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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Don Addington; John Bostic; Mark  
Burman; Afshin Iranpour; Roger Velez;  
Steve Wargoeki,

Plaintiffs,

vs.

US Airline Pilots Association; US  
Airways, Inc.,

Defendants.

No. CV 08-1633-PHX-NVW  
(consolidated)

**ORDER**

Don Addington; John Bostic; Mark  
Burman; Afshin Iranpour; Roger Velez;  
Steve Wargoeki, et al.,

Plaintiffs,

vs.

Steven Bradford; Paul Diorio; Robert  
Frear; Mark King; Douglas Mowery; John  
Stephan, et al.,

Defendants.

CV08-1728-PHX-NVW

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14 **B. STATEMENT OF JURISDICTION.**

15 **1.** Plaintiffs contend that the First Amended Complaint raises a federal question  
16 claim. 45 U.S.C. § 151, *et seq.* There is jurisdiction under Title 28 U.S.C. §1331. *See Air*  
17 *Line Pilots Assn, Intl. v. Transamerica Airlines, Inc.*, 817 F.2d 510, 515 n.3 (9th Cir. 1987)  
18 (noting that NMB jurisdiction is limited to determine “who is the employees’  
19 representative”)

20 **2.** Defendants dispute subject matter jurisdiction on four grounds: i) the case is  
21 not ripe for adjudication; ii) plaintiffs fail to state a legally cognizable claim; iii) this dispute  
22 is within the exclusive jurisdiction of the System Board of Adjustment and/or will pre-judge  
23 factual and contractual interpretation issues that are pending before the System Board of  
24 Adjustment per order of this Court; iv) the National Mediation Board has exclusive  
25 jurisdiction over all election related disputes.

26 **C. STIPULATIONS AND UNCONTESTED FACTS AND LAW**

27 **1.** The following material facts are admitted or stipulated to by the parties and  
28 require no further proof:

- 1 1. Plaintiff Don Addington is a resident of the State of Arizona, who at all times relevant  
2 to this Complaint has been a West Pilot.
- 3 2. Plaintiff John Bostic is a resident of the State of Arizona, who at all times relevant to  
4 this Complaint has been a West Pilot.
- 5 3. Plaintiff Mark Burman is a resident of the State of Arizona, who at all times relevant  
6 to this Complaint has been a West Pilot.
- 7 4. Plaintiff Afshin Iranpour is a resident of the State of Arizona, who at all times  
8 relevant to this Complaint has been a West Pilot.
- 9 5. Plaintiff Roger Velez is a resident of the State of Arizona, who at all times relevant  
10 to this Complaint has been a West Pilot.
- 11 6. Plaintiff Steve Wargocki is a resident of the State of Arizona, who at all times  
12 relevant to this Complaint has been a West Pilot.
- 13 7. US Airways is a Delaware corporation with its principal place of business in Tempe,  
14 Arizona. At all times relevant to this action, US Airways has engaged in interstate  
15 commerce in the industry of air transportation, and has been an employer in an  
16 industry affecting interstate commerce.
- 17 8. At the time of the merger and at all times until April 18, 2008, the Air Line Pilots  
18 Association (“ALPA”) represented both the US Airways (“East”) and the America  
19 West (“West”) pilots as the sole bargaining representative of the pilots.
- 20 9. In May 2005, two air carriers, America West Airlines, Inc. (“America West”) and the  
21 premerger US Airways, Inc., agreed to merge such that they would combine all or  
22 substantially all of their assets.
- 23 10. The surviving entity is known as “US Airways.” To distinguish it from the pre-  
24 merger entity by the same name, it is referred to hereinafter as the “Airline.”
- 25 11. On September 23, 2005, the two airlines and ALPA entered into the “Transition  
26 Agreement,” which was for the purpose of governing the process of the airlines’  
27 operational merger as it related to the airline pilots.  
28

1 12. Under then-existing ALPA Merger Policy, the Arbitration Board is composed of two  
2 non-voting ALPA members chosen from the Master List of Pilot Neutrals. The third  
3 member and Chairman of the Board was required to be chosen from a list of  
4 Arbitrators approved by ALPA.

5 13. The Arbitration Board must render a seniority integration decision consistent with the  
6 criteria set forth in ALPA Merger Policy.

7 14. The parties to the Nicolau Arbitration were stated to be “the US Airways Pilot Merger  
8 Representatives and the America West Pilot Merger Representatives.”

9 15. The decision of Arbitrator George Nicolau was issued in May, 2007.

10 16. The Nicolau Award generated considerable negative reaction among many East pilots.  
11 On or about July 25, 2007, the East MEC determined that the East pilots would never  
12 ratify a single collective bargaining agreement that incorporated the Nicolau List.

13 17. A majority of East Pilots strenuously objected to the Nicolau Award and were  
14 opposed to its implementation.

15 18. From August 15, 2007 through the date of loss of ALPA’s representation status on  
16 April 18, 2008, there were no further negotiations toward a single collective  
17 bargaining agreement.

