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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Don Addington; et al., Plaintiffs, vs. US Airline Pilots Ass'n, et al., Defendants.	No. CV-13-00471-PHX-ROS **PLAINTIFFS' RESPONSE TO USAPA's MOTION TO DISMISS (Doc. 44)** **Oral Argument Requested**

Plaintiffs Addington, *et al.*, (the "West Pilots") respond to US Airline Pilots Association ("USAPA") motion to dismiss. The Court should deny relief because the West Pilots have stated a ripe, valid claim for breach of the duty of fair representation ("DFR").

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I. Overview

Plaintiffs' claims are that: (1) USAPA breached its duty of fair representation ("DFR") because the Memorandum of Understanding ("MOU") (Doc. 14-3, at App. 367)[1] abandons the Nicolau Award without a legitimate union purpose; and (2) US Airways ("Airways") shares such liability because it agreed to abandon the Nicolau Award, knowing this was a DFR breach for USAPA. In contrast, in 2008 and 2010, Plaintiffs' DFR claims were that USAPA intended to make a contract that breached its DFR. Their claim now is ripe because it alleges that USAPA made such a contract.

II. Material Allegations

When deciding a motion to dismiss, "[a]ll factual allegations set forth in the complaint 'are taken as true and construed in the light most favorable to [p]laintiffs.'" *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001). The Court can consider documents referenced in the complaint without converting the motion to one for summary judgment. *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). But the Court should not consider other evidence without converting this motion to one for summary judgment. Fed. R. Civ. P. 12(d).

A. America West Merger

This litigation concerns a dispute over pilot seniority integration following the 2005 merger of two airlines: US Airways and America West. (Doc. 1 ¶ 1.) At the time, US Airways was in Chapter 11 bankruptcy for the second time in two years. (*Id.* ¶ 33.) Its reorganization plan, pursuant to the terms of the Transition Agreement ("TA") (Doc. 14-1 at App. 87), called for it to merge with America West to form a new airline that would also be known as US Airways (hereinafter, "Airways"). (*Id.* ¶ 34.)

At the time of the merger, there were significant differences between the two airlines and their pilot groups. (*Id.* ¶ 35.) Including pilots on furlough, the pilots from US

[1] Page references to ECF documents use the internal pagination of the document.

Airways ("East Pilots") outnumbered the pilots from America West ("West Pilots"), 5,100 to 1,900. (*Id.* ¶ 36.) All West Pilots were active (had flying jobs). (*Id.* ¶ 37.) In contrast, approximately 1,700 East Pilots were inactive (on furlough). (*Id.* ¶ 38.)

B. Seniority Integration

In 2005, Air Line Pilots Association ("ALPA") represented both airline pilot groups. (*Id.* ¶ 39.) Under ALPA governance, each pilot group was represented by its own Master Executive Council ("MEC"). (*Id.* ¶ 40.) The chairmen of each of the MECs signed the TA. (*Id.* ¶ 41.) Among other things, the TA provided that the two pilot groups would create a single integrated seniority list according to rules identified as "ALPA Merger Policy." (*Id.* ¶ 42.) (Doc. 14-1, at App. 114.) That list, without ratification or any re-evaluation, would be incorporated into a contract, the "Single Agreement," that would be used to integrate pilot operations. (*Id.* ¶ 103.)

Each MEC appointed a Merger Committee with authority to create the single seniority list. (*Id.* ¶ 43.) These committees proceeded to "final and binding" arbitration to create a "fair and equitable" single seniority list. (*Id.* ¶¶ 45-46.) That arbitration was chaired by George Nicolau and its award is referred to as the "Nicolau Award" or "Award." (*Id.* ¶ 3.) [2]

During the arbitration, the East Merger Committee argued that East Pilots who were on furlough at the time of the merger (some for many years) were entitled to seniority rights based upon their dates of hire at US Airways, even if that would put them ahead of West Pilots who were active at the time of the merger. (*Id.* ¶ 47.) The West Merger Committee disagreed. It argued that active pilots must be placed ahead of pilots who were on furlough. (*Id.* ¶ 48.) On that point, the Nicolau Award agreed with the West Pilots, stating that "merging active pilots with furloughees, despite the length of service of some of the latter, is not at all fair or equitable under any of the stated criteria." (*Id.* ¶ 51.)

