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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 #7 AND/OR
MOTION TO STRIKE LATE DISCLOSED
EXPERTS**

15 Don ADDINGTON, *et al.*,
16 Plaintiffs,
17 vs.
18 Steven H. BRADFORD, *et al.*,
19 Defendants.

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

20 Both sides have been under pressure of the Court's deadlines to bring
21 this matter to trial on April 28, 2009. The Court has noted that this issue is
22 holding East Pilots hostage to a poor contract, West Pilots hostage to poor
23 seniority positions that have subjected them to furloughs, and the Airline
24 hostage because it cannot fully combine operations until there is the single
25 collective bargaining agreement required to remain a viable player in the
26 industry. Some of the traditional limits for discovery have necessarily been
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1 waived and the parties have cooperated, for the most part, in completing
2 discovery.

3 Neither the shortened discovery period nor the April 1, 2009 deadline
4 set by the Court excuses USAPA's deliberate plan to sabotage both the
5 Plaintiffs and the trial date by identifying four expert witnesses twenty-
6 seven days before trial. No prior disclosure of these experts was made by
7 USAPA in its Initial Disclosure Statement. No supplement has been
8 provided. No report was prepared or provided. There is no stipulation to
9 waive the requirement that an expert provide a report.

10 The four expert witnesses include Rik Salamat (finance and statistic),
11 Daniel Kasper (Finance & Statistic), Richard Hurd (labor and seniority) and
12 James Harris (finance). Except for Mr. Salamat, Plaintiffs have no idea and
13 no reasonable way to find out what these experts are likely to testify about.
14 Mr. Salamat testified at the Nicolau Arbitration hearing, and has
15 apparently been on the payroll as an expert for the East Pilots since the
16 East Pilots made their proposals to Arbitrator Nicolau. He then began
17 working for USAPA in their efforts to undermine the Nicolau Award. Mr.
18 Salamat's work appears, in one form or another, in defense of the date-of-
19 hire ("DOH") seniority scheme and tries to demonstrate how USAPA's DOH
20 seniority proposal actually benefits West Pilots. Mr. Salamat's "expertise" is
21 to justify the "fairness" of the USAPA proposal.

22 Since before the formation of USAPA in June 2007, Mr. Salamat and
23 Mr. Davison have been formulating and revising models analyzing and
24 comparing the Nicolau Award to a DOH proposal. But USAPA refused to
25 identify any experts until April 1, 2009. In December 2008, Plaintiff served
26 interrogatories on USAPA as well as a request for production of documents.
27 USAPA's first substantive response was to make a mass production of
28 approximately 20,000 pages of documents on approximately January 20,

1 2009. Plaintiffs immediately examined the documents and discovered,
2 among other things, partial or incomplete and fragmented Excel
3 spreadsheets and graphic displays of the information. Plaintiffs' counsel
4 made an immediate and detailed request for the information underlying the
5 data. USAPA never provided the information, despite the fact that the trial
6 in this matter had been set and there was no secret about what USAPA's
7 expected defense would be in this case.

8 On April 1, 2009, USAPA did another document dump, including
9 approximately 6000 to 8000 paper documents on irrelevant and immaterial
10 matters. For the most part, these documents had never been previously
11 produced by USAPA, and those irrelevant matters have been addressed in
12 other Motions *in Limine*. Included in that production, however, were 40
13 separate CDs of Excel spreadsheets, many with multiple pages, graphs,
14 charts and diagrams. Many include seniority lists with abbreviated
15 nicknames only remotely identifiable. No explanation or expert report was
16 provided. No identification was given as to which disclosed experts had
17 prepared the information or who would testify about the matter shown on
18 the graphic display. Rule 26, FRCP requires this information in the form of
19 report to be timely provided.

20 In fact, counsel for Plaintiffs and counsel for Defendants had express
21 discussions about the need for expert reports. USAPA made a request that
22 Plaintiffs waive the requirement. Plaintiffs would not agree but were willing
23 to accept a reasonable and complete disclosure of the opinions held by the
24 expert, the specific basis for those opinions and the documents the witness
25 would rely on. That proposal was not accepted.