18 19. The Transition Agreement states that the parties shall maintain “Separate Operations”  
19 until the implementation of a single collective bargaining agreement covering both  
20 pilot groups. During Separate Operations, East and West aircraft may only be flown  
21 by East and West pilots respectively, unless otherwise permitted or agreed under the  
22 Transition Agreement.

23 20. Both the Transition Agreement and ALPA Merger Policy states that the Airline may  
24 not use the single seniority list until an agreement is reached on a single collective  
25 bargaining agreement covering both pilot groups, unless otherwise agreed to by all  
26 of the parties.  
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1 21. At this time, the Airline is still conducting separate pilot operations where each pilot  
2 group works under a different pilot collective bargaining agreement that utilizes its  
3 own seniority list.

4 22. Defendant US Airline Pilots Association (“USAPA”) is an unincorporated association  
5 with a principal place of business in Charlotte, North Carolina.

6 23. After an election, the National Mediation Board (“NMB”) certified USAPA as the  
7 collective bargaining representative of the pilots employed in the service of the  
8 Airline on April 18, 2008.

9 24. The USAPA Merger Committee presented its seniority integration proposal to the  
10 Airline on September 30, 2008. The Airline has not yet responded to the USAPA  
11 seniority integration proposal.

12 2. The following facts are subject to further rulings from the Court regarding  
13 relevance, materiality, foundation and completeness. Both Plaintiffs and USAPA have  
14 proposed Statements of Fact that can be resolved after the Motions in Limine are ruled upon  
15 and the issues at trial are narrowed in the pretrial conference.

16 Plaintiffs’ Proposed Undisputed Facts Not Agreed to by USAPA:

17 *(Plaintiff’s trial exhibit number and the source document are identified. If USAPA will*  
18 *agree to the admission of the source documents, then these additional facts would not require*  
19 *any valuable trial time.)*

20 25. Terms : Plaintiff contends that the parties should be able to agree to a single and  
21 consistent set of terms to use during the trial to avoid juror confusion. The parties  
22 have not been able to reach complete agreement on these terms.

23 a) “Merger” to refer to the merger between US Airways and America West  
24 Airlines.

25 b) “US Airways” to refer to the pre-merger air carrier;

26 c) “Airline” will refer to the post-merger air carrier now flying under the US  
27 Airways name;

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- 1 d) “West CBA” will refer to the collective bargaining agreement between America  
2 West Airlines and its pilots.
- 3 e) “West Pilots” to refers, as individuals and as a group, to the pilots on the  
4 seniority list incorporated into the West CBA.
- 5 f) “East CBA” to refer to the collective bargaining agreement between the pre-  
6 merger US Airways and its pilots;
- 7 g) “East Pilots” to refer, as individuals and as a group, to the pilots on the seniority  
8 list incorporated into the East CBA, including all New Hire Pilots assigned to East  
9 operations;
- 10 h) “Furloughed Pilots”: refers to those US Airways pilots who were on  
11 furlough and not actively flying for US Airways at the time of the merger.
- 12 i) “New Hire Pilots”: refers to those East Pilots who were not employed by, or on  
13 furlough from US Airways at the time of the merger, and who started employment  
14 with the Airline after the merger.
- 15 j) “Separate Operations” refers to the Airlines’s operation as those provisions  
16 defined in Section II.A of the Transition Agreement, including the provisions of  
17 Section II.B.
- 18 k) “West and East Pilots” refers to the entire group of pilots on both West  
19 CBA and East CBA seniority lists, and individuals on those lists;
- 20 26. At the time of the merger, all of the West Pilots were actively working. (Ex. 2,  
21 ADD09.)
- 22 27. In 2005, at the time of the merger, there were approximately 1894 West Pilots and  
23 5,300 East Pilots. (Ex. 2, ADD09.)
- 24 28. At the time of the merger, out of a total of 5,300 East Pilots 1,691 were on furlough  
25 (not working but having recall rights). (Ex. 2, ADD09.)
- 26 29. The Transition Agreement incorporated a set of policies and procedures called  
27 “ALPA Merger Policy.” (Ex. 21, ADD2624.)  
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1 30. Prior to and during this merger, aspects of ALPA Merger Policy were explained in of  
2 US Airwaves, an ALPA magazine available to the East Pilots. (Ex. 4, ADD539, 541;  
3 Ex. 7, ADD658, 660-661; Ex. 16, ADD2006; Ex. 57, ADD4833; Ex. 58, ADD4920-  
4 4921.)

5 31. The January/February/March 2002 edition of US Airwaves stated:

6 a) “A pilot’s status as a furlougee at the time of the merger announcement or  
7 arbitration hearing may also bear significantly on the pilot’s placement on the merged  
8 list”;

9 b) “[A]bsence of current employment and uncertainties about future prospects are  
10 among the equities likely to affect a furlougee’s seniority placement”;

11 c) “The only certainty in seniority integration is that the outcome is never certain  
12 until the merger representatives reach an agreement or, failing a negotiated solution,  
13 the arbitrator issues an award.” (Ex. 7, ADD658.)