[2] An analogous procedure for seniority integration is now mandated by Federal law referred to as the "McCaskill-Bond Amendment." 49 U.S.C. § 42112, note, § 117(a).

The Nicolau Award was announced six years ago, on May 1, 2007. (*Id.* ¶ 50.) It placed some 500 of the most senior East Pilots at the top of the combined seniority list because they flew wide-body aircraft that no West Pilot flew at the time. (*Id.* ¶ 52.) At the other end, it placed the East Pilots who were on furlough when the airlines merged. (*Id.* ¶ 53.) Then, it blended the remainder of the two pilot lists in a ratio of approximately 2 to 1, East Pilots to West Pilots, in their respective existing seniority orders. (*Id.* ¶ 54.)

C. Creation and Misuse of a Union

The East MEC immediately repudiated the commitment to treat the Nicolau Award as final and binding. It appealed to ALPA's Executive Committee to overturn the Award. (*Id.* ¶ 56.) ALPA rejected that appeal on the merits and ordered the East Pilots to implement the Award. (*Id.* ¶ 57.) On December 20, 2007, Airways accepted the Award, a position that has never changed. (*Id.* ¶ 55.) That should have been the end of pilot seniority integration. But it was not.

When the Nicolau Award was announced, East Pilot Stephen Bradford contrived a plan to create a new single-airline union (USAPA) to oust ALPA. (*Id.* ¶ 58.) He knew that East Pilots would control a single-airline union because they outnumbered the West Pilots. (*Id.* ¶ 59.) He reasoned that with such control, a single-airline union would "protect" East Pilot interests over those of the West Pilots. (*Id.* ¶ 60.)[3] East Pilots successfully campaigned to elect USAPA to replace ALPA. (*Id.* ¶¶ 61-62.)[4]

USAPA began to represent the entire bargaining unit or craft (comprised of both pilot groups) on April 18, 2008. (*Id.* ¶ 62.) Later in 2008, USAPA presented a proposal to Airways to use date-of-hire instead of the Nicolau Award list to order pilot seniority. (*Id.* ¶ 62.) That date-of-hire ordering gives East pilots who were on furlough at the time of the merger far better seniority than hundreds of West Pilots who were active at the time of the

[3] As demonstrated in Plaintiffs' unopposed Statement of Facts (Doc. 14 ¶¶ 43-46), lawyers cautioned Mr. Bradford and other East Pilots working with him to avoid showing that their "sole reason for the new union is to abrogate . . . the Nicolau award."

[4] As also demonstrated in the Statement of Facts, USAPA campaign materials equated its election with opposition to the Nicolau arbitration. (*Id.* ¶¶ 47-51.)

merger. (*Id.*) USAPA has never withdrawn that proposal and has no intention to ever implement the Nicolau Award. (*Id.* ¶ 64.) Indeed, USAPA was formed with a constitution that mandates that it always use a date-of-hire order for seniority. (*Id.* ¶ 84.)

D. Prior Litigation

On September 4, 2008, six of these Plaintiffs filed a class action ("*Addington I*," 08-CV-1633-PHX-NVW) in the District of Arizona, alleging that USAPA breached its DFR by repudiating its duty to use the Nicolau Award. (*Id.* ¶ 65.) After a 10-day trial, a jury found that USAPA's actions were intended to frustrate implementation of the Nicolau Award and that its sole objective was to benefit East Pilots, rather than to benefit the bargaining union as a whole. (*Id.* ¶ 66.) The District Court (Judge Wake) ruled: "The West Pilots remain entitled to a union that will not abrogate the Nicolau Award without a legitimate purpose. Any waiver of that right must be consensual." (*Id.* ¶ 67.) The Court permanently ordered USAPA to make all reasonable efforts to implement the Nicolau Award and enjoined it from negotiating a contract that would provide better wages that did not incorporate an unmodified Nicolau Award. (*Id.* ¶ 68(a)-(c).)

