New York, *In re AMR*  
15 *Corp.*, Case No. 11-15463 (Complaint, ¶77). On March 27, 2013, the Bankruptcy Court  
16 approved the motion to merge. *In Re AMR*, No. 7587, Case No. 11-15463 (SHL)  
17 (S.D.N.Y. filed Apr. 11, 2013) On April 15, 2013, the Debtors filed a proposed Plan of  
18 Reorganization (POR), that seeks court approval of the POR at a hearing scheduled for  
19 August 15, 2013. Debtors’ Joint Ch. 11 Plan, *In Re AMR*, No. 7631, Case No. 11-15463  
20 (SHL) (S.D.N.Y. filed Apr. 15, 2013) If the POR is approved, US Airways will become  
21  
22

23 \_\_\_\_\_  
24 <sup>2</sup> It is fundamentally unfair to require USAPA to repeatedly defend the same issues over  
25 and over. The continued absence of any finalized integrated seniority system affecting  
26 West Pilots in the face of at least three decisions rejecting these claims on ripeness  
27 grounds makes this proceeding especially unreasonable and vexatious. Absent prompt  
28 and voluntary withdrawal of this repetitive and vexatious complaint, USAPA reserves its  
right to seek appropriate remedies. *See* 28 U.S.C. § 1927; Fed. R. Civ. P. 11(b).

<sup>3</sup> USAPA accepts as true the facts alleged in the Complaint only for purposes of this motion.

1 a wholly-owned subsidiary of AMR Corporation.<sup>4</sup>

2 Memorandum of Understanding (MOU). As a result of negotiations during  
3 December 2012 and January 2013, and as a prelude to the agreement between US  
4 Airways and American Airlines to merge, four parties – US Airways, USAPA, American  
5 Airlines, and the APA – entered into the MOU that would govern the terms and  
6 conditions of employment of the US Airways and American Airlines pilots after the  
7 approval of the POR.

8 The MOU sets forth the procedures to be used by the parties for reaching: (a) a  
9 Merger Transition Agreement (“MTA”) between APA and New American Airlines; and  
10 (b) a joint collective bargaining agreement (“JCBA”) to apply to the merged American  
11 Airlines and US Airways pilots. (MOU, at ¶1, Doc. 14-3 p. 56 of 149)<sup>5</sup> The MOU must  
12 be approved by the Bankruptcy Court. MOU, at ¶30, Doc. 14-3 p. 68 of 149)<sup>6</sup> On the  
13 effective date of the POR, new compensation and working conditions go into effect for  
14 US Airways pilots, including significant pay increases for all US Airways pilots, the  
15 seniority integration process begins, and USAPA and APA begin joint negotiations for a  
16 JCBA.  
17

18 With respect to the issues relevant herein, the MOU does not make any immediate  
19 changes in the terms and working conditions of US Airways pilots nor in the current two-  
20 list seniority system at US Airways until the completion of the statutorily mandated  
21 process for merging seniority lists (MOU, at ¶10.h, Doc. 14-3 at p.62 of 149).  
22

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23 <sup>4</sup> The merger will result in a new airline called New American Airlines.

24 <sup>5</sup> The MOU was submitted by Defendants in support of their motion for preliminary  
25 injunction and incorporated by reference in the complaint in paragraphs 32, 78-82, 99,  
26 105-106, 108-109, and 123. *See United States v. Ritchie*, 342 F.3d 903, 908-909 (9th Cir.  
27 2003) (In determining a motion to dismiss, the Court may consider documents attached to  
28 the complaint, documents incorporated by reference in the complaint, and matters of  
judicial notice without converting it into a motion for summary judgment.).

<sup>6</sup> The date of approval of the POR is known as the Effective Date of the merger.