14 32. The Summer 2005 edition of US Airwaves stated:

15 a) “The Award of the Arbitration Board shall be final and binding on all parties  
16 to the arbitration and shall be defended by ALPA.”;

17 and

18 b) “No ALPA seniority integration arbitration result has ever been set aside by  
19 the courts, although some dissatisfied pilots have challenged the award before  
20 administrative agencies and the courts.” (Ex. 4, ADD541.)

21 33. The Transition Agreement provided that certain steps would occur when the Airline  
22 transitions from separate to integrated pilot operations. (Ex. 21, ADD2626.)

23 34. One such step was that the pilots would create an integrated seniority list. (Ex. 21,  
24 ADD264.)

25 35. Another such step was that the Airline would accept this integrated seniority list,  
26 subject to certain standards. (Ex. 21, ADD264.)

27 36. A third such step was that the Airline and pilots would bargain to create a single  
28 collective bargaining agreement that would implement that seniority list. (Ex. 4,  
ADD541; Ex. 21 2625.)



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- 37. Under ALPA governance, each of the pilot groups had a Merger Committee that had “complete and full authority” to create an integrated pilot seniority list according to ALPA Merger Policy. (Ex. 3, ADD96; Ex. 57, ADD4834.)
- 38. Under ALPA Merger Policy, in the event of a merger between two ALPA-represented carriers, Merger Representatives appointed by the two MEC’s are required to make efforts to negotiate a mutually satisfactory method of integration of the two affected pilot groups. (Exhibit 3, ADD 0098-0099)
- 39. ALPA Merger Policy provides that “The merger representatives shall carefully weigh all the equities inherent in their merger situation. In joint session, the merger representatives should attempt to match equities to various methods of integration until a fair and equitable agreement is reached, keeping in mind the following goals, in no particular order: (a) preserve jobs; (b) avoid windfalls to either group at the expense of the other; (c) maintain or improve pre-merger pay and standard of living; (d) maintain or improve pre-merger pilot status; and (e) minimize detrimental changes to career expectations.” (Exhibit 3, § G.5, ADD 0090-0090)
- 40. The Merger Representatives were not successful in negotiation or mediating an acceptable pilot integration agreement. (Exhibit 2)
- 41. Under ALPA Merger Policy, in the event that the Merger Representatives appointed by the respective MEC’s could not reach a negotiated or mediated agreement on seniority integration, it was mandatory to submit the dispute to arbitration before a three-person Arbitration Board. The purpose of the arbitration is “to reach a fair and equitable resolution consistent with ALPA policy.” (Exhibit 3, ADD 0095, § B.1)
- 42. These two Merger Committees were unable to agree on how to create an integrated pilot seniority list that merged the 1,691 East Pilots who were on furlough at the time of the merger with the West Pilots, all of whom were actively working at the time of the merger. (Ex. 2, ADD06, 08.)

- 1 43. The Award of the Arbitration Board is “final and binding on all parties to the  
2 arbitration...” (Exhibit 3, ADD 00101; § H.5.B)
- 3 44. The East and West MEC Merger Representatives submitted the dispute to a Board of  
4 Arbitration chaired by George Nicolau (the “Nicolau Arbitration”). (Exhibit 2, ADD  
5 0002)
- 6 45. The East Merger Committee wanted to place these East Pilots ahead of the West  
7 Pilots because the East Pilots had earlier dates of hire. (Ex. 2, ADD12.)
- 8 46. The West Merger Committee wanted to put the West Pilots ahead of these East Pilots  
9 because the West Pilots had jobs at the time of the merger. (Ex. 2, ADD12.)
- 10 47. Following ALPA Merger Policy, the two Merger Committees entered into an  
11 arbitration to create a single integrated seniority list. (Ex. 2, ADD06.)
- 12 48. ALPA Merger Policy stated that such arbitrations would be “final and binding.” (Ex.  
13 3, ADD101.)
- 14 49. Both East and West pilot groups submitted testimony and evidence to the Nicolau  
15 Arbitration Board. (Ex 2 Nicolau Award)
- 16 50. ALPA National engaged in continuing efforts from May, 2007 through April 18,  
17 2008, to encourage the East and West pilot groups to resolve their disagreements.  
18 (Exhibit 3, § I.4)
- 19 51. Under ALPA Merger Policy, the decision of the Arbitration Board “will be presented  
20 to management” and ALPA is required to “use all reasonable means at its disposal to  
21 compel the company to accept and implement the merged seniority list.” (Exhibit 3,  
22 § I.1)
- 23 52. By July 25, 2007, thousands of East Pilots communicated “outrage” to ALPA  
24 representatives and officers at what they perceived to be inequities in the Nicolau  
25 Award. (Ex. 11, ADD707; Ex. 22, ADD2695.)  
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1 53. By July 25, 2007, a majority of East Pilots stated they would refuse to ratify a single  
2 collective bargaining agreement if it implemented the Nicolau Award. (Ex. 11,  
3 ADD707.)

