PATRICK J. SZYMANSKI (*pro hac vice*)
PATRICK J. SZYMANSKI, PLLC
1900 L Street, NW, Ste 900
Washington, DC 20036
Telephone: (202) 721-6035
szymanskip@msn.com

BRIAN J. O'DWYER (*pro hac vice*)
GARY SILVERMAN (*pro hac vice*)
JOY K. MELE (*pro hac vice*)
O'DWYER & BERNSTIEN, LLP
52 Duane Street, 5th Floor
New York, NY 10007
Telephone: (212) 571-7100
bodwyer@odblaw.com
gsilverman@odblaw.com
jmele@odblaw.com

SUSAN MARTIN (AZ#014226)
JENNIFER KROLL (AZ#019859)
MARTIN & BONNETT, P.L.L.C.
1850 N. Central Ave. Suite 2010
Phoenix, Arizona 85004
Telephone: (602) 240-6900
smartin@martinbonnett.com
jkroll@martinbonnett.com

Attorneys for US Airline Pilots Association

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Don Addington, *et. al.*,

Plaintiffs,

v.

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

Defendants.

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

US Airline Pilots Association's Opposition to Plaintiffs' Motion for Preliminary Injunction

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Defendant US Airline Pilots Association ("USAPA") opposes Plaintiffs' motion seeking a preliminary injunction enjoining Defendants "from integrating pilot seniority without using the Nicolau Award list to define the relative seniority of US Airways pilots." Complaint, Doc. 1.

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs ask this Court to force USAPA to use a seniority list that has never been ratified or implemented as the basis for negotiations and arbitration under the McCaskill-Bond Amendment which will apply in the event that the merger between US Airways and American Airlines is approved. The burden is, of course, on Plaintiffs to satisfy the demanding standard for such relief. The most important requirement is probability of success on the merits, and, on this point, Plaintiffs rely on the allegation that the failure to use the Nicolau Award in the McCaskill-Bond process violates USAPA's duty of fair representation. In USAPA's Motion to Dismiss, USAPA shows that there is no merit to this claim for several reasons, including because the previous Declaratory Judgment Action determined that as exclusive bargaining representative, USAPA is not bound to adhere to the Nicolau Award which was the result of the ALPA Merger Policy and which was binding, if at all, only on ALPA, the decertified former union, and not on USAPA. As the Court held, USAPA "is free to pursue any seniority position it wishes during the collective bargaining negotiations." 2:10-cv-01570-ROS, Doc. 193, at 1. Representing the pilots at US Airways in the McCaskill-Bond proceeding is a part of USAPA's function as the exclusive bargaining representative and therefore falls well within the "wide range of reasonableness" granted to the certified bargaining representative under firmly established precedent. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1985); *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 78 (1991).

Thus, Plaintiffs' injunction motion should be denied not only for the reasons stated in USAPA's Motion to Dismiss, which we incorporate here by reference, but also

because, as shown below, Plaintiffs have not satisfied any of the requirements for issuance of a preliminary injunction.

POINT I

LEGAL STANDARD ON A MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs seek the "extraordinary and drastic remedy," *Rigsby v. State of Arizona*, 2013 WL 1283778, at *2 (D. Ariz. Mar. 28, 2013), of an order directing a certified bargaining representative to negotiate a specific seniority proposal. Such an "extraordinary and drastic remedy . . . should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Id.*, quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

There are two types of preliminary injunctions. A prohibitory injunction prohibits a party from taking action and preserves the status quo pending a determination of the action on the merits. *Marilyn Nutraceuticals, Inc. v. Mucos Pharma*, 571 F.3d 873, 878-79 (9th Cir. 2009). A mandatory injunction goes beyond maintaining the status quo and instead orders a responsible party to take action. *Id.* Because "[t]he basic function of a preliminary injunction is to preserve the status quo pending a determination of the action on the merits," *Chalk v. U.S. Dist. Court Cent. Dist. of California*, 840 F.2d 701, 704 (9th Cir. 1988), mandatory injunctions are "particularly disfavored." *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1980). As such, they are "subject to heightened scrutiny and should not be issued unless the facts and law clearly favor the moving party." *Dahl v. HEM Pharmaceuticals Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993). Thus, "mandatory injunctions 'are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of

compensation in damages.'" *Marilyn Nutraceuticals, Inc.*, 571 F.3d at 879 (quoting *Anderson*, 612 F.2d at 1115). Here, Plaintiffs seek a mandatory injunction and therefore must satisfy the applicable heightened standard.