1 On February 8, 2013, the MOU was ratified by 75% of USAPA's membership.  
2 (Complaint, ¶79). 97.69% of the Phoenix pilots voted in favor of the MOU.<sup>7</sup>

3 McCaskill-Bond Proceeding. As to seniority integration, the MOU explicitly  
4 provides that a seniority integration process, as required by the McCaskill-Bond  
5 Amendment to the Federal Aviation Act, 49 U.S.C. § 42112, shall commence "as soon as  
6 possible after" the Effective Date. (Complaint, ¶81; MOU, ¶10.a) The first step under  
7 McCaskill-Bond is for the unions representing the two groups of employees to attempt to  
8 settle the matter through direct negotiations, and if that is unsuccessful, the second step is  
9 binding arbitration resulting in the issuance of a "final and binding" decision (MOU, ¶10)  
10 that integrates seniority "in a fair and equitable manner." See 49 U.S.C. § 42112. The  
11 MOU implements these provisions by requiring the parties to attempt to reach an  
12 agreement during the 90-day period following the Effective Date and, if no agreement is  
13 reached, to commence an arbitration process before a panel of three neutral arbitrators.  
14 (MOU, ¶10.1) The MOU explicitly provides that "neither this Memorandum nor the  
15 JCBA shall provide a basis for changing the seniority lists currently in effect at US  
16 Airways other than through" the McCaskill-Bond process as detailed in the MOU.  
17 (MOU, ¶10.h, Doc. 14-3, p. 62; Complaint, ¶82) The MOU thus provides that the *status*  
18 *quo* regarding seniority is maintained and that the current two list system at US Airways  
19 (one for the former America West pilots and one for the former US Airways pilots) shall  
20 continue in effect until the McCaskill-Bond process concludes either through agreement  
21 or through a decision from the three-member arbitration panel.  
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25 <sup>7</sup> See Exhibit A to the Declaration of Patrick J. Szymanski attached hereto. See also Ted  
26 Reed, *US Airways Pilots Approve Merger Contract in Win for Union President*, Forbes  
27 (Feb. 8, 2013, 6:11 PM), [http://www.forbes.com/sites/tedreed/2013/02/08/us-airways-  
28 pilots-approve-merger-contract-in-win-for-union-president/](http://www.forbes.com/sites/tedreed/2013/02/08/us-airways-pilots-approve-merger-contract-in-win-for-union-president/), reporting that 98% of the  
Phoenix-based pilots approved the MOU.

1 Plaintiffs’ Claims. On March 6, 2013, Plaintiffs filed the instant Complaint  
2 alleging that USAPA has breached its duty of fair representation. Plaintiffs’ central  
3 substantive allegation is that USAPA breached its DFR by failing to require  
4 implementation of the ALPA seniority proposal as part of the MOU (Complaint, ¶¶97-  
5 99). Plaintiffs ask the Court to enter a judgment that USAPA violated its DFR by entering  
6 into the MOU without requiring an “agreement to implement the Nicolau Award list”  
7 (Complaint, ¶120) and that USAPA “is continuing to violate the duty of fair  
8 representation by insisting that it will use a date-of-hire seniority list rather than the  
9 Nicolau Award list” (*id.* ¶121). Plaintiffs also request judgment that “US Airways, with  
10 the consent of USAPA, is in breach of the implied covenant of the Transition  
11 Agreement” (*id.* ¶122), an injunction “requiring Defendants to conduct seniority  
12 integration according to the MOU procedures but using the seniority order in the Nicolau  
13 Award list to order the US Airways pilots” (*id.* ¶123) and a judgment “awarding  
14 Plaintiffs the reasonable litigation expenses, including attorneys’ fees, incurred since  
15 2008 protecting the fair representation rights of the US Airways Pilots” (*id.* ¶124).

16 US Airways has moved to dismiss the claims against it on the grounds that they  
17 are minor disputes within the meaning of the Railway Labor Act and therefore not within  
18 the jurisdiction of this Court. (Doc. 28) USAPA moves to dismiss the claims against it in  
19 their entirety for the reasons stated below.

