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

10 Don ADDINGTON; John BOSTIC; Mark
BURMAN; Afshin IRANPOUR; Roger
11 VELEZ; and Steve WARGOCKI,

12 Plaintiffs,

13 vs.

14 US AIRLINE PILOTS ASSOCIATION,
US AIRWAYS, INC.,

15 Defendants,

16 Don ADDINGTON; John BOSTIC; Mark
BURMAN; Afshin IRANPOUR; Roger
17 VELEZ; and Steve WARGOCKI,

18 Plaintiffs,

19 vs.

20 Steven H. BRADFORD, Paul J. DIORIO,
Robert A. FREAR, Mark. W. KING,
Douglas L. MOWERY, and John A.
STEPHAN,

21 Defendants.
22

Case No. 2:08-cv-1633-PHX-NVW
(Consolidated)

**DEFENDANT USAPA'S
RESPONSES IN OPPOSITION
TO PLAINTIFFS' MOTIONS TO
SUPPLEMENT DISCLOSURE
AND USAPA'S MOTION TO STRIKE**

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

1 **I. RESPONSE.**

2 Defendant USAPA opposes Plaintiffs' motion (Doc. # 322) to supplement
3 Plaintiffs' exhibit list for the proposed Final Pretrial Order disclosed by Plaintiffs'
4 counsel to Defendants on April 1, 2009, and for all evidence requested, on the following
5 grounds:

6 **A. Hemenway Exhibits.**

7 First, as the Court warned, the April 1 deadline was "real." The Court's Order
8 Setting Final Pretrial Conference (Doc. # 251, ¶ 4) warned both parties that "the Court
9 will not allow the parties to offer any exhibit, witness, or other evidence that was not
10 disclosed in accordance with the provisions of this Order ... except to prevent manifest
11 injustice." The Court's subsequent Scheduling Order made it explicit:

12 The Deadlines are real. The parties are advised that the Court intends to
13 enforce the deadlines set forth in this order ... [t]he parties are warned that
14 failure to meet any of the deadlines in this order ... without substantial
justification may result in sanctions, including dismissal of the action ...
(Doc # 251, p. 2, ¶¶ 4, 5).

15 Second, rather than presenting any "substantial justification" or "manifest
16 injustice" for their motion, Plaintiffs simply seek to introduce the Hemenway exhibits
17 because Plaintiffs obtained them after the April 1 deadline. Plaintiffs may label their
18 argument as "in the interests of justice" but they present no evidence other than their
19 failure to abide by the Court-imposed deadline.

20 Third, Plaintiffs' failure is born of a fact their motion ignores. Plaintiffs could
21 have conducted discovery of such documents in several ways, including by deposing
22

1 Mr. Hemenway well before April 1. The documents in question were produced during
2 the deposition of Hemenway on April 3, but Hemenway was known to Plaintiffs to be a
3 potential witness *months ago*. The company offered Hemenway's Declaration on
4 September 29, 2008 (Doc. # 31). And the deposition of Hemenway on April 3 occurred
5 because USAPA requested it, not Plaintiffs. Yet Plaintiffs were perfectly free to depose
6 Mr. Hemenway or seek documents from him any time prior to April 1. This is a fact
7 for which Plaintiffs are unable to offer any explanation.¹

8 **Versions Of Seniority Proposal:**

9 First, as the Court warned, the April 1 deadline was "real."

10 Second, Plaintiffs offer absolutely no reason, let alone a substantial justification,
11 why they could not identify these exhibits in their list because they freely admit that the
12 documents were *disclosed prior to April 1* (2:23 "... because they first disclosed by
13 USAPA on the eve of the deadline ...").

14 Third, it is not material whether USAPA produced these exhibits with Bates
15 stamps or identifying marks or even with coffee stains. USAPA was not obligated to do
16 so by any Rule or order of the Court, there was no stipulation or agreement to do so, and
17 USAPA is not obligated to assist in making Plaintiffs' case. Moreover, there is no
18 reason, nor is any claimed, that identification markers in any practical way *prevented*

19 _____
20 ¹ The document Plaintiffs refer to as US Airways 001761-62 (Deposition Ex. H-4) and
21 seek to supplement into their exhibit list *was produced* by USAPA and Bates Stamped
22 25726-25727. Plaintiffs' failure to conduct a thorough review of USAPA's document
production prior to April 1 is certainly no grounds to disregard the Court's deadlines.

1 listing the documents by the deadline. Surely convenience is not the standard.