POINT II

PLAINTIFFS CANNOT SHOW SUBSTANTIAL LIKELIHOOD OF SUCCESS

Plaintiffs' motion for a preliminary injunction should be denied because they fail to demonstrate substantial likelihood of success on the merits for the reasons stated in USAPA's Motion to Dismiss, Doc. 44, and for the reasons discussed herein.

To prevail on a DFR claim, Plaintiffs must prove that USAPA's having "enter[ed] into the MOU with the firm *intention* of using a date-of-hire seniority list rather than the Nicolau Award list" was arbitrary, discriminatory or in bad faith. *See* Complaint, ¶99 (emphasis in original); *O'Neill*, 499 U.S. at 67 ("[A] union breaches its duty of fair representation if its actions are either 'arbitrary, discriminatory, or in bad faith."). Despite this controlling Supreme Court law, Plaintiffs fail to even allege that USAPA's actions are arbitrary, discriminatory, or in bad faith. Indeed those words are entirely absent from the complaint and Plaintiffs' motion papers.

The Supreme Court in *O'Neill* held that a union's actions are arbitrary "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' . . . as to be irrational." *Id.* (quoting *Huffman*, 345 U.S. at 338). Because "Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper bargain for that reached by the union . . . Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." *Id.*, at 78. To that end, "the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a 'wide range of reasonableness,' . . . that it is wholly 'irrational' or 'arbitrary.'" *Id.* at 78 (quoting *Huffman,* 345 U.S. at 338).

In defining what constitutes arbitrary conduct, the Supreme Court in *O'Neill*

rejected the Fifth Circuit's application of a three part test to determine whether a union's actions are arbitrary, because, *inter alia*, it failed to take into account "the importance of evaluating the rationality of a union's decision in light of both the facts and the legal climate that confronted the negotiators at the time the decision was made." *Id.*

Plaintiffs have not shown any arbitrary conduct on the part of USAPA.

1. The Nicolau Award is not binding on USAPA.

Plaintiffs' DFR claim fails because there is no authority for their position that *any* seniority proposal *other* than the Nicolau Award is a breach of USAPA's DFR. Plaintiffs cite to no legal precedent for their claim that USAPA is bound to negotiate the Nicolau Award. Indeed, the majority in *Addington* rejected the dissent's implicit assumption "that the Nicolau Award, the product of the internal rules and processes of ALPA, is binding on USAPA", instead noting "that USAPA is at least as free to abandon the Nicolau Award as was its predecessor, ALPA." 606 F.3d at 1181 n.3. In granting summary judgment for USAPA, this Court likewise held that USAPA "is free to pursue any seniority position it wishes *during* the collective bargaining negotiations." 2:10-cv-01570-ROS, Doc. 193, p. 1 (emphasis added).

Assuming the POR is approved, USAPA and the APA will engage in negotiations for a new collective bargaining agreement and seniority integration with the New American Airlines. Just as there was no obvious impediment to negotiations between USAPA and US Airways, USAPA and the APA and the new carrier will be free to negotiate appropriate seniority provisions, as authorized by McCaskill-Bond.

