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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; Steve WARGOCKI;Michael J. SOHA; Rodney Albert BRACKIN; and George MALIGA, on behalf of themselves and all similarly situated former America West pilots,

Plaintiffs,

vs.

US AIRLINE PILOTS ASS'N, an unincorporated association; and US AIRWAYS, INC., a Delaware Corporation,

Defendants.

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

Judge Roslyn O. Silver

MEMORANDUM OF LAW IN SUPPORT OF AMR CORPORATION AND AMERICAN AIRLINES, INC.'S APPLICATION TO INTERVENE AND BRIEF OF INTERVENOR

INTRODUCTION AND SUMMARY OF ARGUMENT

American Airlines, Inc., and its corporate parent, AMR Corporation, (collectively, "American") seek to intervene for limited purposes to protect interests in this litigation that are different from those of the parties.[1] American's unique interests qualify for intervention for two reasons. First, American is a debtor in possession in a Chapter 11 proceeding in the Southern District of New York. As part of its Plan of Reorganization, American intends to merge with Defendant US Airways, and that proposed merger has been approved by the bankruptcy court. A critical feature of the merger process involves the future integration of pilot seniority lists at the two airlines. Although American takes no position on the underlying merits of this litigation, the possibility exists that injunctive relief entered here in favor of Plaintiffs (should they prevail) could interfere with the obligations of all parties to the merger process (including Defendant US Airline Pilots Association ("USAPA")) to proceed with that process on a timetable and on conditions memorialized in a four-party Memorandum of Understanding currently under consideration for approval by the bankruptcy court as part of that court's jurisdiction over American's reorganization. American thus seeks to intervene to assist this Court in avoiding unnecessary and potentially inadvertent conflict with the bankruptcy process and that court's jurisdiction.

Second, American seeks to express — briefly — its unique perspective on the argument made in this Court by Defendant USAPA that the long-running pilot seniority integration dispute among the US Airways pilots is not yet ripe, and will not become ripe for a matter of years. Accepting that argument would mean an effective halt to the pilot seniority integration aspect of the American/US Airways merger process for years to come. Such a result would force the merged American to manage its pilot workforce as if the two airlines remained separate indefinitely, but certainly for years to come, denying American, and its employees and other stakeholders many of the efficiencies on which the merger was predicated. American is best

[1] If for any reason this Court does not grant American's motion to intervene, American requests that the Court deem this motion to be a brief *amicus curiae* in support of neither party but urging the careful approach to potential equitable relief described herein, as well as prompt and final resolution of the dispute on the merits.

situated to explain this potential harm to the Court.

It bears repeating: American takes no position on the merits of this case or even, for the most part, the relief the Court might consider should Plaintiffs prevail. Moreover, discussions with Plaintiffs' counsel have yielded proposed language granting injunctive relief that would, if entered as suggested, leave USAPA and the other parties to the merger seniority integration process free to comply with their contractual obligations. (Plaintiffs' Reply In Support Of Motion For Preliminary Injunction, Doc. 53: 5-9.) American seeks intervention here only to ensure that the Court is aware of the risks that would accompany a more broadly worded injunction, and to inform the Court of the real, immediate, and long-lasting consequences that would flow from a conclusion that this matter is not yet ripe.

FACTS

On November 29, 2011, American filed for protection under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. Over the last 17 months, American has worked diligently to bring its costs under control, streamline its operations, and set out a business plan for emergence and success.

As a cornerstone of that business plan, American has agreed to merge with US Airways, thereby creating the largest carrier in the world. The bankruptcy court approved that merger on March 27, 2013.