2 Fourth, under these circumstances, to grant a motion would in effect penalize
3 USAPA for meeting the Court's April 1 deadline by getting the documents in question
4 to the Plaintiffs by April 1. This would be the height of unfairness especially given the
5 fact that while USAPA labored to provide physical copies of all of its trial exhibits in
6 tabbed trial binders, and literally transported them to Plaintiffs' office for a meeting to
7 review them pursuant to the Court's order, Plaintiffs utterly failed to provide copies of
8 any exhibits on that day (and Plaintiffs presently seek to exclude USAPA's expert
9 witnesses who *were* timely listed in the April 1 witness disclosures).

10 **USAPA Road Show Videos:**

11 First, as the Court warned, the April 1 deadline was "real."

12 Second, again without making any argument or presenting any evidence of
13 substantial justification or manifest injustice, Plaintiffs ask this court to allow in
14 evidence that Plaintiffs themselves *months ago identified as their own exhibit* (3:3 "...
15 videos that were identified at the Preliminary Injunction Hearing as Exhibit 64 ...").

16 Third, that Plaintiffs erred in failing to list this evidence in their list of exhibits
17 when there is no dispute this evidence was in their possession and known to them by the
18 deadline, cannot conceivably constitute manifest injustice. Plaintiffs were aware that
19 with respect to trial exhibits, it was use it or lose it by April 1. Plaintiffs failed to err on
20 the side of caution and include these exhibits that were in their possession – they should
21 not be rewarded for that failure.

1 Fourth, if not seeking discovery, or simply neglecting to list exhibits by April 1,
2 is the standard by which the real Court imposed deadlines are to be enforced, then it is
3 predicable that both sides will ask for additional supplementation.

4 In consideration of the above, Defendant respectfully requests that Plaintiffs'
5 motion to supplement be denied, or, in the alternative that the Court grant the following
6 motion:

7 **II. MOTION TO STRIKE.**

8 Defendant USAPA hereby moves to strike Plaintiffs' motion (Doc. # 322) to
9 supplement on the following grounds:

10 First, USAPA has now pending motion in limine No. 29 (Doc. # 316 at p. 36, line
11 9) aimed at preventing exactly the sort of tactic that this motion represents: after-the-
12 deadline attempts to introduce evidence not disclosed by the Court-imposed real
13 deadline of April 1.

14 Second, this Court has ordered that there shall be no reply briefs allowed in
15 response to motions in limine. (Doc. # 251 at ¶ 7 "No replies will be permitted").

16 Third, Plaintiffs motion is calculated to, or has the effect of, constituting a Reply
17 brief in violation of the Court's order that there shall be no Reply briefs in response to
18 motions in limine.

19 Fourth, having met the deadline for motions in limine, USAPA is entitled to have
20 its motion in limine No. 29 considered and ruled upon as contemplated in the ¶ 7 of the
21 Court's order:
22

1 7. The parties shall file and serve all motions in limine no later than April
2 7, 2009. Responses to motions in limine shall be filed on or before April
3 14, 2009. No replies will be permitted. Each motion in limine shall
4 include proposed language for the order in limine being sought from the
5 Court, and the proposed language shall state with precision the evidence
6 that is subject to the proposed order and the limitation or exclusion placed
7 on the evidence. Counsel shall be prepared to argue the merits of such
8 motions at the Final Pretrial Conference. (Doc. # 251).

9 Respectfully Submitted,

10 Dated: April 10, 2009

11 By: /s/ Nicholas P. Granath, Esq.

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1 **CERTIFICATE OF SERVICE**

2 This is to certify that on the date indicated herein below true and accurate copies
3 of the foregoing documents and their attachments, *to wit*,

- 4 • Defendant USAPA’s Combined Responses To Plaintiffs Motions In Limine
5 • Certificate of Service

6 were electronically filed with the Clerk of Court using the CM/ECF system, which
7 will send notification of such filing to all admitted counsel who have registered with
8 the ECF system, including but not limited, to:

9 Marty Harper	Don Stevens	Andrew S. Jacob
MHarper@Polsinelli.com	DStevens@Polsinelli.com	AJacob@Polsinelli.com
Kelly J. Flood	Katie Brown	
KFlood@Polsinelli.com	KVBrown@Polsinelli.com	

10 Further, I certify that paper hard copies shall be provided to The Honorable Neil
11 V. Wake, District Court Judge, 401 W. Washington Street, SPC 52, Phoenix, AZ 85003.

12 On April 10, 2009, by:

13 */s/ Nicholas Paul Granath, Esq.*