2. USAPA's agreement to the MOU was not arbitrary.

The current factual and legal landscape is substantially different than the landscape facing the parties in 2006 and 2007 when the seniority integration issue first went to arbitration, than in 2008 when *Addington I* went to trial, and in 2012 when summary judgment was granted to USAPA by this Court in the Declaratory Judgment Action.[1]

[1] Aside from reciting the events leading up to the Nicolau Award, the findings of Judge

Factually, US Airways is in a much different position than it was in 2006, 2008, and 2012. As a prelude to the merger agreement, US Airways, USAPA, American Airlines and the APA entered into the MOU that would govern the terms and conditions of employment of the US Airways and American Airlines pilots after the approval of the POR. The Bankruptcy Court approved the merger between US Airways and American Airlines on March 27, 2013. *In re AMR*, No. 7587, Case No. 11-15463 (SHL) (S.D.N.Y. filed Apr. 11, 2011). On April 15, 2013, the Debtors filed a proposed Plan of Reorganization (POR), seeking court approval of the POR at a hearing scheduled for August 15, 2013. *In re AMR*, No. 7631, Case No. 11-15463 (SHL) (S.D.N.Y. Apr. 15, 2013). If the POR is approved, US Airways will become a wholly-owned subsidiary of AMR Corporation, and the two airlines will be merged into a new airline called New American Airlines.

The questions regarding seniority integration are no longer confined to questions regarding potential differing interests affecting the East and West pilots. Rather, the issues now concern the entire pilot workforce of US Airways and the much larger pilot workforce of American Airlines. The APA is the bargaining representative for over

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Wake in *Addington I* (which were vacated and dismissed and thus carry no weight), and certain facts regarding the Declaratory Judgment Action, Plaintiffs fail to allege any facts supporting their claim that "USAPA does not have a legitimate union purpose to use anything other than the Nicolau Award list to integrate East Pilots and West Pilots." Complaint, ¶ 98. Indeed, their DFR claim consists of the above statements, and three additional conclusory statements:

> 97. Pursuant to the duty of fair representation, USAPA must have a legitimate union purpose to use anything other than the Nicolau Award list to integrate East Pilots and West Pilots . . .
>
> 99. USAPA, therefore, breached the duty of fair representation by entering into the MOU with the firm intention of using a date-of-hire seniority list rather than the Nicolau Award list.
>
> 100. Plaintiffs are entitled to a declaratory judgment to that effect and to other remedy sought.

Complaint, ¶¶ 98, 99-100. USAPA moves to strike all citations and references to the District Court's decision in *Addington I* for the reasons cited in USAPA's Motion to Dismiss. Doc. 44 pp. 15-16.

10,000 American pilots. Declaration of Jess Pauley ("Pauley Decl."), ¶13. USAPA represents a total of approximately 4,000 US Airways pilots. *Id.* There is simply no escaping the reality that a merger between US Airways and American Airlines changes the factual landscape and the interests of USAPA and its members. The APA, with several million dollars in reserve, has the resources to fight for the seniority rights of their pilots. Pauley Decl., ¶14. In its negotiations with the APA, USAPA must protect the interests of *all* US Airways pilots vis-å-vis the interests of a much larger airline and pilot workforce. To that end, Plaintiffs and the West Pilots may find that their interests are in fact much more closely aligned with the interests of the East Pilots, and that the seniority list in the Nicolau Award is less important, if important at all. In addition, USAPA is legally bound to follow the seniority integration process required by the McCaskill-Bond process. Given these intervening circumstances, the complaint fails to allege facts from which a plausible DFR claim against USAPA can reasonably be inferred and should be dismissed.

3. Approval of the MOU by 98% of the West Pilots defeats any DFR claim

The ratification of the MOU by 98% of the Phoenix based pilots defeats any claim that USAPA breached its DFR by failing to incorporate the Nicolau Award in the MOU. Doc. 44-1, Ex. A. Only 24 Phoenix based pilots voted against the MOU out of a total of 1,024 Phoenix votes. *Id.* All US Airways pilots, both East and West, benefit from the MOU. For example, as Plaintiffs concedes, the MOU was beneficial to Plaintiffs and the putative class in that it "provides materially improved wages for US Airways pilots (East and West)." Complaint, ¶105.

