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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE DISTRICT OF ARIZONA**

10 Don ADDINGTON, *et al.*,

11 Plaintiffs,

12 vs.

13 US AIRLINE PILOTS ASSN., *et al.*,

14 Defendants.

CASE NO. 2:08-CV-1633-PHX-NVW

(Consolidated)

**MOTION IN LIMINE #1:
TO EXCLUDE EVIDENCE &
ARGUMENT TO RELITIGATE THE
PROCESS, PROCEDURE OR
DECISION IN THE NICOLAU
ARBITRATION.**

15 Don ADDINGTON, *et al.*,

16 Plaintiffs,

17 vs.

18 Steven H. BRADFORD, *et al.*,

19 Defendants.
20

Case No. 2:08-CV-1728-PHX-NVW

21 USAPA has made no secret of its position that as the successor union to
22 ALPA, it is not bound by the Nicolau Award or the integrated pilot seniority
23 list established by the Nicolau Arbitration. The Court should exclude such
24 evidence and argument because this trial is not a review of the Nicolau
25 Arbitration. Such evidence is of no consequence to Plaintiffs' case-in-chief
26 and cannot establish an affirmative defense. This Motion is supported by a
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28

1 separately filed Memorandum that supports all of Plaintiffs' motions *in*
2 *limine*, and by the Memorandum of Points and Authorities that follows.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. Defendants may not use Plaintiffs' DFR claims to relitigate the**
5 **Nicolau Arbitration.**

6 Plaintiffs do not base their claim on the merits of the Nicolau
7 arbitration. Rather they base their claim on the fact that the pilots on both
8 sides agreed the Nicolau Award would be final and binding. They agreed,
9 therefore, that the merits of the Award itself would not be challenged in any
10 context. The Court recognized as much when it made this observation:

11 I'm not here to decide to choose between competing notions of wise
12 labor policy and different views of seniority policy. That's not the
13 Court's responsibility. There are different views on that. You have
14 articulated yours. ALPA has theirs. I would have to have a
15 fundamental transformation of my notion of the case to charge
16 myself with having to decide what is good seniority policy.

17 (RT. 163:23-164:5 (Oct. 29, 2008).)

18 Although the pre-merger financial status of each airline was relevant to
19 the Nicolau arbitration it is not relevant here. What is relevant here is only
20 that the parties chose to submit to binding arbitration. The evidence that
21 was used in that binding arbitration is not relevant to Plaintiffs' duty of fair
22 representation claims. Such evidence should come in only on a limited basis
23 as needed to give the jury a basic background on the subject matter.

24 What matters here is that the East Pilots agreed to be bound to the
25 result of the Nicolau arbitration—the Nicolau Award. What matters as well
26 is that the East Pilots formed USAPA to disregard the Nicolau Award,
27 USAPA promised it would disregard the Nicolau Award if elected, and that
28 USAPA has uniformly disregarded the Nicolau Award in every action it has
taken as the bargaining agent for all pilots employed by US Airways.

1 **II. USAPA plans to introduce evidence that questions the merits of**
2 **the Nicolau Award.**

3 USAPA intends to introduce a substantial amount of evidence (and
4 argument) on the subject of the pre-merger financial strength of the two
5 airlines. For example, Defendant's exhibits # 1292-1313 and 1473-1486,
6 consisting of hundreds of pages of technical financial data, are various
7 financial filings with the SEC for the two airlines for the year before the
8 merger. USAPA intends to argue (as its lawyers have, through deposition
9 questions) that despite US Airways having been in bankruptcy at the time
10 of the proposed merger, US Airways had the financial strength, routes and
11 equipment to be the "savior" airline, rescuing a weaker and almost bankrupt
12 America West Airlines. East Pilots presented this same evidence in the
13 Nicolau Arbitration and the resulting expert testimony took many hours of
14 testimony and exhibits.

15 USAPA intends to offer testimony and exhibits that Nicolau was
16 "unfair" or "inequitable". To support this argument, on April 1, 2009,
17 USAPA produced forty (40) CD's of Excel spreadsheets and analysis of
18 multiple combinations of seniority arrays or distribution. This untimely
19 disclosure, without any bates ranges or other identifying information,
20 expert-related or other disclosure, and on the very eve of trial, will be
21 addressed in a separate motion in limine. Most of the 40 CD's contain
22 multiple forms of analysis showing each pilot's seniority position number
23 with US Airways or America West, each pilot's seniority position under
24 Nicolau, and the seniority position under USAPA's Date-of-Hire seniority
25 proposal. Defendants present this evidence to demonstrate that older and
26 more experienced pilots were unfairly "displaced" by younger and less
27 experienced America West pilots. There is some analysis of the number of
28