4 54. On May 21, 2007, the East MEC asserted in a presentation made to the ALPA  
5 Executive Council that the Nicolau Award should not be implemented. (Exhibit 221,  
6 AAA ..2263; Exhibit 168, ADD 002277)

7 55. The East Pilots supported the action of the East Pilot MEC.

8 56. Hundreds of East Pilots protested at the May 21 Executive Council meeting in  
9 opposition to implementation of the Nicolau Award. (Exhibit 11, ADD 00077)

10 57. On or about August 15, 2007, the East MEC resolved to withdraw its representatives  
11 from negotiations for a single collective bargaining agreement. Exhibit 5, ADD  
12 00600; Exhibit 59, ADD 4924)

13 58. The Nicolau Award placed East Pilots who were on furlough at the time of the merger  
14 below the West Pilots, all of whom had been actively employed at the time of the  
15 merger. (Exhibit 2, ADD 00032)

16 59. Until the announcement of the Nicolau Award, the East Pilots intended to adopt a  
17 single collective bargaining agreement using the seniority list from the Award.

18 60. On August 15, 2007, the East Pilots withdrew their representatives from the Joint  
19 Negotiating Committee. (Ex. 5, ADD600; Ex. 17, ADD2021, Ex. 59, ADD4924.)

20 61. On May 16, 2007, Stephen Bradford (referring to the Nicolau Award as “this award”)  
21 raised the subject of replacing ALPA with a new union in a letter to ALPA Executive  
22 Vice-President Russ Webber, stating “[w]e must leave ALPA if this award stands.”  
23 (Ex. 107, ADD4945.)

24 62. In the same letter, Mr. Bradford stated “we don’t not want to leave ALPA, but we will  
25 just to ensure we can have some say in the next merger. We will write our own  
26 merger policy into our bylaws and defend it in civil court if we have to, even if we are  
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out-voted by ALPA in another election as a result of a merger.” (Ex. 107, ADD4946.)

63. By the end of May 2007, Mr. Bradford, Scott Theuer, Jamie Javurek and other East Pilots formed a committee (the “Committee”) to explore ways to prevent implementation of the Nicolau Award. (E. 40, ADD4737; Ex. 53, ADD4855.)

64. On June 9 and June 14, 2007, the Committee met with two law firms to inquire whether “formation of a new bargaining agent” could prevent implementation of the Nicolau Award. (Ex. 14, ADD909; Ex. 40, ADD4737; Ex. 42, ADD916; Ex. 77, ADD4927; Ex. 314, USAPA2346; Ex. 315, USAPA2356.)

65. Sometime in June, 2007, the Committee created Defendant US Airline Pilots Association (“USAPA”).

66. Mr. Bradford became the “Interim President” of USAPA at its inception on June 1, 2007. (Exhibit 48, USAPA 23491)

67. After being formed, USAPA successfully campaigned to replace ALPA as the bargaining representative for the pilots employed by the Airline.

68. As Interim President, Mr. Bradford asked USAPA’s current counsel whether the East Pilots could prevent implementation of the Nicolau Award if they were represented by a new independent union such as USAPA.. (Ex. 43, ADD4690.)

69. USAPA, from its creation, announced that as the single bargaining agent (union) it would not allow implementation of the Nicolau Award. (Ex. 24, 3107.)

70. “Roll call voting” in a union is a method of voting where each member votes and each vote is weighted equally. The alternative is voting through representatives. Representatives might be allotted in some way other than in proportion to the number of represented members.

71. An individual who participated in drafting USAPA’s Constitution commented on roll call voting as follows: “Roll call voting is an issue. I understand the reluctance to allow this method. Our lawyers tell us we must have it or in the case of a

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gerrymandering of the bases we could find ourselves in deadlock with the West, unable to do business.” (Ex. 50, USAPA23821.)

72. This individual also commented that if USAPA’s Constitution had a voting scheme that was unfair to West Pilots, USAPA and its leaders might be sued for violation of the duty of fair representation (“DFR”) as follows:

“This would kill us in a courtroom. We must remember that loosing a DFR lawsuit on this basis would involve monetary compensation to the West and very likely a court mandated seniority re-integration. This reintegration could be punitive to the East to make up for lost time to the West. Additionally the leadership could be up for additional charges and costs. I am not willing to face personal chapter 11 for an experiment that our legal team is telling me could happen. We don't want to reinvent the Wheel. In a perfect world the ideal of a non-domicile related seniority system that was thoroughly vetted and tested could be a good thing. We don't have the time, resources or ability, as far as I can see, to build this better mousetrap. The perfect is the enemy of the good.”

(Ex. 50, USAPA23822.)

73. US Aviation.com is a web board where, using pseudonyms, pilots from both sides have posted commentary concerning their seniority dispute.

74. Mr. Javurek, one of the founders of USAPA, posts on US Aviation.com using the pseudonym “USA320 Pilot.”

1 75. On August 4, 2007, Mr. Javurek wrote: “the US Airways pilots will do everything and  
2 anything to never let the Nicolau Award be implemented.” (Ex. 52, ADD4794.)