In DFR cases arising out of the negotiation of a seniority arrangement, ratification of the seniority arrangement by those asserting a DFR claim is a valid defense to any claims of union misconduct in reaching the seniority arrangement. *Gullickson v. Southwest Airlines Pilots' Ass'n*, 87 F.3d 1176, 1183-84 (10th Cir. 1996); *see also Papcin v. Dichello Distributors, Inc.*, 697 F.Supp. 73, 80 (D. Conn. 1988) (In dismissing

plaintiffs' hybrid DFR claim, finding that the 1980 agreement modified seniority provisions, and "plaintiffs knew this to be the case when they voted to ratify the 1980 agreement.), judgment aff'd in unpublished decision 862 F.2d 304 (2d Cir. 1988). This defense is especially applicable in cases such as this one, where the Plaintiffs were "well-informed" as to the nature and effect of the contract containing the seniority arrangement in question, and there are no allegations of irregularities during the ratification vote. *Gullickson*, 87 F.3d at 1186.

The overwhelming ratification of the MOU by the West Pilots is fatal to Plaintiffs' DFR claim, including the claim that USAPA somehow did not have an objectively legitimate purpose in agreeing to the MOU.[2] Neither Plaintiffs nor the putative class of West Pilots were misled as to the MOU provisions, the absence of the Nicolau Award within its terms, or the effect of the ratification process. Pauley Decl., ¶¶11-12. By a margin of 98% to 2%, the West Pilots overwhelmingly accepted a central trade-off contained in the MOU, significant pay increases (as Plaintiffs acknowledge) for a seniority integration process (McCaskill-Bond) that by its express terms does not require USAPA to propound the Nicolau Award.

As in *Gullickson*, the language of the MOU was sufficiently clear to inform pilots that it did not include implementation of the Nicolau Award, and indeed Plaintiffs concede that the MOU makes no mention of the Nicolau Award or a separate process to integrate the separate East and West seniority lists at US Airways. 87 F.3d at 1185; Complaint, ¶82. Paragraph 10 of the MOU addresses the seniority integration process that will occur upon the approval of the proposed merger and the effective date of AMR's POR, stating that the seniority integration process between US Airways and American Airlines will be through the McCaskill-Bond process and binding on the parties. MOU

[2] Any argument that the MOU would still have been ratified if all the West Pilots voted against it is unavailing, and was rejected in *Gullickson* as mere speculation and unpersuasive. 87 F.3d at 1185-86.

¶10(a), (c); *see also* Complaint, ¶81. Thus, the plain language of the MOU put Plaintiffs on notice that ratifying the MOU would act as assent to the seniority arrangements in paragraph 10 therein. *Gullickson*, 87 F.3d at 1185 (finding that plaintiffs knew "ratifying the [new collective bargaining agreement] signified assent to the seniority arrangements contained in the [Letter of Agreement]."). The ratification vote clearly shows that after five years of protracted litigation surrounding the Nicolau Award, the West Pilots moved on. *See Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1534 (7th Cir. 1992) (affirming dismissal of the DFR claim and noting that plaintiffs there ""eventually stopped sulking, voted, and approved the . . . [MOU]"), *cert. denied sub nom., Hammond v. Air Line Pilots Ass'n Int'l*, 510 U.S. 861 (1993). As the Seventh Circuit in *Rakestraw* noted:

> A voluntary choice may not be withdrawn because the choice was an effort to make the best of a bad situation. Adult pilots, of sound mind and well aware of the consequences of their acts, must expect to keep their contracts, even when they wish they could have made better deals.

981 F.2d at 1534.

By voting in overwhelming numbers to ratify the MOU, Plaintiffs and the putative class of West Pilots are now barred from alleging a DFR claim arising out of the negotiation and contents of the MOU, and the complaint should be dismissed.

4. Plaintiffs make no showing for changing the status quo

The status quo is and at all times has been the two separate seniority lists that are currently in effect at US Airways – one for former US Airways pilots and one for former America West pilots.