20 **ARGUMENT**

21 **POINT I**

22 **PLAINTIFFS’ CLAIMS ARE BARRED BY *RES JUDICATA***

23 The crux of Plaintiffs’ DFR claim is that USAPA “breached the duty of fair  
24 representation by entering into the MOU with the firm *intention* of using a date-of-hire  
25 seniority list rather than the Nicolau Award list.” (Complaint, ¶99) (emphasis added).  
26 However, the issue of whether USAPA can negotiate seniority with the intention of using  
27 something other than the Nicolau Award was adjudicated by this Court in October 2012  
28 when it granted USAPA summary judgment in the Declaratory Judgment Action, holding

1 that “USAPA’s seniority proposal does not automatically breach its duty of fair  
2 representation.” Plaintiffs did not appeal. Accordingly, this Court’s judgment is *res*  
3 *judicata* and bars Plaintiffs from re-litigating their claim that USAPA is bound to  
4 negotiate for the Nicolau award or that failure to include a requirement in the MOU to  
5 negotiate for the Nicolau award violates its duty of fair representation. 2:10-cv-01570-  
6 ROS, Doc. 193, p. 8.

7       The issue of whether the 2005 Transition agreement somehow required USAPA to  
8 incorporate the Nicolau award in the MOU was also litigated and rejected. The Court  
9 held that “[i]t is undisputed that the Transition Agreement can be modified at any time[.]”  
10 Doc. 193 p. 7, and that “there is no obvious impediment to USAPA and US Airways  
11 negotiating and agreeing upon any seniority regime they wish.” *Id.*

12       *Res judicata* prevents the re-litigation of a claim previously tried and decided.  
13 *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992). For the doctrine  
14 to apply, there must be (1) an identity of claims, (2) a final judgment on the merits, and  
15 (3) privity between parties.” *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning*  
16 *Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003).

17       When applicable, *res judicata* bars all grounds for recovery which could have  
18 been asserted, whether they were or not, in a prior suit between the same parties on the  
19 same cause of action. In determining whether successive lawsuits involve the same cause  
20 of action, a court will consider: (1) whether rights or interests established in the prior  
21 judgment would be destroyed or impaired by prosecution of the second action; (2)  
22 whether substantially the same evidence is presented in the two actions; (3) whether the  
23 two suits involve infringement of the same right; and (4) whether the two suits arise out  
24 of the same transactional nucleus of facts. *Clark*, 966 F.2d at 1320 (citing *Constantini v.*  
25 *Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982)).

26       *Res judicata* applies to this case and bars Plaintiffs’ claims. The parties to this  
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1 action and the Declaratory Judgment Action are identical. The issue of whether USAPA,  
2 and, by extension, US Airways, are free to negotiate a non-Nicolau seniority proposal  
3 was precisely the basis of the Declaratory Judgment Action in which US Airways sought  
4 declaratory relief clarifying the “parties’ respective rights, constraints and obligations” as  
5 to the Nicolau Award. 2:10-cv-01570-ROS, Doc. 1, p. 3. In bringing that suit, US  
6 Airways contended it needed clarification “in order to determine the range of permissible  
7 proposals in the collective bargaining agreement negotiations”, and sought one of three  
8 alternative judgments. *Id.*, at p. 5. Thus, the two suits involve the alleged infringement of  
9 the same rights – whether USAPA’s duty to the former America West Pilots or the 2005  
10 Transition Agreement require USAPA to negotiate seniority integration that includes the  
11 Nicolau Award.

12  
13 That this action focuses, in large part, on what should be the starting point for the  
14 McCaskill-Bond process, rather than on the negotiation of a collective bargaining  
15 agreement between USAPA and US Airways, does not distinguish it from this Court’s  
16 prior holding or that of the Ninth Circuit in *Addington I*. There are only two grounds for  
17 ordering USAPA to use the ALPA seniority proposal as the starting point. The first is that  
18 it is required by the 2005 Transition Agreement. As stated below (Point II.2), that claim  
19 is a minor dispute under the Railway Labor Act and therefore not within the jurisdiction  
20 of this Court. The second is that it is required by USAPA’s duty of fair representation.  
21 But that is in all respects the same claim made in *Addington I* and previously before this  
22 Court, namely that USAPA’s duty of fair representation requires it to adhere to the ALPA  
23 proposal. That claim was previously rejected and under the doctrine of *res judicata* that  
24 previous decision controls.<sup>[1]</sup> The Complaint should be dismissed.