As part of the merger process, American and US Airways entered into a Memorandum of Understanding ("MOU") with the unions representing the pilots at the two carriers (Allied Pilots Association or "APA" at American and USAPA at US Airways) that constitutes a collective bargaining agreement among the four parties. *See* MOU, *In Re AMR Corporation*, United States Bankruptcy Court, Southern District of New York, 13-01282-shl, Doc. 20-2, attached hereto as Exhibit A. That collective bargaining agreement was subsequently ratified by the US Airways pilots overwhelmingly. In that agreement, the parties agreed that once the merger closes, with limited exceptions, the pilots at US Airways would immediately transition, without any further ratification vote, to the terms established in the new six-year American Airlines/APA collective bargaining agreement, which was approved by the bankruptcy court on December 19, 2012, as

modified by the MOU. The parties recognized that they would still need to harmonize practices currently applicable to the two pilot groups, and accordingly, they agreed to an expedited process for compiling a new, final "joint" collective bargaining agreement ("JCBA"), but also agreed that the economic and most critical aspects of the modified six year American/APA agreement would remain in effect throughout.[2] Because the JCBA will only implement, rather than alter, the economics of the MOU and would only make other limited changes contemplated by the MOU, the JCBA reached through arbitration will not be subject to membership ratification.

A key feature of the MOU — and the one directly implicated here — is an agreement to a specified procedure and timetable for completing the work of combining the pilot seniority lists at American and US Airways. The MOU requires the parties to begin that process as soon as possible after emergence, and to conclude the process and produce a final and binding seniority list within a specified time. *See* Exhibit A, ¶ 10. The processes and timetables to which the parties have committed in that collective bargaining agreement — the MOU — are threatened by this proceeding. If that threat were to become a reality, it would hinder the merger process, ultimately undermining all of American's best efforts to realize the anticipated synergies on which the merger is based.

ARGUMENT

I. AMERICAN IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT UNDER RULE 24

American should be permitted to intervene in this case as a matter of right, but seeks to do so only for a limited purpose. A federal court must permit intervention on the timely motion of anyone who:

> claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

[2] If negotiations on this JCBA fail, the process ends in final and binding arbitration, but the "arbitrator's jurisdiction and award will be limited to fashioning provisions which are consistent with the terms of the [American/APA CBA and the MOU]" and "specifically [must] adhere to [those] economic terms . . . ." *See* Exhibit A, ¶ 27.

Fed. R. Civ. P. 24(a)(2).

The requirements of Rule 24(a)(2) have been distilled to four inquiries. Applicants must demonstrate that "(1) the intervention application is timely; (2) the applicant has a significant protectable interest relating to the property or transaction that is the subject of the action; (3) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the existing parties may not adequately represent the applicant's interest." *Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006) (internal quotation marks and citation omitted). These requirements "are broadly interpreted in favor of intervention." *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (citing *Prete*, 438 F.3d at 954). A court's review of the application, moreover, is "guided primarily by practical considerations, not technical distinctions." *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001). Here, intervention should be permitted because each of those four requirements has been met.

A. **American's Application is Timely**

A motion to intervene is timely if it is "made at an early stage of the proceedings, the parties would not have suffered prejudice from the grant of intervention at that early stage, and intervention would not cause disruption or delay in the proceedings." *Citizens for Balanced Use*, 647 F.3d at 897 (citing *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 836 (9th Cir 1996)). American's motion possesses each of these attributes. The Complaint in this matter was filed just two months ago, on March 6, 2013. At present, no Answer has been filed by either of the Defendants. American's motion, therefore, is not merely at an "early stage" of this proceeding, but at the earliest possible stage. *See Officers for Justice v. Civil Serv. Comm'n*, 934 F.2d 1092, 1095 (9th Cir. 1991) (permitting intervention even ten years after entry of consent decree).

