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 to Consolidate the Preliminary Injunction Hearing with Trial on the Merits

Defendant US Airline Pilots Association ("USAPA") opposes Plaintiffs' motion to consolidate the preliminary injunction hearing with a trial on the merits.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Eight weeks after Plaintiffs filed their motion seeking a preliminary injunction, nearly three weeks after the Court set a hearing on that motion, and with only six days remaining before the preliminary injunction hearing, on May 8, 2013 Plaintiffs belatedly moved to consolidate the May 14, 2013 preliminary injunction hearing with a trial on the merits. Although no response to the motion is even required until May 27, 2013, (almost two weeks after the scheduled hearing at which consolidation is sought), Plaintiffs are filing this response so that this belated and meritless motion can be summarily denied.

First, Plaintiffs' significant delay, and failure to comply with Fed. R. Civ. P. 6(c) and Local Rule 7.2 provide sufficient grounds to summarily deny Plaintiffs' motion. Second, both Defendants have pending motions to dismiss that, if granted, would result in dismissal of the entire action. *See* Motions to Dismiss, Docs. 44, 28. Plaintiffs' attempts to require the parties to proceed to a trial on the merits of claims that are subject to dismissal is inefficient and would entail a significant waste of both the Court's and USAPA's resources. Finally, Plaintiffs' request that the Court "sua sponte" consolidate this matter for trial is inappropriate and would result in significant prejudice to USAPA.

The Supreme Court has cautioned, "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395-96 (1981). There are completely different burdens, inquiries and evidentiary requirements when addressing preliminary injunction and final determination requirements. *Id.* at 395. Plaintiffs failed to meet their burden show a preliminary injunction is warranted and USAPA responded accordingly. In contrast to the injunction hearing, a trial on the merits of a claim for breach of the duty of fair

representation is by its very nature fact intensive, requiring inquiry and discovery of the facts and circumstances existing at the time of the challenged action. *See, e.g., Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67 (1991). ("We hold that the rule announced in *Vaca v. Sipes*, 386 U.S. 171, 190, 87 S.Ct. 903, 916, 17 L.Ed.2d 842 (1967)—that a union breaches its duty of fair representation if its actions are either "arbitrary, discriminatory, or in bad faith"—applies to all union activity, including contract negotiation. We further hold 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," *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953), as to be irrational.") *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67 (1991).

Plaintiffs' argument that there would be no prejudice by combining the hearing scheduled for May 14, 2013 with a trial on the merits is frivolous. First, Plaintiffs' claim that USAPA's failure to respond to Plaintiffs' unauthorized "Separate Statement of Facts" submitted in violation of Local Rule 7.2, somehow suggests that there are no facts in dispute is erroneous.[1] USAPA addressed the injunction motion within the confines of Local Rule 7.2 and was under no obligation to respond to Plaintiffs' unauthorized submission. In the event this matter is not subject to immediate dismissal, USAPA

[1] As shown below, Plaintiffs have committed serial violations of LR Civ 7.2. Their preliminary injunction motion was 18 pages instead of the permitted 17. Their "statement of facts," which was not a "required statement of facts" added an additional unauthorized 24 pages to Plaintiffs' motion. Their 12 page reply also violated the 11 page limitation of LR Civ 7.2(e)(1) and (2). *See* LR Civ. 7.2(e)(1). *See also Campbell v. Fernando-Sholes*, CV-05-0880-PHX-SMM, 2009 WL 151200 (D. Ariz. Jan. 21, 2009) (striking motion papers for violating the 17 page limit of LR Civ 7.2(e)(1): "This page limitation includes any statement of facts that the parties may choose to include with their response. The one exception is the separate statement of facts which the Local Rules require to be submitted with motions for summary judgment. LRCiv. 56(b). Consequently, Plaintiffs' Opposition, at a length of thirty-one pages, exceeds the permissible page length.**").** In contrast, in advance of filing its motion to dismiss, USAPA filed a request to exceed the page limit on that motion. Doc. 42. That request was denied. Doc. 43.

intends to conduct discovery as is its right, and to introduce numerous facts either through a motion for summary judgment or at trial. Plaintiffs have proffered absolutely no basis to circumvent USAPA's right to develop a complete record on all aspects to its defense of the DFR claim. Seeking to compel USAPA to litigate "sua sponte," as Plaintiffs suggest, the fact-intensive breach of the duty of fair representation claim to a final conclusion on the merits without discovery is improper. Plaintiffs' motion should be denied.