USAPA appealed. (*Id.* ¶ 69.) The Ninth Circuit vacated the District Court judgment, holding that the dispute was not ripe, but cautioned USAPA that unless it "bargain[ed] in good faith pursuant to its DFR, with the interests of all members—both East and West—in mind," there would be "an unquestionably ripe DFR suit, once a contract is ratified." (*Id.* ¶ 70.)

On July 27, 2010, Airways filed a declaratory judgment class action ("*Addington II*," 10-CV-01570-PHX-ROS) seeking guidance, *inter alia*, as to whether it could legally enter into a collective bargaining agreement with USAPA that did not implement the Nicolau Award. (*Id.* ¶ 71.) This Court was constrained by the 2010 Ninth Circuit ripeness ruling. (*Id.* ¶ 73.) It wrote, therefore, "the best 'declaratory judgment' the Court can offer is that USAPA's seniority proposal does not automatically breach its duty of fair representation." *Addington II* (Oct. 11, 2012) (Doc. 193 at 8:5 to 8:7) (emphasis added).) Nonetheless, the Court ruled that USAPA would breach its DFR by entering into a

contract that used date-of-hire seniority integration unless it had "a legitimate union purpose" for doing so. (Doc. 1 ¶ 75(c).)

The District Court provided additional findings as follows:

a) "[D]ecertification of ALPA and the certification of USAPA did not change the binding nature of the Transition Agreement"; and

b) "Discarding the Nicolau Award places USAPA on dangerous ground."

(*Id.* ¶¶ 75(a)-(b).)

Incredibly, USAPA was not deterred.

E. American Airlines Merger

AMR (the parent company for American Airlines) filed a Chapter 11 petition on November 29, 2011. (*Id.* ¶ 77.) In February 2013, Airways and American Airlines ("American"), and their pilot unions entered into the MOU, an agreement that sets the stage for that merger. (*Id.* ¶ 78.) USAPA's membership ratified the MOU on February 8, 2013. (*Id.* ¶ 79.) Ratification of the MOU fixed, for years to come, all material contract terms for Airways pilots. (*Id.* ¶ 92.) As Airways states in its briefing, this ratification was "the completion of the collective bargaining process for a combined East and West labor agreement – the very process that was still ongoing at the time of the Ninth Circuit's decision in *Addingtion I* and this Court's decision in *Addington II*." (Doc. 49 5:19 to 5:22.)

Prior to the MOU ratification vote, USAPA repeatedly told its members that they should not consider their position on the Nicolau Award when deciding whether to vote to ratify the MOU. (*Id.* ¶¶ 88-90.) For example, in a January 23, 2013, message to its members, USAPA stated that "no East pilot should vote against the MOU because they fear that ratifying the MOU will implement the Nicolau Award, and no West pilot should vote for the MOU because they believe the MOU will implement the Nicolau Award." (Doc. 14 at ¶ 88; Doc. 14-3 at App. 389-90.) For another example, on February 7, 2013, USAPA stated that "West pilots should not vote in favor of the MOU because they believe it will revive the Nicolau Award, and the East pilots should not vote against it

because they are concerned it will cause the Nicolau Award to be implemented." (Doc. 14 at ¶ 90; Doc. 14-3 at App. 391.)

USAPA members voted to ratify the MOU. (*Id.* ¶ 91.) But only a little over half of those who were West Pilots at the time of the 2005 merger and about 2/3 of putative West Pilot Class members participated. (See Doc. 1 at 36, stating there were 1,900 West Pilots in 2005; *id.* ¶ 87, stating there are 1600 members in the proposed West Pilot Class; Doc. 44-1, at 4, stating 1,041 West Pilots participated in the MOU vote.)