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28 <sup>[1]</sup> Re-litigation of ripeness is likewise barred by the doctrine of collateral estoppel, which  
requires that: (1) the issue at stake be identical to the one alleged in the prior litigation;  
(2) the issue must have been actually litigated in the prior litigation; and (3) the  
determination of the issue in the prior litigation must have been a critical and necessary

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**POINT II**

**THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER  
PLAINTIFFS' CLAIMS AGAINST USAPA**

**1. Plaintiffs' DFR claim is not ripe for the same reasons held by the Ninth Circuit in *Addington I* and by this Court in the Declaratory Judgment Action.**

“Ripeness is a constitutional prerequisite for jurisdiction.” *U.S. v. Streich*, 560 F.3d 926, 931 (9th Cir. 2009). A court has no jurisdiction to review claims unless they are ripe. *Id.* The Ninth Circuit in *Addington I* stated that “[a] question is fit for decision when it can be decided without considering ‘contingent future events that may or may not occur as anticipated, or indeed may not occur at all.’” *Addington*, 606 F.3d at 1179 (quoting *Cardenas v. Anzai*, 311 F.3d 929, 934 (9th Cir. 2002)).

Plaintiffs' DFR claim against USAPA is no more ripe now than it was in 2010 when the Ninth Circuit remanded the case to the District Court with directions to vacate its judgment and dismiss the action. The claim is equally no more ripe now than it was in 2011 when this Court dismissed Plaintiffs' cross-claim in the Declaratory Judgment Action (2:10-cv-01570-ROS, Doc. 85, p. 9), and again in 2012 when this Court granted summary judgment for USAPA for the simple reason that there is still no final collective bargaining agreement.

If anything, there are more “contingencies” now than at the time the Ninth Circuit held the DFR claim was not ripe due to the presence of numerous contingencies. As to

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part of the judgment in the earlier action. *Clark*, 966 F.2d at 1320-21 (citations omitted); *see also Offshore Sportswear, Inc. v. Vuarnet Int'l, B.V.*, 114 F.3d 848, 850 (9th Cir. 1997). The District Court's dismissal of the “West Pilots' Cross-Claim as not ripe” bars re-litigation of that issue. 2:10-cv-01570-ROS, Doc. 85, p. 9; *In re Brooks-Hamilton*, 271 F. App'x 654, 657 (9th Cir. 2008) (“A dismissal for lack of subject matter jurisdiction is not a final judgment on the merits . . . but such dismissal does preclude re-litigation of the jurisdictional issue there presented, in a subsequent action.”), citing *Kendall v. Overseas Dev. Corp.*, 700 F.2d 536, 538, 538 n. 1 (9th Cir. 1983).

1 seniority, Plaintiffs are in the exact same position as they were in 2008. There is no final  
2 combined seniority integration list, and now, as before, US Airways seniority is governed  
3 by the East and West CBAs. The MOU, which is not a final and binding collective  
4 bargaining agreement as set forth above, does not affect this analysis at all.

5 As to seniority integration, there are several contingent events that must take place  
6 before there is an Integrated Seniority List. Because any one of the contingent events  
7 might not take place, Plaintiffs' DFR claim is not ripe for judicial adjudication. *See*  
8 *Richardson*, 124 F.3d at 1160-61. These contingent events include bankruptcy court  
9 approval of the MOU and the POR, approval by the Antitrust Division of the Justice  
10 Department, petition to and determination made by the National Mediation Board for  
11 Single Carrier Status, and negotiation and/or arbitration of a Joint Collective Bargaining  
12 Agreement.

13  
14 Given the foregoing circumstances, Plaintiffs are in the position of urging the  
15 Court "to rule based on future events that may not occur as anticipated, or indeed may not  
16 occur at all." *Steffenson v. Ives*, 2011 WL 4710798, at \*1 (E.D. Cal. Oct. 4, 2011).  
17 Moreover, no action as to seniority integration has been taken by USAPA for this Court  
18 to review. *See Schneider v. Amador County*, 2013 WL 898054, at \*6 (E.D. Cal. Mar. 8,  
19 2013) ("even assuming all of plaintiff's allegations are true, no action has been taken by  
20 or on behalf of the County for this court to review and, while it is possible some event  
21 could occur in the future between plaintiff and the County that could warrant review in  
22 federal court, this claim is not yet ripe. No such event has occurred at this time.") (citing  
23 *U.S. v. Streich*, 560 F.3d 926, 931 (9th Cir. 2009)), Report and Recommendation  
24 Adopted, 2013 WL 1325212 (E.D. Cal. Mar. 28, 2013). The seniority integration process  
25 with the APA has not even begun. It is purely speculative that either the APA or USAPA  
26 would agree in direct negotiations to an integrated seniority list that does or does not  
27 order seniority on a date-of-hire or any other basis. Further, it is pure speculation what a  
28