POINT I

PLAINTIFFS' MOTION VIOLATES LR CIV 7.2 AND FED. R. CIV. P. 6(C)

Fed. R. Civ. P. 6(c) provides:

> **c) Motions, Notices of Hearing, and Affidavits.**
> **(1)** ***In General.*** A written motion and notice of the hearing must be served at least 14 days before the time specified for the hearing, with the following exceptions:
> **(A)** when the motion may be heard ex parte;
> **(B)** when these rules set a different time; or
> **(C)** when a court order--which a party may, for good cause, apply for ex parte--sets a different time.

Plaintiffs' belated motion to consolidate violates Fed. R. Civ. P. 6(c). Plaintiffs filed their motion for a preliminary injunction eight weeks ago, on March 26, 2013 and did not request consolidation at that time. Doc. 13. On April 18, 2013, the Court entered an order setting a preliminary injunction hearing for May 14, 2013. Doc. 43. Nearly three weeks after the Court's order and with only six days remaining before the preliminary injunction hearing, Plaintiffs made the instant motion seeking to hold a trial on the merits on May 14, 2013. Plaintiffs' failure to comply with the requirement to make a motion 14 days prior to the May 14, 2013 date of the preliminary injunction hearing violates Fed. R. Civ. P. 6(c). *See, e.g., Marshall Durbin Farms, Inc. v. Nat'l Farmers Org., Inc.*, 446 F.2d 353, 358 (5th Cir. 1971) (Fed. R. Civ. P. 6 applies to Rule 65's notice requirements).

Plaintiffs' motion also violates LR Civ 7.2, which provides:

> (a) Motions Shall be in Writing. All motions, unless made during a hearing or trial, shall be in writing and shall be made sufficiently in advance of trial to comply with the time periods set forth in this Local Rule and any Court order and to avoid any delays in the trial.

LR Civ 7.2 provides in subsection (c) that a party shall have 14 days to respond to a written motion. Plaintiffs' motion was made only 6 days before May 14 and accordingly, not made sufficiently in advance of the May 14, 2013 date to allow the proper time to comply with LR Civ 7.2's time requirements. Plaintiffs' repeated violations of the LR Civ 7.2 warrants denial of the motion. In addition, due to the intense preparation that would accompany a full trial on a breach of the duty of fair representation claim, there is simply no way a delay of either the preliminary injunction hearing or a trial could be avoided. In the event USAPA's pending motion to dismiss is not granted, USAPA intends to conduct discovery. Further, USAPA intends to secure the attendances of witnesses who would be required at a trial on the merits and to introduce testimony. The process for trial preparation and presentation of evidence is significantly different than merely opposing Plaintiffs' motion for a preliminary injunction.

POINT II

PLAINTIFFS' MOTION SHOULD BE DENIED BECAUSE THE CASE SHOULD BE DISMISSED

As set forth in USAPA's Motion to Dismiss, Doc. 44, this case should be dismissed in its entirety. If the Court dismisses the action, no trial is necessary. It does not make sense to proceed to a trial on the merits until the Court rules on the pending motions to dismiss.

The Court granted the request to stay the briefing on the class certification motion pending other rulings, including the ruling on the motion to dismiss. *Id.* As the Court

stated in its Order setting the preliminary injunction hearing (Doc. 43.), "given that Plaintiffs are requesting a preliminary injunction," the Court did not defer briefing on the motion for a preliminary injunction until the Court ruled on the motions to dismiss. Doc. 43 p. 1. However, the Court set "expedited briefing schedules such that it can rule on the request for a preliminary injunction, as well as the motions to dismiss, in the very near future." Doc. 43 p. 1. Given that the motions to dismiss may dispose of the entire case, a trial on the merits is inappropriate.

POINT III

CONSOLIDATION IS INAPPROPRIATE AND PREJUDICIAL

The Supreme Court has cautioned that deciding a case at the preliminary injunction stage "is generally inappropriate." As the Court explained:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party is thus not required to prove his case in full at a preliminary injunction hearing, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits. In light of these considerations, it is generally inappropriate for a federal court at the preliminary injunction stage to give a final judgment on the merits.