F. The MOU is the Single Agreement envisioned by the TA that must implement the Nicolau Award seniority order.

The TA envisioned a "Single Agreement" between Airways and USAPA that would replace material terms in the separate contracts governing the employment of the West Pilots (the West CBA) and the East Pilots (the East CBA). (*Id.* ¶ 103.) The MOU is that "Single Agreement" because it defines (and fixes) all the terms of employment that were to be part of the Single Agreement. (*See* Doc. 49 at 5:10 to 5:12, Airways referring to the MOU as a "new, single CBA.")

Because the MOU is the TA "Single Agreement," it should provide for implementation of the Nicolau Award seniority order. (*Id.* ¶ 105.) But, the MOU does not even mention the Nicolau Award. (*Id.* ¶ 82.) In fact, it disclaims that it "provide[s] a basis for changing the seniority lists currently in effect at US Airways other than through the process set forth in this Paragraph 10 [the McCaskill-Bond integration with the American pilots]." (Doc. 5-1 (MOU ¶ 10.h.).)

USAPA intends to use the MOU as a shield against ripeness while it integrates Airways pilots with American pilots without regard to the Nicolau Award seniority order:

> The MOU thus provides that the status quo regarding seniority is maintained and that the current two list system at US Airways (one for the former America West pilots and one for the former US Airways pilots) shall continue in effect until the McCaskill-Bond process concludes either through agreement or through a decision from the three-member arbitration panel.

(Doc. 44 at 4:18 to 4:23.)

III. Legal Argument

The West Pilots have pleaded a fully ripe, valid DFR claim against USAPA.

A. Issue preclusion doctrine supports the DFR claim.

The West Pilots agree that much of their DFR claim is controlled by issue preclusion (what USAPA calls *res judicata*) that arises from this Court's rulings in *Addington II*. USAPA, however, mischaracterizes the substance of many of the rulings that are preclusive. Properly characterized, issue preclusion strongly supports the DFR claim.

Contrary to USAPA's characterization, this Court never ruled that USAPA is free to abandon the Nicolau Award. Rather, it held that USAPA's use of a date-of-hire seniority order would "not automatically breach its duty of fair representation." (*Addington II*, Doc. 193 at 8:5 to 8:7 (emphasis added).) Importantly, the Court cautioned that "[d]iscarding the Nicolau Award places USAPA on dangerous ground" (*Id.* 7:17 to 7:19) and it indicated that USAPA would breach its DFR by entering into a contract that used date-of-hire seniority integration unless it had "a legitimate union purpose" for doing so. (*Id.* 8:3 to 8:5).

Issue preclusion, therefore, supports the West Pilots' DFR claim. It establishes that USAPA's conduct is wrongful if it is "unrelated to legitimate union interests." *See Robesky v. Oantas Empire Airways Ltd.*, 573 F.2d 1082, 1090 (9th Cir. 1978). It also establishes that to justify abandonment of the Nicolau Award, USAPA must "show some objective justification." *See Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 800 (7th Cir. 1976). Finally, it establishes that USAPA "may not juggle the seniority roster for no reason other than to advance one group of employees over another." *See Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1537 (7th Cir. 1992).

In short, both issue preclusion and compelling legal authority establish that USAPA must have a legitimate union purpose to justify abandonment of the Nicolau Award seniority order in favor of a seniority order that favors the East Pilots. USAPA has never identified such a purpose.

B. This claim is ripe under the Ninth Circuit's standard.

The Ninth Circuit held that there would be "an unquestionably ripe DFR suit, once a contract is ratified." *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1180 n.1 (9th Cir. 2010). This Court applied that standard in *Addington II*, where it indicated that there will be a ripe a DFR claim "[w]hen the collective bargaining agreement is finalized." (Doc. 193, at 8:3 to 8:4.) [5] Because the MOU is the contract contemplated by those orders, the DFR claim is now ripe.