1 panel of arbitrators would decide is “fair and equitable” in the event the issue went to  
2 arbitration under the McCaskill-Bond process. The uncertainty that was the basis for the  
3 Ninth Circuit’s conclusion that Plaintiffs’ DFR claim was not ripe applies with even  
4 greater force now. *Addington*, 606 F.3d at 1180 (“Thus, even under the district court’s  
5 injunction mandating USAPA to pursue the Nicolau Award, it is uncertain that the West  
6 Pilots’ preferred seniority system ever would be effectuated.”).

7         At this time, no one knows what seniority integration list will ultimately be part of  
8 the final merger. “[T]he Supreme Court case that clarified that the DFR was applicable  
9 during contract negotiations articulated its holding in terms that imply a claim can be  
10 brought only after negotiations are complete and a ‘final product’ has been reached.”  
11 *Addington*, 606 F.3d at 1182 (citing *Air Line Pilots Ass’n, Int’l v. O’Neill*, 499 U.S. 65,  
12 78, 111 S.Ct. 1127 (1991)); *see also* 2:10-cv-01570-ROS, Doc. 193, p. 7 (“Pursuant to  
13 the Ninth Circuit’s decision, any claim for breach of the duty of fair representation will  
14 not be ripe until a collective bargaining agreement is finalized.”). Negotiations are not  
15 complete and a “final product” will not be reached unless and until the merger is  
16 complete. Because numerous uncertain future contingencies make Plaintiffs’ claim  
17 speculative, the DFR claim is not yet fit for judicial decision, and the complaint should be  
18 dismissed.  
19

20         **2. Plaintiffs’ DFR claim rests on interpretation of the MOU, and is thus a**  
21         **“minor dispute” within the exclusive jurisdiction of the System Board of**  
22         **Adjustment.**

23         It is well established that under the RLA disputes growing out of the interpretation  
24 or application of agreements concerning rates of pay, rules, or working conditions are  
25 subject to mandatory arbitration before the System Board of Adjustment. 45 U.S.C. §§  
26 184; *Consol. Rail. Corp. v. Ry. Labor Executives’ Ass’n*, 491 U.S. 299, 303, 109 S.Ct.  
27 2477, 2480 (1989) (“*Conrail*”); *International Ass’n of Machinists and Aerospace*  
28 *Workers, AFL-CIO v. Aloha Airlines*, 776 F.2d 812, 815 (9th Cir. 1985). Such disputes,

1 denominated as “minor disputes” “contemplate[] the existence of a collective agreement  
 2 already concluded . . . The dispute relates either to the meaning or proper application of a  
 3 particular provision . . .” *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 723, 65 S.Ct.  
 4 1282, 1290 (1945). Major disputes, on the other hand, involve disputes concerning the  
 5 formation of collective agreements, and “therefore the issue is not whether an existing  
 6 agreement controls the controversy.” *Id.* “When in doubt, courts construe disputes as  
 7 minor.” *Ass’n of Flight Attendants v. Mesa Air Group, Inc.*, 567 F.3d 1043, 1047 (9th  
 8 Cir. 2009) (citing *Bhd. of Locomotive Eng’rs v. Burlington Northern R. Co.*, 838 F.2d  
 9 1102, 1111 (9th Cir. 1988)).

10 Plaintiffs’ claims in this action are premised on their assertion that the ratification  
 11 of the MOU now makes their DFR claim ripe. (Complaint, ¶32) Even if Plaintiffs were  
 12 free to collaterally attack this Court’s judgment, the essence of their claim is that the  
 13 MOU is a collective bargaining agreement necessitating implementation of the Nicolau  
 14 Award, which is a “minor dispute.” As the System Board has exclusive jurisdiction over  
 15 “minor disputes”, the instant action must be dismissed for lack of subject matter  
 16 jurisdiction.<sup>8</sup> *Conrail*, 491 U.S. at 310, 109 S.Ct. 2477.