Nor would intervention prejudice the parties or cause disruption or delay in the proceedings.[3] American seeks to intervene for the very limited purpose of filing this brief[4] to

[3] In considering the timeliness question, the potential prejudice to a proposed *intervenor* is relevant to whether a motion to intervene should be granted. *See*, *e.g.*, *Edwards v. City of*

express its views on the potential impact this litigation may have on another proceeding — the American Chapter 11 proceeding currently pending in the Southern District of New York — and respond to the argument that the merits of this dispute are not ripe. None of the parties here is a party in the Chapter 11 proceeding, and thus American is uniquely situated to inform the Court regarding those matters and express American's interests in having the Chapter 11 process, and the related US Airways/American Airlines merger, proceed without interference from the relief requested here. Because, as explained below, American has a unique interest in seeing the dispute underlying this action resolved as soon as possible, American also seeks to intervene to express its views in this brief that the dispute at the heart of this litigation is ripe for decision. Consequently, American is not asking the court to delay resolution of this case or to deprive any party of its right to be heard.

In any event, in determining prejudice, "[t]he question is whether existing parties may be prejudiced by the delay in moving to intervene, not whether the intervention itself will cause the nature, duration, or disposition of the lawsuit to change." *United States v. Union Elec. Co*., 64 F.3d 1152, 1159 (8th Cir. 1995) (citation omitted). No such prejudice will occur here because American has moved in advance of any hearing on the merits, and this Motion will not alter the briefing or argument scheduled on the request for injunctive relief or the merits.

B. **American Has a Significant Protectable Interest Relating to this Case**

"Whether an applicant for intervention as of right demonstrates a sufficient interest in an action is a 'practical, threshold inquiry,' and '[n]o specific legal or equitable interest need be established.'" *Glickman*, 82 F.3d at 837 (quoting *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993)). To demonstrate a significant protectable interest, an applicant must establish only

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Houston, 78 F.3d 983, 1002 (5th Cir. 1996) (considering "the prejudice caused the applicants [to intervene] if their positions are denied"); *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995) ("we must also consider . . . the prejudice to the intervenor if his motion is denied") (citation omitted).

[4] Counsel for American will attend the hearing currently scheduled on Plaintiffs' Motion for Preliminary Injunctive Relief to answer any questions the Court may have and to observe the proceedings, but if this Application is granted, American has no current plans to present or question witnesses.

that the interest is protectable under some law and that there is a relationship between the legally protected interest and the claims at issue. *Id.*

American's interest in this case is patent. To effect the merger already approved by the bankruptcy court and obtain the efficiencies on which the merger is premised, American must combine the pilot groups at the two merging carriers. A (if not *the*) primary obstacle to completing that task is integrating the pilot seniority lists currently in use at the two carriers. To achieve that goal, American, US Airways, USAPA, and APA entered into a four-party agreement (the MOU) that provides for a fair and equitable seniority integration process for accommodating the interests of all concerned pilots and, most importantly for American, a strict timeline for accomplishing that result.

Injunctive relief in this case could threaten that process and its timing. By intervening, American seeks to protect the value of its merger and to protect its own contractual rights under the collectively bargained four-party MOU. American's interest is not merely in *eventually* obtaining a combined pilot seniority list; American is vitally interested in protecting its bargained-for right to obtaining such a list on the schedule to which the parties all agreed. If injunctive relief is granted without adequate care, American's contract rights — and substantial merger-related value — could be sacrificed. Intervention is warranted to allow American to seek to prevent that from occurring.

C. **Disposition of this Case May, as a Practical Matter, Impair American's Interest in Successfully Reorganizing under Chapter 11**

"If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene . . . ." Fed. R. Civ. P. 24 advisory committee's note; *see also Berg*, 268 F.3d at 822 ("We follow the guidance of Rule 24 advisory committee notes"). As explained above, if Plaintiffs obtain the relief they have requested, the practical result will be to freeze in its tracks for years to come the merger process as to this critical element. In these circumstances, it cannot really be denied that the disposition

of the case could impair American's interest.[5] *See Citizens for Balanced Use*, 647 F.3d at 900 ("intervention of right does not require an absolute certainty that a party's interests will be impaired"); *California ex rel. Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir. 2006) ("Having found that appellants have a significant protectable interest, [this court had] little difficulty concluding that the disposition of [the] case may, as a practical matter, affect it.").