This dispute began with the 2005 TA. (Doc. 1 at ¶¶ 2, 34, 42.) That agreement provided that a single pilot collective bargaining agreement ("CBA") would be used to integrate pilot operations at the post-merger airline. That CBA would have two parts. One part would be a single pilot seniority list created according to ALPA Merger Policy. (*Id.* ¶ 42.) That is the Nicolau Award. (*Id.* ¶ 52.) The other part would be a contract that establishes terms and conditions of employment for both pilot groups. The TA refers to that contract as the "Single Agreement." (*Id.* ¶ 103.) Only the Single Agreement would be subject to ratification. (Doc. 14-1, at App. 116 (Section 45.D.3. ALPA Merger Policy.)

The MOU sets all material terms and conditions of employment for both pilot groups. (Doc. 1, ¶¶ 80, 83, 105.) [6] Pursuant to the TA, therefore, the MOU is the Single

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[5] USAPA misconstrues language from this Court's decision in *Addingtion II*, where this Court held to that it might not be possible to determine the "viability of any claim for breach of the duty of fair representation until a particular seniority regime is ratified." (*Addington II*, Doc. 193 at 8:1 to 8:3.) The West Pilots do not believe that the Court intended to require ratification of a seniority regime in contexts such as this where the union membership will never directly vote to ratify a seniority regime. Because the MOU provides no opportunity to later "ratify" a seniority list, ratification of the MOU triggers ripeness.

[6] Airways agrees with the West Pilots on this point. (*See* Doc. 49 at 5:10 to 5:12) ("To the extent a 'final CBA, or a 'new, single CBA" . . . is a prerequisite to ripeness of the DFR claim asserted by plaintiffs in this case, the requirement is satisfied." (*quoting Addington*, 606 F.3d at 1179-80.) Airways also notes in its briefing that:

> the MOU itself has already determined and sharply circumscribed the parameters of the JCBA [the final version of the Single Agreement]. If the parties cannot reach agreement on a JCBA, or the pilots do not ratify a

Agreement and it should incorporate the Nicolau Award unless USAPA had a legitimate union reason to abandon the Award. But, the MOU fails to do so. (*Id.* ¶ 108.)[7] It is a contract that directly abandons the firm agreement to treat the Nicolau Award as final and binding.

The West Pilots' claim is that USAPA breached its DFR because it made a contract that abandons a duty to treat the Nicolau award as final and binding. In contrast, in 2008 and 2010, the West Pilots' claim was that USAPA intended to make such a contract. Because the present claim is directed at a ratified contract, it is materially differs from the claims made in 2008 and 2010 and, therefore, is ripe under the Ninth Circuit standard.

Ripeness is not affected, as USAPA argues, because it is not yet know whether the seniority integration with the American pilots will be by date-of-hire. (Doc. 44 at 9:25 to 9:28.) This DFR claim is not based on how the Airways pilots' seniority may be integrated, in the future, with the American pilots' seniority. It is based on abandonment of the duty to order the Airways' pilots according to the Nicolau Award in that process. No matter how the Airways pilots are eventually integrated with the American pilots, the DFR requires that the order of the Airways pilots must follow the Nicolau Award.

> negotiated CBA, the MOU provides that the terms of the JCBA will be imposed through "final and binding" arbitration and that the arbitrator's award must be "consistent with the terms of the MTA [the contract incorporated into the MOU" . . . and "specifically shall adhere to the economic terms of the MTA . . ."

(Doc. 49 at 6:2 to 6:8.) Airways also states "the material terms and conditions of employment for both the East and West pilots following the merger are now known and fixed by the MOU." (*Id.* at 6:11 to 6:12.)

[7] USAPA admits in its briefing that the MOU changes the TA by stating that the MOU requires that Airways must continue to use separate seniority lists for East and West (to the detriment of the West) "until the McCaskill-Bond process concludes either through agreement or through a decision from the three-member arbitration panel." (Doc. 44 at 4:21 to 4:23.)