Univ. of Texas v. Camenisch, 451 U.S. 390, 395 (1981).

Accordingly, when a court is contemplating consolidation, "the court should provide the parties with 'clear and unambiguous notice [of the intended consolidation] either before the hearing commences or at a time which will afford the parties a full opportunity to present their respective cases.'" *Air Line Pilots Ass'n, Int'l v. Alaska Airlines, Inc.*, 898 F.2d 1393, 1397-98 (9th Cir. 1990) (citing *Camenisch*, 451 U.S. at 395) (alterations in original). Where there are factual issues in dispute, discovery is

needed, or additional time is needed to prepare, consolidation may be inappropriate. In *Air Line Pilots Ass'n, Int'l*, 898 F.2d at 1397-98, for example, the Ninth Circuit reversed and remanded a decision awarding summary judgment that was entered by the district court when it ruled on the request for a preliminary injunction and summary judgment on a breach of the duty of fair representation claim after the preliminary injunction proceedings. There, the airline had argued that the union was not harmed by consolidation of the preliminary injunction and a decision on the merits and that there was no need for discovery because the union knew the history of the bargaining relationship and had significant time to prepare for the case. The Ninth Circuit rejected those arguments, finding that discovery was warranted. The court stated that additional discovery and time to prepare should have been provided before a decision was made on the merits:

> Thus, and in sum, although the district court's findings were not clearly erroneous, upon further discovery the factual conclusions might change in deciding the merits of the case. Furthermore, the fact that ALPA had several months to prepare before filing this suit does not obviate the requirement of proper notice to the parties before entry of final judgment. Accordingly, the district court's entry of final judgment against ALPA is vacated, and the case is remanded for further proceedings.

898 F.2d at 1397-1398.

If Plaintiffs' claims are not dismissed in their entirety, additional discovery and time to prepare is likewise warranted. Aside from the absurdity of the suggestion that preparation for trial to be ordered "sua sponte" is not prejudicial, Plaintiffs' claim that there is no prejudice to USAPA because Plaintiffs have been suing USAPA for five years ignores the law and the outcome of the prior proceedings. Despite dismissal of their claims on ripeness grounds, Plaintiffs continue to attempt to circumvent the facts and circumstances that have transpired since 2005. Their alleged "statement of facts" is nothing but a rehash of historical events. However, a claim for breach of the duty of fair representation looks to the "factual and legal landscape" at the time the union enters into

an agreement. *O'Neill*, 499 U.S. at 67. *See also Hendricks v. Airline Pilots Ass'n Int'l*, 696 F.2d 673 (9th Cir. 1983) (finding no breach of duty of fair representation where changed circumstances justified changes to collective bargaining agreement eliminating a contract provision that enabled the pilots to earn extra compensation).

Here, the inquiry on the merits will focus on the facts and circumstances as they exist now and at the time the MOU was agreed to and ratified by an overwhelming number of West Pilots. Facts and circumstances surrounding the impending merger with American and the McCaskill-Bond process with a pilot workforce which is more than double the size of USAPA will also be relevant. At trial, USAPA intends to conduct discovery and present evidence that demonstrates that the MOU was eminently reasonable and that if it determines to pursue a seniority structure based on date of hire with conditions and restrictions that protect and ensure that no pilot is displaced from their position, such would likewise be fair and equitable. USAPA will also conduct discovery and show that in light of the facts and circumstances at present and those that have transpired since 2005, including, *inter alia*, financial and operational matters and Plaintiffs' efforts to obstruct USAPA in fulfilling its duties, attempting to impose the Nicolau Award based on a claim under the duty of fair representation would be entirely unreasonable and inequitable. USAPA will also conduct discovery on matters raised by the other parties that have not been the subject of previous discovery and which are directly relevant to the allegation that USAPA is breaching its duty of fair representation by deviating from the Nicolau Award including discovery concerning whether USAPA's actions were arbitrary without any rational basis and the effect of the MOU on the former America West pilots. *See* USAPA's Motion to Conduct Additional Discovery Pursuant to Rule 56(d) of the Federal Rules of Civil Procedure in the Declaratory Action Case (Doc.