D. **The Existing Parties to this Lawsuit Do Not Adequately Represent American's Interest**

Finally, neither the Plaintiffs nor either of the Defendants can adequately represent American's interests in this matter. The burden of showing inadequacy of representation is "minimal" and satisfied if the applicant can demonstrate that representation of its interests "may be" inadequate. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). Adequacy of representation is evaluated on three factors: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Id.* The "most important factor" in assessing the adequacy of representation is "how the interest compares with the interests of existing parties." *Id.*

Here, American's interests are not sufficiently aligned with those of any party to this lawsuit to conclude that *necessarily* American's own interests will be protected.[6] None of the parties to the present case is a party in American's Chapter 11 case. American's interest in

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[5] Even if this Court's rulings as to the seniority integration list for the US Airways/America West merger are not binding on American as to the US Airways/American merger, the consequences for American's contract and statutory rights are nonetheless established. The fact that the bankruptcy court might find rulings from this Court persuasive is sufficient to illuminate the potential for impairment. *See Yniguez v. Arizona*, 939 F.2d 727, 737 (9th Cir. 1991) (intervenors established the impairment requirement; "even if we assume that the district court's ruling has no binding effect on the Arizona courts, we cannot wholly overlook the fact that jurisprudential concerns might cause those courts to find the reasoning of the district court more persuasive than they might otherwise find a similar argument to be, and that they might choose to accept the district court's reasoning to avoid confusion, lack of finality, and disrespect for the law.").

[6] Although US Airways shares American's interest in effectuating the merger, it is not a party to American's reorganization proceeding in bankruptcy court.

protecting its own reorganization is distinct from the interests of any party, and none of the parties currently in the case has any obligation to make (much less emphasize) the arguments American has in defending its own contract rights.

II. IF PLAINTIFFS PREVAIL, THE COURT SHOULD FASHION INJUNCTIVE RELIEF CAREFULLY, MINDFUL OF THE PARTIES' CONTRACTUAL OBLIGATIONS

As explained above, American's interest in any injunctive relief the Court may enter is exceedingly narrow. It extends only to the potential risk that an Order from this Court might inadvertently prevent USAPA from complying with its contractual obligations under the MOU to resolve the merger-related integration process on the agreed-upon schedule, or give USAPA the choice either to begin that process using the Nicolau list or wait until this litigation is concluded. *If* the Court concludes that injunctive relief is warranted, it should be careful to avoid any language in its Order that might provide an arguable basis for USAPA to delay the MOU process or renounce its bargained-for responsibilities. Language consistent with the proposed injunctive relief sought by Plaintiffs would, in American's view, be adequate to protect its interests in this regard. *See* Plaintiffs' Proposed Order, Doc. 53-1.

III. THIS DISPUTE IS RIPE

American agrees with the arguments made by US Airways with respect to the ripeness issue. It writes separately here merely to emphasize the unique harm that will be done to American should there be any delay in considering the merits of that dispute. "A court "appl[ies] a two-part test to determine if a case satisfies prudential requirements for ripeness: the fitness of the issue for judicial decision and the hardship to the parties of withholding court consideration." *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 486 (9th Cir.), cert denied, 132 S. Ct. 366 (2011). 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." *Cardenas v. Anzai*, 311 F.3d 929, 934 (9th Cir. 2002) (internal quotation marks omitted).

"At the same time, a litigant need not 'await the consummation of threatened injury to obtain preventive relief. If the injury is *certainly* impending, that is enough.'" *Id.* (quoting *18 Unnamed "John Smith" Prisoners v. Meese*, 871 F.2d 881, 883 (9th Cir. 1989)). To meet the hardship requirement, meanwhile, "a litigant must show that withholding review would result in 'direct and immediate' hardship and would entail more than possible financial loss." *Winter v. Cal. Med. Review Bd., Inc.*, 900 F.2d 1322, 1325 (9th Cir. 1990) (citing *Cal. Dep't of Educ. v. Bennett*, 833 F.2d 827, 833-34 (9th Cir. 1987)).