3 76. On September 20, 2007, the ALPA Executive Council passed resolutions that stated:

4 “[T]here is no basis for the Executive Council to further consider the  
5 [East Pilot] request to set aside the Award. The Executive Council  
6 further finds that there is no basis for setting aside the Award, which  
7 under Merger Policy is now to be defended by ALPA as issued by the  
8 Arbitration Board.”  
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12 (Ex. 28, USAPA312; Ex. 19, ADD 2152; Ex. 25, 3111.)

13 77. On October 1, 2007, the President of ALPA wrote the following to the Chairman of  
14 the East Pilots governing body (called the “East MEC”):

15 “The ALPA Executive Council has determined that there is no ground  
16 under ALPA Merger Policy to set aside the Nicolau Award seniority  
17 list.”

18 “With respect to the ... merger, it is time for the MEC to comply with  
19 its representational and legal obligations under the Constitution & By-  
20 Laws, ALPA Merger Policy, the Transition Agreement, and  
21 implementing resolutions of the Executive Council. The MEC, at this  
22 meeting, should adopt a resolution (or resolutions) reversing all prior  
23 efforts to bar or precondition the continuation of joint negotiations.”  
24 (Ex. 19, ADD2151-2152.)

25 78. In December, 2007, ALPA submitted the Nicolau Award to the Airline for  
26 its acceptance. (ADD4695-ADD4696.)

27 79. The Airline accepted the Nicolau Award on December 20, 2007, as the  
28 integrated seniority list to be incorporated into the single collective  
bargaining agreement under negotiation between the Airline and ALPA  
as the bargaining agent for the East Pilots and West Pilots.

1 80. The President of ALPA directed the East Pilot MEC as follows:

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3 ["T]he MEC should also adopt a resolution recognizing that the award  
4 is to be included in the single agreement to be negotiated under the  
5 Transition Agreement and Merger Policy, provided only that the  
6 Association and all MECs will comply with valid court orders, if any,  
7 affecting the terms of the award."  
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10 (Ex. 19, ADD2152.)

11 81. On December 20, 2007, the Airline accepted the Nicolau Award. (Ex. 9,  
12 ADD699.)

13 82. USAPA posts comments and information on its web site.

14 83. On October 28, 2007, the USAPA website stated as follows:

15 "Unlike ALPA, which is constitutionally committed to implementing  
16 the Nicolau award, USAPA is constitutionally committed to using its  
17 full resources to obtain seniority integration on a date of hire basis."  
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21 (Ex. 97, ADD4916.)

22 84. On October 28, 2007, the USAPA website stated as follows:

23 "The Nicolau is the product of an ALPA-mandated process and ALPA  
24 is bound to defend that process" and "USAPA, however, is not bound  
25 by ALPA's Constitution and cannot be subjected to ALPA's political  
26 control."  
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2 (Ex. 97, ADD4915.)

3 85. On January 21, 2008, USAPA filed a Constitution with the Department of  
4 Labor. (Ex. 47, ADD3825-3854.)5 86. On January 31, 2008, Stephen Bradford stated that the Nicolau Award  
6 “can be negotiated away by USAPA whether the West agrees or not.”  
7 (Ex. 33; USAPA 2351.)8 87. The National Mediation Board (“NMB”) began the process of holding an  
9 election to decide whether to recognize ALPA or USAPA as the  
10 bargaining representative.11 88. The NMB determined that, as of November 29, 2007, the pilot counts for  
12 the two sides of the Airline were as shown in the table below:

	<b>Active</b>	<b>Leave</b>	<b>Furlough</b>	<b>Total</b>
<b>East</b>	2,844	537	161	3,542
<b>West</b>	1622	149	0	1,771

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14 (Ex. 95, ADD4863.)

15 89. The pilot counts changed from 2005 because nearly all of the East Pilots  
16 who had been on furlough were recalled. Approximately half of these  
17 pilots accepted recall and returned to work. (Ex. 15, ADD1906.)18 90. In the campaign leading up to the NMB election, representatives of  
19 USAPA stated that it has “abandoned the Nicolau Award”; it would not  
20 be “bound” to honor the Nicolau Award; and “certainly on USAPA’s  
21 watch, it [the Nicolau Award] will go away.” (Ex. 8, ADD668-687.)22 91. In the campaign leading up to the NMB election, the USAPA website  
23 stated: “Inside ALPA, the only issue preventing a ratifiable joint contract  
24 is the existence of two MECs, and therefore mandatory dual-ratification;”  
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1 “USAPA will remove this impediment and will promptly enter into  
2 negotiations with management for a quality contract;” and “ALPA is  
3 required to defend the Award.” (Ex. 37, USAPA2379.)

4 92. On January 31, 2008, Mr. Bradford stated that the Nicolau Award “can be  
5 negotiated away by USAPA whether the west agrees or not.” (Ex. 33,  
6 USAPA2351.)