C. This Court has hybrid jurisdiction.

Ordinarily, a contract related claim by a worker against a carrier-employer must be remedied before the System Board. But, where a union's DFR breach is intertwined with such a claim (as is the case here), the United States District Court has hybrid claim jurisdiction. *Allen v. United Food & Commercial Workers Int'l*, 43 F.3d 424, 426 n.1 (9th Cir. 1994) (explaining that a hybrid claim "involves allegations both that the employer breached the collective bargaining agreement, and that the union breached its duty of fair representation"). This Court, therefore, has subject matter jurisdiction over the DFR claim notwithstanding that it is intertwined with a minor dispute directed at Airways.

D. USAPA acted without a legitimate union purpose.

USAPA cannot hide behind DFR standards that apply to other contexts. This case is different, for example, from *Airline Pilots Ass'n, Int'l, v. O'Neill*, 499 U.S. 65 (1991), where the claim was that the substance of terms that a union negotiated with a carrier showed a DFR violation. That kind of DFR claim must show that the union acted far outside a wide range of reasonableness. *Id.* at 67.

The *O'Neill* DFR standard is not applicable in this case, no matter how much USAPA wants it to be. It does not apply here because the West Pilots do not base their DFR claim on the substance of a term newly negotiated between Airways and USAPA. The bargain that led to the arbitration that created the Nicolau Award occurred in 2005 and all agreed that the award from that arbitration would be final and binding. The wrongful act here is USAPA's decision to abandon that bargain with no legitimate union purpose for doing so. That kind of action is judged by a different standard.

USAPA has always favored the seniority interests of one member faction (East Pilots) over another (West Pilots). A union can do that only for a "legitimate purpose." *Laborers & Hod Carriers Loc. No. 341 v. NLRB*, 564 F.2d 834, 840 (9th Cir. 1977); *see also Robesky*, 573 F.2d at 1090 (same); *Rakestraw*, 981 F.2d at 1537; *Barton Brands*, 529 F.2d at 800.

A legitimate union purpose seeks "increased benefits for workers in the bargaining unit as a whole." *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U. S. 728, 742 (1981). A union has a legitimate purpose for shifting seniority benefits under very limited circumstances. *E.g.*, *Rakestraw*, 981 F.2d at 152 (purpose was to punish pilots who in a past strike had crossed picket lines). USAPA offers no reason why this Court must find that it had a legitimate purpose here. This Court, therefore, should find that the West Pilots have stated a proper DFR claim.

E. MOU ratification does not allow USAPA to breach the DFR.

Equitable estoppel applies against a party who has engaged in conduct that causes justifiable reliance by the other party; it prevents the first party from later taking the benefit of a contrary position. *See Carrillo v. United States*, 5 F.3d 1302, 1306 (9th Cir. 1993).

Prior to the vote on ratifying the MOU, USAPA repeatedly told its members that they should not use their position on the Nicolau Award to decide whether to vote for MOU ratification. For example, in a January 23, 2013, message to its members, USAPA stated that "no East pilot should vote against the MOU because they fear that ratifying the MOU will implement the Nicolau Award, and no West pilot should vote for the MOU because they believe the MOU will implement the Nicolau Award." (Doc. 14 at ¶ 88; Doc. 14-3 at App. 389-90.) For another example, on February 7, 2013, USAPA stated that "West pilots should not vote in favor of the MOU because they believe it will revive the Nicolau Award, and the East pilots should not vote against it because they are concerned it will cause the Nicolau Award to be implemented." (Doc. 14 at ¶ 90; Doc. 14-3 at App. 391.)

Now, USAPA argues that the vote ratifying the MOU in some way abrogates the West Pilots' right to enforce implementation of the Nicolau Award. Having repeatedly told its members that they should vote on MOU ratification without regard to their position on implementation of the Nicolau Award, it is incomprehensible how USAPA thinks it can now tell this Court that the West Pilots, by voting to ratify the MOU,

intentionally and knowingly abandoned their right to such implementation. The Court must hold USAPA estopped from making such an argument.[8]

The right to the benefits of the Nicolau Award is personal to each pilot. Every pilot with a position on the Nicolau Award seniority list, therefore, has the right to enforce implementation of the Award. That is true whether the pilot is a union member or not, whether the pilot is active or on furlough, whether the pilot voted on ratification or not.