1 “seats” lost or gained under various seniority schemes. In addition, USAPA
2 intends to offer testimony that “separate operations” is an acceptable
3 alternative to a single collective bargaining agreement. Indeed, publications
4 by USAPA and questions by its lawyers in depositions demonstrate that
5 USAPA’s position is that this Court is powerless to create a remedy that
6 involves application of the Nicolau List because the East pilot majority will
7 never ratify a bargaining proposal with the Nicolau List. None of this
8 proposed evidence is relevant or admissible. The jury will be instructed on
9 the duty of fair representation. USAPA will be judged on what it did or did
10 not do to fulfill that duty. The Court should not permit USAPA to relitigate
11 the Nicolau Award.

12 The East Pilots that presented a date-of-hire proposal to Nicolau took
13 their best shot, in presenting evidence and in post-hearing briefs. These
14 same pilots appealed to the Executive Council of ALPA national to set aside
15 or modify the award. ALPA found that there were no grounds to set the
16 Award aside. As the then-certified bargaining agent for the pilots of these
17 two airlines, ALPA submitted the Nicolau Award to US Airways, which
18 accepted the award after concluding that the Award met the conditions and
19 restrictions established in the Transition Agreement. Mr. Al Hemenway,
20 the negotiator for US Airways was recently deposed and confirmed that the
21 seniority list, as far as US Airways was concerned, was the seniority list
22 that would be incorporated into any single collective bargaining agreement.

23 Plaintiffs also respectfully submit that USAPA should not be able to
24 put on testimony or evidence to demonstrate that the current Date of Hire
25 seniority list with “Conditions and Restrictions” is either as fair to West
26 Pilots, or more fair to East Pilots than the seniority list created by the
27 Nicolau Award. USAPA will stop at nothing to create appealable error,
28

1 confusion by the jury, or unfair prejudice to Plaintiffs by trying to put
2 thousands of irrelevant documents into evidence, and presenting misleading
3 and incomplete testimony to urge the jury to adopt one or more various
4 seniority schemes USAPA hopes will help it avoid liability.

5
6
7 **CONCLUSION**

8 Plaintiffs, therefore, ask the Court to order, *in limine*, that USAPA not
9 present any of the Exhibits identified in Exhibit A, or any other similar
10 evidence, or make argument that would invite the jury to review the merits
11 of the Nicolau arbitration.

12 Dated this 7th day of April, 2009

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14 **POLSINELLI SHUGHART PC**

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16 **KATHERINE V. BROWN**

17 By:

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23 **CERTIFICATE OF SERVICE**

24 I hereby certify that on April 7, 2009 I electronically transmitted the
25 foregoing document to the U.S. District Court Clerk's Office by using the
26 CM/ECF System for filing and transmittal of a Notice of Electronic Filing to
27 the following CM/ECF registrant(s).

28 I further certify that on April 7, 2009 I delivered a paper courtesy copy
of the foregoing document and the Notice of Electronic Filing to the assigned
Judge:

29
30 s/ **KATHERINE V. BROWN**

EXHIBIT A

**Exclude Evidence & Argument to Relitigate the Nicolau
Arbitration**

Exhibit No.	Exhibit No.	Exhibit No.	Exhibit No.
1002	1305	1546	1587
1030	1306	1547	1588
1070	1307	1548	1589
1071	1308	1549	1590
1091	1309	1550	1591
1147	1310	1551	1599
1148	1311	1552	1600
1149	1312	1553	1601
1150	1313	1554	1602
1151	1446	1555	1603
1152	1473	1556	1604
1153	1474	1557	1605
1154	1475	1558	1606
1155	1476	1559	1607
1156	1477	1560	1608
1157	1478	1561	1609
1158	1479	1562	1610
1159	1480	1563	1611
1160	1481	1564	1612
1161	1482	1565	1613
1162	1483	1566	1614
1163	1484	1567	1615
1164	1485	1568	1616
1165	1486	1569	1617
1166	1503	1570	1618
1167	1507	1571	1619
1168	1510	1572	1620
1171	1522	1573	1621
1292	1533	1574	1622
1293	1534	1575	1623
1294	1535	1576	1630
1295	1536	1577	1361
1296	1537	1578	1632
1297	1538	1579	1633
1297	1539	1580	1634
1298	1540	1581	1635
1300	1541	1582	1636
1301	1542	1583	1637
1302	1543	1584	1638
1303	1544	1585	
1304	1545	1586	