7 93. On February 2, 2008, Mr. Bradford stated, “the question of East/West will  
8 be decided by a vote for ALPA or USAPA. When USAPA becomes the  
9 bargaining agent, there will be no West and a simple majority can  
10 renegotiate seniority integration.” (Ex. 34, USAPA2352.)

11 94. On February 10, 2008, Mr. Bradford stated: “[T]he question of East/West  
12 will be decided by a vote for ALPA or USAPA. When USAPA becomes  
13 the bargaining agent, there will be no West and a simple majority can  
14 renegotiate seniority integration.” (Ex. 35, USAPA2353.)

15 95. On April 16, 2008, USAPA stated on its website as follows: “Upon  
16 certification of USAPA, the Nicolau Award is rendered moot. It doesn’t  
17 have to be fixed, changed, or renegotiated as it is no longer relevant to the  
18 US Airways pilots.” (Ex. 24, ADD3107.)

19 96. USAPA formed a Merger Committee, a Negotiating Committee, and a  
20 governing Board of Pilot Representatives.

21 97. The Merger Committee was comprised of 3 East Pilots, the Negotiation  
22 Committee was comprised of 3 East Pilots and the Board of Pilot  
23 representatives was composed of 12 East Pilots.

24 98. USAPA “charg[ed]” the Merger Committee “to create contract language  
25 to ensure the implementation and durability of the date of hire seniority  
26 list with suitable conditions and restrictions.” (Ex. 383, USAPA13780.)  
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1 99. USAPA stated: “A primary objective of the Merger Committee is not only  
2 to negotiate a DOH-based seniority integration of East and West pilots,  
3 but also to ensure the permanency of any such integration agreed to with  
4 the Company.” (Ex. 24, ADD3107; Ex. 96, ADD4911.)

5 100. USAPA did not expressly instruct the Merger Committee to consider West  
6 Pilot views with respect to the finality of the Nicolau Award.

7 101. At the start of June 2008, there were no pilots on furlough.

8 102. It was reasonably foreseeable that the Airline might reduce service and if  
9 it did, that it might furlough First Officers, and/or demote Captains.

10 103. It was reasonably foreseeable that during separate operations, any  
11 furloughs would fall on the pilots at the bottom of either the West or the  
12 East seniority lists.

13 104. It was reasonably foreseeable that if there were integrated operations  
14 implementing the Nicolau Award, any furloughs would fall on the pilots  
15 at the bottom of the Nicolau Award seniority list.

16 105. On or about June 12, 2008, the Airline announced plans to furlough 300  
17 pilots, including 175 West Pilots. (Ex. 301, USAPA3221.)

18 106. At present, the Airline has furloughed 142 West Pilots (all of whom were  
19 working in 2005). (Ex. 110, ADD4947-4972.)

20 107. The Airline has two-pilot crews comprised of a Captain and a First  
21 Officer.

22 108. Generally, therefore, the Airline operates with equal numbers of Captains  
23 and First Officers.

24 109. Captain is a preferred higher paying position.

25 110. Pilots with higher seniority tend to be Captains and pilots with lower  
26 seniority tend to be First Officers.  
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1 111. To keep the numbers of Captains and First Officers equal, therefore, the  
2 Airline on average will demote one Captain to First Officer for every two  
3 First Officers it furloughs.

4 112. Similarly, the Airline will promote one First Officer to Captain for every  
5 two First Officers it hires or recalls from furlough.

6 113. The Airline demoted approximately 71 West Pilot Captains as a result of  
7 having furloughed 142 West Pilot First Officers.

8 114. While these 142 West Pilot First Officers are on furlough, approximately  
9 750 East Pilots who were on furlough at the time of the merger are  
10 working.

11 115. No West Pilot First Officer would have been furloughed, and no West  
12 Pilot Captain would have been demoted if the Airline had selected pilots  
13 for furlough according to the seniority order of the Nicolau Award.

14 116. USAPA has been bargaining with the Airline toward the adoption of a  
15 new collective bargaining agreement.

16 117. USAPA has not been bargaining with the Airline toward the adoption of  
17 a new collective bargaining agreement that would integrate operations  
18 utilizing the Nicolau Award.

19 118. In March 2009, candidate for USAPA President, Doug Mowery,  
20 announced that his intentions to finalize bargaining with the Airline as  
21 soon as possible so that USAPA could “secure” a date-of-hire seniority list  
22 and achieve what he asserted would be the “complete elimination” of the  
23 Nicolau Award “threat hanging over our heads.” (Ex. 111, ADD4963-  
24 4969.)

25 119. USAPA is planning to use its Constitutional ratification provision to  
26 thwart any remedy by this Court to order adoption of the Nicolau Award.  
27 Hence, the Philadelphia Domicile recently stated: “NOTHING will  
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1 happen until a majority of members in GOOD standing ratify a new  
2 contract.” (Ex. 45, ADD4739.)  
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4 USAPA’s Proposed Undisputed Facts Not Agreed to by Plaintiff:  
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7 120. With respect to union-represented employee groups, the general policy of  
8 the air carriers was to permit the unions to resolve the seniority integration  
9 issue internally, subject to the airlines’ right to avoid undue costs arising  
10 from the seniority integration process.