### 18 POINT III

#### 19 PLAINTIFFS FAIL TO STATE A DFR CLAIM AGAINST USAPA

##### 20 1. The complaint fails to allege facts to support a DFR claim.

21 In the event this Court decides this case is ripe for review and/or not barred by *res*  
 22 *judicata*, the complaint should nevertheless be dismissed for failure to state a claim. In  
 23 deciding a Rule 12(b)(6) motion to dismiss, a court must determine “whether the  
 24

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25 <sup>8</sup> Plaintiffs’ claim that the MOU is the “single agreement” referred to in the 2005  
 26 Transition Agreement, and that because the MOU has been ratified the Nicolau Award  
 27 must be implemented under the terms of that Transition Agreement is equally an issue  
 28 that requires interpretation and application of the Transition Agreement and is therefore  
 also “minor dispute” within the exclusive jurisdiction of the System Board of  
 Adjustment. (See Complaint, ¶¶34, 42, 102-110)



1 complaint’s factual allegations, together with all reasonable inferences, state a plausible  
2 claim for relief.” *Cafasso, United States ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d  
3 1047, 1054 (9th Cir. 2011) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79, 129 S.Ct.  
4 1937 (2009)). “A claim has facial plausibility when the plaintiff pleads factual content  
5 that allows the court to draw the reasonable inference that the defendant is liable for the  
6 misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S.  
7 544, 556, 127 S.Ct. 1955 (2007)).

8  
9 Plaintiffs have alleged nothing but conclusory allegations in support of their DFR  
10 claim against USAPA. “[L]egal conclusions . . . cast in the form of factual allegations”  
11 are insufficient to defeat a motion to dismiss. *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th  
12 Cir. 2011), cert. denied 132 S.Ct. 850 (2011). Aside from reciting the events leading up  
13 to the Nicolau Award, the findings of Judge Wake in *Addington I* (which were vacated  
14 and dismissed and thus carry no weight), and the Declaratory Judgment Action, Plaintiffs  
15 fail to allege any facts supporting their claim that “USAPA does not have a legitimate  
16 union purpose to use anything other than the Nicolau Award list to integrate East Pilots  
17 and West Pilots.” (Complaint, ¶98)

18  
19 Absent from the complaint are any allegations that USAPA’s conduct in entering  
20 into the MOU was “arbitrary, discriminatory, or in bad faith”, the *sine qua non* of a DFR  
21 claim. *See Vaca v. Sipes*, 386 U.S. 171, 190, 87 S.Ct. 903 (1967). Instead, the DFR claim  
22 is reduced to mere tautologic repetition of a legal principle but no actual facts as to the  
23 alleged DFR.

24  
25 Moreover, given the current circumstances, *i.e.*, the proposed merger between US  
26 Airways and American Airlines, the Complaint is significant for its lack of any  
27 allegations to suggest that “in light of the factual and legal landscape at the time”,  
28 USAPA’s behavior “is so far outside a ‘wide range of reasonableness,’ . . . as to be  
irrational.” *O’Neill*, 499 U.S. at 67, 111 S.Ct. 1127, 1130 (quoting *Ford Motor Co. v.*

1 *Huffman*, 345 U.S. 330, 338, 73 S.Ct. 681, 686, 97 L.Ed. 1048 (1953)). Integrating  
2 seniority is a complex issue affecting employees after a merger, and is often the subject  
3 of litigation by disgruntled and unsatisfied minority employees. *See Herring v. Delta Air*  
4 *Lines*, 894 F.2d 1020, 1023 (9th Cir. 1989) (“The integration of a seniority list is a  
5 difficult undertaking because of the inevitability that some individual employees will be  
6 disadvantaged in comparison to others.”).