26 In addition, many, if not all of the Excel spreadsheets include "macros"
27 or commands that allow the spreadsheet to be analyzed. Those "macros"
28 have been disabled. Plaintiffs are therefore only able to examine statistical

1 analysis done by Mr. Davison and Mr. Salamat without any was to cross
2 examine or challenge the basis or source of the data. There are multiple
3 static displays and videos of displays that are graphic illustrations of Excel
4 spreadsheets, but no index or correlation was provided.

5 Moreover, the author of the spreadsheet is identified as "Boris." No
6 foundational or other validation of the underlying information, the
7 spreadsheet formulas, or the assumptions on which the analysis was made
8 was ever provided to Plaintiffs.

9 Plaintiffs have reason to believe that Mr. Davison and Mr. Salamat are
10 the primary architects of these charts and diagrams. Mr. Davison recently
11 testified on March 19, 2009 that the form in which USAPA produced the
12 spreadsheet documents was confusing and difficult to analyze, even for him
13 (Depo. p. 92, line 4,; p. 92, lines 10-23). He testified that he had prepared
14 Excel spreadsheets which analyzed and compared the seniority proposals,
15 some that he began working on in as early as June 2008 (Depo p. 60, line 7-
16 8). In addition, since the USAPA seniority proposal was submitted to US
17 Airways in September 2008, Mr. Davison testified that he has worked with
18 the merger Committee and Mr. Salamat to construct an analysis of the
19 USAPA seniority proposals for use as exhibits at trial. (Id. p.61 line 6-11).

20 Mr. Davison has done some work on his own, but he has also relied on
21 analysis done by Mr. Salamat, and has also had Mr. Salamat validate some
22 of his own work. (Id. p. 61 lines 15-23). Mr. Davison was tasked to "display
23 various career advancement profiles under the Nicolau Award, the USAPA
24 proposal and unmerged or premerged conditions". The lack of relevance for
25 that analysis is amply demonstrated in the other Motions *in Limine* filed by
26 Plaintiffs. Mr. Davison could not even identify what was prepared by him or
27 by Mr. Salamat (Id. p. 92, lines 10-23).

28

1 As to the three other experts, Plaintiff is prejudiced by USAPA's
2 decision to turn this into a trial by ambush. USAPA had the information
3 and the intention to use these graphical displays and statistical analysis to
4 support its defense to the DFR. There is no excuse for hiding these charts
5 for 6-8 months before producing poor and disorganized copies, only to be
6 followed by a production of color displays of the same information that is at
7 least readable but no more coherent.

8 This discovery violation cannot be cured. Plaintiff has not had any
9 opportunity to review and analyze the information. Had this information
10 been produced before the deposition of Mr. Davison on March 19, Plaintiffs
11 would have examined him on those issues. Instead, Plaintiffs had to rely on
12 the incomplete, fragmented, and almost unintelligible documents USAPA
13 previously produced. USAPA intentionally deprived Plaintiff of the
14 opportunity to examine the primary witness on what Defendant considers a
15 relevant defense. Plaintiff cannot rebut the information because it does not
16 have the underlying data or formulas. The time for listing experts has
17 passed. Plaintiff cannot reasonably be expected to have an expert analyze 40
18 CDs of material in time for trial.

19 USAPA should be precluded from offering this information in any way,
20 shape or form. First, this information is a thinly disguised effort to
21 demonstrate why the Nicolau Award was unfair or inequitable, an issue
22 that is thoroughly discussed in Plaintiffs' First Motion *in Limine*. Second,
23 USAPA's deliberate disclosure abuse warrants the sanction requested. If
24 there is any doubt about the matter alleged herein, Plaintiffs request that
25 the court conduct an evidentiary hearing about the information, the
26 disclosure and the failure by USAPA to make any effort, let alone a
27 reasonable one, to properly disclose the information or the opinions of these
28 experts.

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Dated this 7th day of April, 2009

POLSINELLI SHUGHART PC

KATHERINE V. BROWN

By:

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CERTIFICATE OF SERVICE

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

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:

s/ **KATHERINE V. BROWN**

EXHIBIT A

Experts

Exhibit No.	Exhibit No.	Exhibit No.
1533	1576	1633
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