The RLA status quo is limited to "actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose. *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 153 (1969). The ALPA/Nicolau list has not been implemented and therefore is not an "actual,

objective working condition" that is "in effect." It is clear, moreover, that even under the 2005 Transition Agreement, the ALPA/Nicolau list had to be ratified before it could become effective. 2:10-cv-01570-ROS, US Airways' Memorandum, Doc. 156, p. 7; USAPA Exhibit 3 (Transition Agreement), Section IV.A I. As explained in *Transport Workers Union v. Haw. Airlines*, 2009 WL 972483 (D.Haw. April 8, 2009), *aff'd without opinion*, 344 Fed. App'x. 351 (9th Cir. 2009), an unratified contract proposal is not part of the RLA status quo. *See accord Goclowiski v. Penn Cen. Transp. Co.*, 571 F.2d 747 (3rd Cir. 1978). The Nicolau Award, which was issued under the merger policy then in effect at ALPA, the decertified union, has never been ratified and has never been implemented.

5. As the exclusive bargaining representative USAPA has broad discretion.

As the certified bargaining representative for all the US Airways pilots, whatever decisions USAPA may make on how to approach the McCaskill-Bond process and how best to protect the interests of all US Airways pilots in that process are decisions committed to its sound discretion and the wide range of reasonableness it is granted under federal law. The DFR standard is well established. A plaintiff must show that the union's conduct is "arbitrary, discriminatory or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). With respect to the application of the DFR standard in the context of negotiations, the Supreme Court observed in *Huffman*, 345 U.S. at 338:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

A bargaining representative necessarily proceeds to act despite differences between groups of employees. There is nothing extraordinary about this and nothing that would justify the extraordinary step of dictating to USAPA the substantive contents of proposals

it must make in the McCaskill-Bond process.

6. Plaintiffs' request is a minor dispute that would violate the MOU.

US Airways, USAPA and the other parties to the MOU have explicitly agreed that the existing two-list system will not be disturbed other than through the McCaskill-Bond process. Pauley Decl. ¶ 7. The MOU explicitly provides: "US Airways agrees that neither this Memorandum nor the JCBA shall provide a basis for changing the seniority lists currently in effect at US Airways other than through the [McCaskill- Bond process]." MOU, ¶ 10.h. The MOU further provides that the MOU and the Merger Transition Agreement shall "displace any conflicting or wholly or partially inconsistent provision of the former US Airways pilot agreements or the status quo arising thereunder." MOU, ¶ 4. As this Court previously held, "It is undisputed that the Transition Agreement can be modified at any time 'by written agreement of [USAPA] and [US Airways].'" (2:10-cv-01570-ROS, Doc. 193, at 7.) Although disputes concerning the interpretation of Railway Labor Act agreements such as the 2005 Transition Agreement and the MOU are minor disputes that can only be definitively resolved through the RLA mandated System Board procedure, it is clear for the purposes of this case that the parties have indeed modified the 2005 Transition Agreement by the MOU.[3]

For all these reasons, as well as those stated in USAPA's Motion to Dismiss, there is no likelihood that Plaintiffs can succeed on the merits.

POINT III

THERE IS NO IMMEDIATE IRREPARABLE HARM TO PLAINTIFFS

A plaintiff seeking a preliminary injunction must make a "clear showing" that irreparable injury is *likely* in the absence of an injunction. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (emphasis in original). The mere "possibility" of

[3] Because the relief sought arises out of interpretation or application of the MOU, the complaint is also a minor dispute and subject to dismissal as within the exclusive jurisdiction of the National Mediation Board.

irreparable harm is insufficient. *Id.* A party must show a significant threat of "irreparable injury, irrespective of the magnitude of the injury." *Big Country Foods, Inc. v. Bd. of Educ. of Anchorage Sch. Dist., Anchorage, Alaska*, 868 F.2d 1085, 1088 (9th Cir. 1989). *See also Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended . . . are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.'") (*quoting Virginia Petroleum Jobbers Association v. Federal Power Commission*, 110, 259 F.2d 921, 925 (D.C. Cir. 1958)).

Plaintiffs allege as their harm: (1) risk of their DFR claim being time-barred; (2) no one but the West Pilots will defend the Nicolau Award; (3) unnecessary litigation expenses; and (4) delay in seniority integration. Doc. 13, Motion for Preliminary Injunction, pp. 18-20.