It is difficult to imagine a labor case in which impending injury would be more certain, or in which the direct and immediate hardship that would result from waiting is more patent. American is about to embark on a merger valued at approximately $10 billion. As with most mergers, the value in the merger is bound up in the ability to achieve efficiencies from combining operations as soon as possible; the longer the merged company is required to operate separately one "American" pilot workforce and a second "US Airways" pilot workforce, the more the value of the merger for shareholders will be degraded. The competitive capacity of the merged airline — and thus the livelihood of the tens of thousands of individuals the airline will employ — will turn on the airline's ability to capitalize quickly on the opportunities the merger presents. Delay means diminished opportunities.

It was precisely for that reason that US Airways, American and their respective pilot unions negotiated a detailed, comprehensive pre-merger collective bargaining agreement, with meticulous attention to deadlines, to ensure that the labor components of the merger could be effectuated as soon as possible. USAPA, however, continues to delay the process of resolving the internal US Airways pilot seniority integration dispute (a resolution that obviously would facilitate the process of merging the American and US Airways pilot seniority lists). It now claims, not only that this dispute is not *currently* ripe, but that it will not *become* ripe for years — until the operational integration of the airlines is otherwise completed and the parties have finished the JCBA process.

That is not tenable. The bankruptcy court has approved the merger. The Plan of Reorganization, which incorporates the MOU, has been filed and is awaiting approval by the

bankruptcy court. The risk of harm to American is imminent. USAPA has contractually agreed to begin the merger-related seniority integration process "as soon as possible after" the Plan is approved and American emerges from Chapter 11 — a date scheduled to arrive early in the third quarter. This potential injury to American's contract rights is not remote or insubstantial; it is here and now.

To the extent it applies here, ripeness is a prudential doctrine, not a jurisdictional rule. *See Addington v. U.S. Airline Pilots Ass'n*, 606 F.3d 1174 (9th Cir. 2010). Given the current state of affairs, it would be unwarranted and imprudent in the extreme to use that doctrine to deny the merging parties the benefit of their bargain and frustrate American's efforts to realize the advantages expected by the new company's shareholders and employees alike.[7]

CONCLUSION

For the reasons discussed above, American's Application to Intervene in this case should be granted, the Court should move promptly to resolve the merits of this case, and should tailor any relief it might find appropriate to avoid interference with the Bankruptcy Court's jurisdiction.

[7] It is worth noting that the bankruptcy court expressed unequivocally its view that "[t]here needs to be a decision as to what the integration is going to be by [USAPA]." *See* Transcript of April 3, 2013 hearing, *In Re AMR Corporation*, United States Bankruptcy Court, Southern District of New York, 13-01282-shl, Doc. 20-1, attached hereto as Exhibit B, at 33. Resolving the US Airways seniority dispute, the court concluded "is a precondition to the [seniority] integration [process] that's contemplated by this merger . . . . You have to figure out what the rights are within [US Airways] first." *Id.*, at 21. The court observed that "[c]ertainly there is a live dispute about [US Airways] seniority as a result of that merger. I would think after 13 [sic; eight] years I guess one would think it's ripe for decision." *Id.*, at 31.

DATED: May 7, 2013

By /s/ Todd C. Duffield

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May, 2013, I electronically transmitted AMR CORPORATION AND AMERICAN AIRLINES, INC.'S APPLICATION TO INTERVENE, MEMORANDUM OF LAW IN SUPPORT THEREOF, AND BRIEF OF INTERVENOR to the U.S. District Court Clerk's Office by using the ECF System for filing and transmittal.

By /s/ Todd C. Duffield