11 121. **Plaintiffs’ Objections:** relevance; agreements with other groups  
12 not relevant to arbitration process the pilots agreed to, *see Plts.’ MIL #2*,  
13 or issues in the case; Airline accepted the list so no issue regarding Airline  
14 avoiding acceptance of the Nicolau Award.

15 122. Pursuant to internal union policy, the unions for the Flight Attendants,  
16 Mechanics, Stock Clerks, Baggage Handlers, and Maintenance Specialists  
17 integrated the employees in these classifications on a date-of-hire basis.  
18 The airlines agreed that that integration on this basis for these employee  
19 groups was “fair and equitable.”

20 123. **Plaintiffs’ Objections:** Relevance; as more fully set forth in  
21 *Plts.’ MIL #2*; waste of time and confusion of the jury.

22 124. Pursuant to an arbitration conducted under Allegheny-Mohawk  
23 procedures, the East and West Dispatchers were integrated on a date-of-  
24 hire basis.

25 125. **Plaintiffs’ Objections:** relevance, Rule 403; confusion of issues  
26 and waste of time; not material or probative of claims or defenses. *See*  
27 *Plts.’ MIL #2*.  
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1 126. Under the Transition Agreement, the airlines allowed ALPA to resolve the  
2 pilot seniority integration issue subject to ALPA’s internal ALPA Merger  
3 Policy subject to the airlines’ right to avoid undue costs arising from the  
4 seniority integration process. The terms of ALPA Merger Policy are set  
5 out in a document, entitled “Section 45 –Merger and Fragmentation  
6 Policy” and dated August 10, 2005.

7 127. **Plaintiffs’ Objections:** relevance, Rule 403; confusion of issues  
8 and waste of time; not material or probative of claims or defenses; Airline  
9 accepted the Nicolau Award.

10 128. Merger Representatives consider the following criteria currently stipulated  
11 by ALPA Merger Policy: a) Preserve Jobs, b) Avoid windfalls to either  
12 group at the expense of the other, c) Maintain or improve pre-merger pay  
13 and standard of living, d) Maintain or improve pre-merger pilot status, and  
14 e) Minimize detrimental changes to career expectations. These criteria  
15 were established in 1991 pursuant to an amendment of ALPA Merger  
16 Policy by the ALPA Board of Directors in 1991.

17 129. **Plaintiffs’ Objection:** This is not a complete or accurate  
18 statement of the ALPA Merger Policy, Section G.5.

19 130. ALPA is a unitary labor organization with a single Constitution and By-  
20 Laws governing all subordinate bodies and members.

21 131. **Plaintiffs’ Objections:** relevance; not material to any claim or  
22 defense; confusion, Rule 403 waste of time, misleading the jury. ALPA  
23 status not in issue. *See Plts.’ MIL #3.*

24 132. At all relevant times, ALPA was an international labor organization that  
25 represented approximately 61,000 airline pilots at over 40 U.S. and  
26 Canadian airlines.  
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133. **Plaintiffs’ Objection:** relevance; not material to any claim or defense; confusion, Rule 403 waste of time, misleading the jury. ALPA status not in issue. *See Plts.’ MIL #3.*

134. All ALPA members may be “disciplined fined, or expelled” for violating ALPA’s rules and policies, including violations of the ALPA Constitution and By-Laws or failing to comply with the decisions of ALPA’s governing bodies, such as the ALPA Board of Directors, the ALPA Executive Board or the ALPA Executive Council.

135. **Plaintiffs’ Objection:** relevance; not material to any claim or defense; confusion, Rule 403 waste of time, misleading the jury. ALPA status not in issue; ALPA discipline not in issue. *See Plts.’ MIL #3.*

136. At airlines where ALPA is the collective bargaining representative, the CBA is administered by a Master Executive Council (“MEC”) composed of pilot representatives who are elected by pilots who are members in good standing. In order to be a member in good standing of ALPA, an individual pilot must be current in his dues obligations to ALPA as required under the ALPA Constitution and By-Laws.

137. **Plaintiffs’ Objection:** relevance; not material to any claim or defense; confusion, Rule 403 waste of time, misleading the jury. ALPA status not in issue. Pilot membership in ALPA not an issue; no issue re ALPA dues collection; no relevance to USAPA’s conduct. See Plts.’ MIL #3.

138. MEC’s are subordinate bodies of ALPA. MEC’s do not have the authority to act as collective bargaining representatives. ALPA itself is the sole bargaining representative of the pilots employed by ALPA-organized airlines. MEC’s and their representatives are forbidden to initiate any

1 action that is inconsistent with Constitution and By-Laws or with the best  
2 interests of the Association or the general membership.