Contrary to Plaintiffs, there is no "intolerable uncertainty" as to when their DFR claim becomes ripe. A DFR claim is not ripe until there is a "final product." *O'Neill*, 499 U.S. at 78. As this Court held, "it is not possible to determine the viability of any claim for breach of the duty of fair representation until a particular seniority regime is ratified. No. 2:10-cv-01570-ROS, Doc. 193 p. 8; *see Addington v. U.S. Airline Pilots Ass'n*, 606 F.3d 1174, 1181-82 (9th Cir. 2010).

The allegation that no one but Plaintiffs will defend the Nicolau Award is not an injury, but simply a restatement of Plaintiffs' underlying claim. Plaintiffs' claim that a preliminary injunction is necessary to avoid the denial of "long overdue seniority rights" (Doc. 13, Motion for Preliminary Injunction, p. 20) is likewise a restatement of their underlying claim and does not support a finding of irreparable harm. The same was true when the Ninth Circuit vacated the judgment in *Addington I*. The Ninth Circuit was well aware that its holding would adversely affect the claim posed by the West Pilots, yet

found the DFR claim was not ripe nonetheless.

"Unnecessary litigation expenses" do not constitute irreparable harm, especially given that such litigation expenses have been incurred as a result of Plaintiffs' repeated attempts at a DFR claim when it is not ripe for judicial review. In addition, litigation costs generally do not qualify as irreparable harm. *In re Carey*, 2012 WL 6054648, at *2 (9th Cir. Nov. 12, 2012).

Also without merit is Plaintiffs' claim that a denying an injunction will delay seniority integration. To the contrary, the MOU clearly provides that the seniority integration process will begin on the Effective Date of the POR. Pauley Decl. ¶ 10. It is uncontested that the parties intended in paragraph 10 of the MOU to maintain the status quo with respect to the separate seniority lists at US Airways. Declaration of John Owens ¶ 10; Pauley Decl. ¶ 7; MOU, ¶ 10.h.

Plaintiffs' claim that the instant injunction is necessary because "USAPA is committed to excluding it from the MOU seniority integration process" (Motion for Preliminary Injunction pp. 14-15) simply has nothing to do with the claim that USAPA must be enjoined to use the Nicolau Award, and is, in any event, contradicted by USAPA's multiple attempts to meet and confer with the West Pilots and their counsel to negotiate regarding USAPA's McCaskill-Bond seniority proposal. Declaration of Gary Hummel, ¶¶ 8-12. These attempts have been consistently rebuffed by the West Pilots, who continue to maintain their "Nicolau-or-Nothing" position. *Id.* The West Pilots are not and have not been excluded. There are two West Pilots on the Negotiating Advisory Committee ("NAC"), Declaration of John Owens, ¶ 5, and USAPA is in the process of selecting the members of the Merger Committee. Pauley Decl. ¶ 15.

Aside from being subject to remediation through monetary or other corrective relief, all of this alleged "harm" is purely speculative. What the Ninth Circuit said about the collective bargaining process is equally true about the seniority integration process,

that is that the result "may yet be one that does not work the disadvantages Plaintiffs fear, even if that proposal is not the Nicolau Award." *Addington*, 606 F.3d at 1181. No one at this time knows what will happen during seniority integration negotiations between USAPA, the APA and the New American, and USAPA must be given the flexibility to use its discretion in advancing and responding to negotiation proposals. There is no irreparable harm, and the motion should be denied.

POINT IV

BALANCE OF THE EQUITIES FAVORS USAPA

Plaintiffs are mistaken when they state that "[n]o adverse effects would flow from preliminary relief." Doc. 13, p. 21. On the contrary, an order from this Court directing USAPA to advance the Nicolau Award during negotiations for seniority integration can severely weaken USAPA's ability to protect US Airways' pilots' in negotiations with American Airline pilots.