7  
8 There is no escaping the reality that a merger between US Airways and American  
9 Airlines, an airline with a much larger pilot workforce, changes the factual landscape and  
10 the interests of USAPA. This is no longer an intra-union dispute between East and West  
11 Pilots. In its negotiations with the APA, USAPA must protect the interests of all US  
12 Airways pilots in relation to the interests of a much larger airline and pilot workforce. To  
13 that end, Plaintiffs and the putative West Pilots may find that their interests are in fact  
14 aligned with the interests of the East Pilots, and that the seniority list in the Nicolau  
15 Award is less important, if important at all. In addition, USAPA is legally bound to  
16 follow the seniority integration process required by the McCaskill-Bond process. Given  
17 these intervening circumstances, the Complaint fails to allege facts which reasonably  
18 permit the Court to infer a plausible DFR claim against USAPA, and the Complaint  
19 should be dismissed.

20 **2. West Pilots’ overwhelming support for the MOU precludes a DFR claim.**

21 The complaint alleges that “The MOU was ratified by 75% of USAPA’s membership  
22 on February 8, 2013.” (Complaint, ¶ 79) In fact, 97.69% of the Phoenix pilots voted for  
23 the MOU.<sup>9</sup> Plaintiffs admit they understood that the MOU did not address the Nicolau  
24

25 <sup>9</sup> *See* Official Election Results issued by USAPA’s Ballot Certification Committee,  
26 Exhibit A to the Declaration of Patrick J. Szymanski attached hereto. Because the vote  
27 count is alleged in the complaint and there can be no question as to the authenticity of the  
28 document, the Court may consider it. *See Twombly*, 550 U.S. at 568 n.13, 127 S.Ct. at  
1973 n.13 (district court was entitled to take notice of full contents of article referenced in  
complaint); *Parrino v. FHP, Inc.* 146 F.3d 699, 705-06 (9th Cir. 1998), *superseded by*

1 issue (Complaint, ¶82) and that USAPA entered into the MOU with the “firm intention”  
2 of using date of hire list instead of the Nicolau list. (*Id.* at ¶99) Under these circumstances  
3 and in light of their overwhelming ratification of the MOU, Plaintiffs fail to state a claim  
4 for breach of the duty of fair representation. *Gullickson v. Southwest Airlines Pilots’*  
5 *Ass’n*, 87 F.3d 1176, 1183-84 (10th Cir. 1996); *see also Papcin v. Dichello Distributors,*  
6 *Inc.*, 697 F.Supp. 73, 80 (D. Conn. 1988) (In dismissing plaintiffs’ hybrid DFR claim,  
7 finding that the 1980 agreement modified seniority provisions, and “plaintiffs knew this  
8 to be the case when they voted to ratify the 1980 agreement.), judgment aff’d in  
9 unpublished decision 862 F.2d 304 (2d Cir. 1988). Under these cases, the overwhelming  
10 approval of the MOU amounts to ratification of USAPA’s decision not to include the  
11 Nicolau list in the MOU and “a knowing and voluntary waiver” of any DFR claim  
12 against USAPA based on the MOU. The DFR claim should be dismissed on this  
13 independent ground. *Gullickson*, 87 F.3d at 1185.

#### 15 POINT IV

#### 16 PLAINTIFFS ARE NOT ENTITLED TO ATTORNEYS’ FEES

17 As a general rule, attorneys’ fees are not recoverable absent specific statutory  
18 authority or enforceable contract, and when recoverable, only to prevailing parties.<sup>10</sup> *See*  
19 *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 257 (1975); *Benda v.*  
20 *Grand Lodge of the Int’l Ass’n of Machinists & Aerospace Workers*, 584 F.2d 308, 318  
21 (9th Cir. 1978), cert. dismissed *Grand Lodge of Intern. Ass’n Aerospace Workers v.*  
22 *Benda*, 441 U.S. 937 (1979). Despite this well-established legal rule, plaintiffs make the  
23 extraordinary claim that they are entitled to attorneys’ fees, not only for this action, but  
24

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25 *statute on other grounds as recognized in Abrego v. Dow Chem. Co.*, 443 F.3d 676, 681  
26 (9th Cir. 2006) (district court may consider documents “whose contents are alleged in a  
27 complaint and whose authenticity no party questions, but which are not physically  
28 attached to the [plaintiff’s] pleading.”).