163) and Declaration of Patrick J. Szymanski incorporated herein by reference, Doc. 163, 163-1, No. 10-cv-01570-ROS (filed Feb. 21, 2012).[2]

Plaintiffs' filings to date also demonstrate the necessity for discovery. For example, Plaintiffs complain in their reply brief on the preliminary injunction that USAPA somehow "does not explain" why the pending merger creates circumstances that change the existing factual landscape. Doc. 53 p. 5. Plaintiffs also contend that preserving the status quo is somehow not relevant. Doc. 53 p. 7. Although as set forth in USAPA's motion to dismiss and reply, these arguments are attempting to improperly shift Plaintiffs' burden in this case, these arguments show that discovery will be necessary.[3]

In sum, it is inappropriate to request a trial of this matter "sua sponte" without notice and without affording USAPA an opportunity to develop a complete factual record. *See* 11A Fed. Prac. & Proc. Civ. § 2950 (2d ed.) ("Accordingly, ordering consolidation during the course of a preliminary injunction hearing is reversible error when little or no notice is given of this change and the effect is to deprive a party of the right to present his case on the merits."). Given the lack of any notice of consolidation and the inability of USAPA to have conducted any discovery and the complete lack of

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[2] In the Declaratory Judgment action, the Court found it unnecessary to address USAPA's motion for discovery. Given the Court's decision that "USAPA's seniority proposal does not automatically breach its duty of fair representation," the Court found it unnecessary to address USAPA's motion to conduct discovery. Doc. 193 p.8 n.3.

[3] By way of further example, in the motion to dismiss, USAPA established that the overwhelming ratification of the MOU precludes a claim for breach of the duty of fair representation. *See* USAPA's Motion to Dismiss pp. 13-14. Although Plaintiffs do not dispute the fact that the MOU was overwhelmingly ratified and USAPA believes that on this basis, the motion to dismiss may be granted, Plaintiffs contend that "barely more than half of the West Pilots *with positions on the Nicolau Award list* voted to ratify the MOU." Doc. 53 p. 6 (emphasis supplied). If the Court does not grant the motion to dismiss, discovery on this issue would also be warranted.

time to prepare its defense, consolidation is highly inappropriate. As Justice Stevens stated when writing for the Seventh Circuit:

> If a consolidation of a trial on the merits with a hearing on a motion for a preliminary injunction is to be ordered, the parties should normally receive clear and unambiguous notice to that effect either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases. … Different standards of proof and of preparation may apply to the emergency hearing as opposed to the full trial. At times, particularly if the parties consent, if discovery has been concluded or if it is manifest that there is no occasion for discovery, consolidation may serve the interests of justice. But the parties should be given a clear opportunity to object, or to suggest special procedures, if a consolidation is to be ordered.

Pughsley v. 3750 Lake Shore Drive Co-op. Bldg., 463 F.2d 1055, 1057 (7th Cir. 1972). *See also Air Line Pilots Ass'n*, 898 F.2d at 1397-98; *Lamex Foods, Inc. v. Audeliz Lebron Corp.*, 646 F.3d 100, 107 (1st Cir. 2011) ("truncated hearing will often limit the parties' opportunity to present and thoroughly examine witnesses."); *United States v. Owens*, 54 F.3d 271, 277 (6th Cir. 1995) ("we must vacate the permanent injunction and remand this case to the district court to allow Spirko to conduct additional discovery and present his version of the facts at an evidentiary hearing. Otherwise, we would create a rule that would obligate a party to present his full case at a hearing for a preliminary injunction."); *Paris v. U.S. Dept. of Housing and Urban Development*, 713 F.2d 1341, 1345-1347 (7th Cir. 1983) (reversing order of consolidation where the plaintiffs were denied "a full opportunity to present their case"); *Wohlfahrt v. Memorial Medical Center*, 658 F.2d 416, 417-418 (5th Cir. 1981) (reversing and remanding to give party full opportunity to develop case).

CONCLUSION

For the foregoing reasons, USAPA respectfully requests that Plaintiffs' motion to consolidate be denied.

Respectfully submitted this 13th day of May, 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 May 13, 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/T. Mahabir