"A union's duty to fairly represent all of the individuals in its bargaining unit is a difficult task under the best of circumstances." *Hanley v. Continental Airlines, Inc.*, 1991 WL 94381, at *7 (D. Col. May 24, 1991). In negotiating collective bargaining agreements, "a union must be allowed a 'wide range of reasonableness' because it must be able to focus on the needs of its membership as a whole without undue fear of lawsuits from individual members disgruntled by the result of the collective process." *Bautista v. Pan American World Airlines*, 828 F.2d 546, 549 (9th Cir. 1987) (quoting *Huffma*n, 345 U.S. at 338). "In establishing seniority systems, there are a variety of legitimate options, and the courts are careful not to substitute their judgments for those of the authorized labor organization." *Ratkosky v. United Transp. Union*, 843 F.2d 869, 876 (6th Cir. 1988).

Thus, in negotiating seniority integration, the parties must be allowed flexibility and discretion to respond to changing proposals and negotiation positions. Pauley Decl.

¶¶ 16-17. If this Court grants the relief Plaintiffs seek, it will force upon USAPA the seniority integration proposal of the Nicolau Award and nothing else. The Court will give USAPA no room to negotiate and respond to the APA proposals. Such an intractable position puts USAPA and all US Airways pilots at a severe disadvantage.

It is precisely because of the need for broad flexibility and discretion that "Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper bargain for that reached by the union." *O'Neill*, 499 U.S. at 78. "Any substantive examination of a union's performance . . . must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities. *Id.* The relief Plaintiffs seek would do far more harm to all US Airways pilots than any benefit to be gained by the West Pilots. The balancing of the equities favors denial of Plaintiffs' motion.

POINT V

DENIAL OF THE MOTION IS IN THE PUBLIC INTEREST

The relief Plaintiffs seek must be denied for it "is inconsistent with the longstanding federal labor policy, repeatedly recognized by the Supreme Court, to avoid unnecessary interference in internal union affairs." *Fin. Inst. Employees of Am., Local No. 1182, Chartered By United Food & Commercial Workers Int'l Union, AFL-CIO v. N.L.R.B.,* 752 F.2d 356, 362 (9th Cir. 1984) (citing *NLRB v. Allis-Chalmers Manufacturing Co.,* 388 U.S. 175 (1967), *aff'd and remanded* 475 US 192 (1986).

Furthermore, the public policies that underlie the McCaskill-Bond process – fair and equitable seniority integration so that mergers do not result in inequities to merged employees – must play out on the factual landscape currently facing USAPA without handcuffing it to a particular seniority proposal. Given the nature of negotiations, there is no way to determine in advance what will be fair and equitable. The underlying policies of McCaskill-Bond – and hence, the public interest -- are inconsistent with "take it or

leave it" negotiating that would be the consequence of tying USAPA's hands to the Nicolau Award. Denial of Plaintiffs' motion for a preliminary injunction is in the public interest.

POINT VI

IN THE UNLIKELY EVENT THE COURT ISSUES AN INJUNCTION, PLAINTIFFS SHOULD BE REQUIRED TO POST A BOND

Under Fed. R. Civ. P. 65, if an injunction issues, Plaintiffs should be required to provide security to cover the costs and damages that USAPA will sustain if it is wrongfully enjoined to utilize the Nicolau award in the McCaskill-Bond proceedings that will take place if the POR is approved.[4] In the unlikely event that the Court grants Plaintiffs' motion, USAPA requests that the Court require Plaintiffs to provide security in amount not less than $5,000,000 and that the Court set a further hearing to determine the exact amount of such security.

Fed R. Civ. P. 65(c) provides:

> **Security.** The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained

The purpose of the security requirement is: (1) "to discourage the moving party from seeking preliminary injunctive relief to which it is not entitled"; (2) "to assure the court that if it errs in granting such relief the moving party rather than the wrongfully-enjoined party will bear the cost of the error"; and (3) "to provide a wrongfully-enjoined party a source from which it may readily collect damages without further litigation and without regard to the moving party's solvency." *Cal. Prac. Guide Fed. Civ. Pro. Before Trial* Ch. 13-D, at 13:192.