<sup>10</sup> The Railway Labor Act does not provide for fee awards. *See Rogers v. Air Line Pilots*  
*Ass’n*, 988 F.2d 607, 615 n. 9 (5th Cir. 1993).

1 for two previously dismissed DFR actions. (Complaint, ¶¶114-119)

2 Plaintiffs did not seek attorneys' fees in either *Addington I* or the Declaratory  
3 Judgment Action, and it is without dispute that Plaintiffs were not "prevailing" parties in  
4 either litigation. *See Park, ex rel. Park v. Anaheim Union High School Dist.*, 464 F.3d  
5 1025, 1034 (9th Cir. 2006) ("For the purposes of attorney's fees awards, a prevailing  
6 party is defined as 'a party which 'succeed[s] on any significant issue in litigation which  
7 achieves some of the benefit the parties sought in bringing the suit.'") (internal citations  
8 omitted) (emphasis included); *Kollsman v. Cohen*, 996 F.2d 702, 706 (4th Cir. 1993) ("A  
9 dismissal of an action, whether on the merits or not, generally means the defendant is the  
10 prevailing party."). As the losing party to both cases, Plaintiffs achieved no benefit for  
11 the West Pilots whose interests they represented, and certainly not for the East Pilots who  
12 plaintiffs concede reject the Nicolau Award. There is simply no definition of "prevailing"  
13 that encompasses the rejection of plaintiffs' claims in those actions and to argue  
14 otherwise is plainly frivolous. Accordingly, Plaintiffs' claim for attorneys' fees should be  
15 dismissed.  
16

#### 17 **POINT V**

#### 18 **THE COURT SHOULD STRIKE THE COMPLAINT'S IMPROPER CITATIONS** 19 **TO THE DISTRICT COURT DECISION IN *ADDINGTON I***

20 Plaintiffs' improper citations and reference to the District Court's decision in  
21 *Addington I* and their attempts to include it in the record are improper and should be  
22 stricken.

23 The District Court's decision in *Addington I* was vacated on appeal. Precedent  
24 uniformly holds that an appellate court's decision vacating a lower court's judgment or  
25 order "effectively annuls or sets aside the lower court's decision for all purposes" and  
26 "the appealed from judgment or order" should be treated "as if [it] never occurred." C.  
27 Goelz & M. Watts, *Rutter's California Practice Guide: Federal Ninth Circuit Civil*  
28 *Appellate Practice* § 10:231 (emphasis in original), citing *State of Calif. Dept. of Social*

1 *Servs. v. Thompson*, 321 F.3d 835, 847 (9th Cir. 2003).<sup>11</sup> In denying Plaintiffs’ motion in  
2 the Declaratory Judgment Action to transfer that case to him, Judge Wake himself said,  
3 “[T]he substantive rulings in *Addington* have been vacated pursuant to mandate, and both  
4 cases would now write on clean slates if there were anything to write in *Addington*, which  
5 there is not.” *Addington v. US Airline Pilots Ass’n*, 2010 WL 4117216, at \*3 (D. Ariz.  
6 Oct. 19, 2010). The attempt by Plaintiffs to interject portions of vacated rulings in  
7 *Addington I* in paragraphs 66-68 of the Complaint should be stricken.

### 8 CONCLUSION

9 For the foregoing reasons, USAPA respectfully requests that claims against  
10 USAPA be dismissed in their entirety and that the Court strike all references to  
11 *Addington I* in the Complaint.  
12

13 Respectfully submitted this 22<sup>nd</sup> day of April 2013.

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25 <sup>11</sup> *Accord id.*, § 10:260 (“with reversal on appeal, the Ninth Circuit’s vacatur of a district  
26 court judgment nullifies and renders the judgment inoperative”, citing *United States v.*  
27 *Munsingwear*, 340 U.S. 36, 40-41 (1950) (vacatur prevents judgment from “spawning  
28 any legal consequences”); *Orff v. United States*, 358 F.3d 1137, 1149 (9th Cir. 2004)  
(district court’s ruling on merits of certain claims issued without subject matter  
jurisdiction vacated as nullities”).

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**CERTIFICATE OF SERVICE**

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I hereby certify that on April 22, 2013, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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