It would be antithetical to the doctrine of fair representation if union members could vote to abrogate the rights of others (in particular non-members) who are represented by their union. That would negate the DFR "protection against the tyranny of the union majority," *Voccio v. Gen. Signal Corp.*, 732 F. Supp. 292, 295 (D.R.I. 1990), which limits the broad powers provided to labor unions. *See Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 64 (1975) ("In vesting the representatives of the majority with this broad power Congress did not, of course, authorize a tyranny of the majority over minority interests."). Yet, that is what USAPA argues happened here with the MOU vote.

Barely more than half of the West Pilots with positions on the Nicolau Award list participated in the MOU ratification vote. Only about 2/3 of the members of the putative West Pilot Class participated. Even if the MOU were an overt vote on whether to abandon the Nicolau Award (which it was not), this subgroup of West Pilots cannot consent to abandonment of the Nicolau Award for the entire West Pilot Class. The Court should find, therefore, that even if USAPA were not estopped from making such a defense, the MOU ratification vote could not, and did not, release USAPA from its duty to implement the Nicolau Award.

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[8] It would be a separate DFR violation if USAPA intentionally misled its members to persuade them to vote for the MOU. *See Bautista v. Pan Am. World Airlines, Inc.*, 828 F.2d 546, 550 (9th Cir. 1987) ("Intentionally misleading statements by union officials designed to persuade members to join in . . . ratification of a newly negotiated agreement, can supply the bad faith necessary to a DFR violation.").

F. Plaintiffs make a proper common benefit attorneys' fees claim.

The West Pilots claim attorneys' fees and other expenses under common benefit doctrine. (Doc. 1 at ¶¶ 116 - 119.) Courts make such awards where litigation conferred "a substantial benefit on the members of an ascertainable class, and . . . the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375, 393-394 (1970).

Courts make common benefit awards where a member successfully sues a union, "because to allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Hall v. Cole*, 412 U.S. 1, 5-6 (1973) (internal quotation and alteration marks omitted). Such awards simply shift the costs of litigation to "the class that has benefited from [the litigation]." *Id.* at 8-9. Indeed, there is authority for the proposition that such fee shifting is mandatory in DFR cases. *Harrison v. United Transp. Union*, 530 F.2d 558, 564 (4th Cir. 1975), for example, found error where the district court denied a fee award in successful DFR litigation. Indeed, Harrison had a right to a fee award even though his DFR claim was based on what the court regarded as "settled law." *Id.* at 561.

Where courts consider the nature of the benefit derived from DFR litigation, they do not require "that the plaintiffs and the union members [at large] must share in the benefit of the suit in the same way." *Ramey v. District 141, Int'l. Ass'n of Machinists & Aerospace Workers*, 2010 WL 292769, *4 (2d Cir. Jan. 27, 2010). To the contrary, "the threshold question in determining whether or not defendants' should bear the burden of attorney's fees is whether the litigation has the potential to confer a common benefit to the union membership." *Id.* (internal quotation and alteration marks omitted). "[E]ach member of the union [, therefore, need not] receive precisely the same benefits as the plaintiff." *Id.*

With such clear support for making common benefit fee awards in DFR cases, this Court should not dismiss the fee claim here.[9]

G. The Court should not strike material cited from *Addington I.*

The West Pilots cite to *Addington I* in their complaint to provide context for the Ninth Circuit's decision on ripeness. (Doc. 1 at ¶¶ 67-68.) This Court should consider those allegations for that purpose.

IV. Conclusion

The West Pilots respectfully ask this Court to deny USAPA's motion to dismiss.

Dated this 3rd day of May, 2013.

POLSINELLI PC

/s/ Andrew S. Jacob

By _____

Marty Harper
Andrew S. Jacob
Jennifer Axel
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May 2013, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the ECF System for filing and transmittal.

/s/ Andrew S. Jacob

By _____

[9] The Court need not address the merits of attorneys' fees claim when deciding the pending motion for injunctive relief.