The Court generally requires "security in an amount that covers the potential

[4] Plaintiffs never cite the statutory basis for their request for a preliminary injunction but Fed. R. Civ. P. 65 applies to all preliminary injunctions and temporary restraining orders.

incidental and consequential costs as well as either the losses the unjustly enjoined or restrained party will suffer during the period he is prohibited from engaging in certain activities or the complainant's unjust enrichment caused by his adversary being improperly enjoined or restrained." Requirement of Security for the Issuance of a Preliminary Injunction or Temporary Restraining Order, 11A *Fed. Prac. & Proc. Civ.* § 2954 (2d ed.).

Preparations for the upcoming merger and the merger process itself are difficult, time consuming and expensive undertakings and require significant resources. As set forth in the MOU, the respective airlines have agreed to reimburse USAPA and APA merger representatives up to $4 million for the expenses and flight pay losses that are incurred in the merger process, but the airlines will not reimburse USAPA for any expenses or flight pay losses in connection with this litigation. Doc. 14-3 p. 57 of 149, at ¶ 7. If USAPA is enjoined to use the Nicolau list in the merger proceedings, an appeal would probably not be concluded until many months after the McCaskill-Bond process is completed at the earliest.[5] If it is ultimately determined that USAPA was wrongfully enjoined, the parties to the MOU would have to seek a delay or repeat the expensive, time consuming and difficult negotiations and McCaskill-Bond arbitration process a second time, the first time using the Nicolau list and the second time without the constraints of the Nicolau list. It is reasonable to assume that repeating the entire process will cost no less than the estimated $4 million in expenses and flight pay losses that the airlines have agreed to reimburse the bargaining representatives. *See, e.g.*, *Nokia Corp. v. InterDigital, Inc.*, 645 F.3d 553, 560 (2d Cir. 2011), aff'd following remand 477 F. App'x 815, 816 (2d Cir. 2012) (party awarded their attorneys' fees as damages where they were wrongfully enjoined to seek a stay of one proceeding and engage in arbitration); Cal.

[5] *See* United States Courts for the Ninth Circuit, *Frequently Asked Questions*, http://www.ca9.uscourts.gov/content/faq.php (Q&As 17 & 18).

Prac. Guide Fed. Civ. Pro. Before Trial Ch. 13-D, at 13:204 ("attorney fees and expenses incurred in *complying* with a wrongfully issued injunction may be recoverable. Thus, for example, fees incurred in a collateral proceeding required by the terms of a wrongful injunction have been held to be recoverable against a bond") (citing *Nokia*, 645 F.3d at 560). Further, any pilots harmed by losing their positions would be entitled to damages if USAPA is wrongfully enjoined.

CONCLUSION

For the foregoing reasons, USAPA respectfully requests that Plaintiffs' Motion for a Preliminary Injunction be denied.

Respectfully submitted this 26th day of April 2013.

Martin & Bonnett, P.L.L.C.

By: s/Susan Martin
Susan Martin
Jennifer L. Kroll
Martin & Bonnett
1850 N. Central Ave., Suite 2010
Phoenix, AZ 85004

Patrick J. Szymanski (*pro hac vice*)
Patrick J. Szymanski, PLLC
1900 L Street, NW, Suite 900
Washington, DC 20036

Brian J. O'Dwyer (*pro hac vice*)
Gary Silverman (*pro hac vice*)
Joy K. Mele (*pro hac vice*)
O'Dwyer & Bernstien, LLP
52 Duane Street, 5th Floor
New York, NY 10007

Attorneys for US Airline Pilots Association

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 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:

Marty Harper
Andrew S. Jacob
Jennifer Axel
Polsinelli & Shughart, PC
CityScape
One East Washington St., Ste. 1200
Phoenix, AZ 85004

Attorneys for Plaintiffs

US Airways, Inc.
Karen Gillen
111 West Rio Salado Parkway
Tempe, AZ 85281

Robert A. Siegel
Chris A. Hollinger
400 South Hope Street, Suite 1500
Los Angeles, CA 90071-2899

Attorneys for US Airways, Inc.

s/J. Kroll