3 139. **Plaintiffs' Objections:** relevance: MEC authority not in issue  
4 or relevant to any claim or defense; Rule 403 waste of time; confusion of  
5 issues; misleading the jury. *See Plts.' MIL #3.*

6 140. ALPA Merger Policy is promulgated by the ALPA Board of Directors.

7 141. **Plaintiffs' Objections:** relevance: ALPA's governance or  
8 organization is not relevant to any issue in the case. *See Plts.' MIL #3.*

9 142. The ALPA Board of Directors is also empowered to amend ALPA Merger  
10 Policy. Neither the promulgation nor the amendment of ALPA Merger  
11 Policy is subject to a ratification vote by ALPA rank-and-file members.

12 143. **Plaintiffs' Objections:** relevance: ALPA's governance or  
13 organization is not relevant to any issue in the case. *See Plts.' MIL #3.*

14 144. Pursuant to ALPA Merger Policy, MEC's are required to appoint Merger  
15 Representatives, who are also subject to removal by the MEC's. Merger  
16 Representatives are not elected by ALPA rank-and-file members. Merger  
17 Representatives must be ALPA members in good standing.

18 145. **Plaintiffs' Objections:** relevance: ALPA's governance or  
19 organization is not relevant to any issue in the case. No issue re ALPA  
20 MEC's duties. *See Plts.' MIL #3.*

21 146. Prior to this amendment, ALPA Merger Policy provided as preface to  
22 these criteria: "Merger representatives should, whenever possible, use  
23 Conditions and Restrictions so as to accomplish seniority list integration  
24 based on date of hire, keeping in mind the following primary goals:". The  
25 amendment of ALPA Merger Policy in 1991 was advocated by  
26 representatives of the relatively junior pilot group at United in order to  
27 obtain an advantage over the more senior US Airways pilot group.  
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147. **Plaintiffs’ Objections:** relevance: seniority issue was submitted to final and binding arbitration that did not involve this provision; confusion; waste of time, hearsay. *See Plts.’ MILs #2, #3.*

148. The Nicolau Award granted no seniority credit to East Furloughees with up to 16 years of seniority relative West pilots with as little two months of seniority. [Brucia dissent] Moving up the list from that point, West and East pilots were ratioed together in a manner that effectively eliminated 16 years of date-of-hire seniority for every East pilot.

149. **Plaintiffs’ Objections:** relevance, materiality; USAPA not permitted to relitigate Nicolau Award; contested issues is whether or not USAPA bound to defend the Award and use it as the seniority proposal for the new CBA. The Nicolau Award is the best evidence of the consideration give to each pilot group. *See Plts.’ MIL #1.*

150. On or about August 15, 2007, the US Airways MEC resolved to withdraw its representatives from negotiations for a single collective bargaining agreement due to the West MEC’s refusal to agree to a joint proposal for immediate pay parity. [State Complaint ¶ 93].

151. **Plaintiffs’ Objections:** no objection to the fact of withdrawal from joint negotiations on 8/15/2007; objection to the accuracy or credibility of the stated purpose. Should use “East MEC” for consistent terminology.

152. ALPA National engaged in continuing efforts from May, 2007 through April 18, 2008, to resolve the impasse that had developed between the US Airways MEC and the West MEC. These efforts were conducted pursuant to a May 24, 2007 Executive Council resolution, which urged the two MEC’s to “explore consensual approaches that promote career protection and mutual success, and achieve an acceptable single collective bargaining



1 agreement that improves pay, benefits, work rules and job security for  
2 both pilot groups.” During this period ALPA National put “extreme  
3 pressure” on the West MEC to agree to a modification of the Nicolau  
4 Award. The West MEC refused, at all times, to consider any modification  
5 of the Nicolau Award, including the introduction of any conditions or  
6 restrictions that would delay or limit the impact of the seniority integration  
7 list contained in the Nicolau Award.

8 153. **Plaintiffs’ Objections:** Relevance, hearsay. The pilots submitted  
9 to final and binding arbitration that did not require any further negotiation  
10 or discussion; ALPA’s effort to get the East Pilots to accept the final and  
11 binding nature of the Nicolau Award or come up with a compromise that  
12 both pilot groups would accept and support is not relevant to whether the  
13 Nicolau Award was final and binding. ALPA National determined that  
14 there was no error in the process or procedure, and therefore submitted the  
15 list to the Airline, who accepted it. Should use “East MEC” for consistent  
16 terminology. *See Plts.’ MIL #1.*

17 154. ALPA used all reasonable means at its disposal to implement the Nicolau  
18 Award.

19 155. **Plaintiffs’ Objections:** Plaintiffs do not contend that ALPA  
20 failed to follow the Transition Agreement or the ALPA Merger Policy.  
21 USAPA intends to offer this language to impose its argument that West  
22 Pilots were obligated to renegotiate the Nicolau Award with the East  
23 Pilots to give the East Pilots the result they had asked for in the  
24 Arbitration. No such obligation existed because the Nicolau Award was  
25 final and binding between the East and West Pilots. “All reasonably” is  
26 an ambiguous conclusion that could be misconstrued in other contexts.  
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1 156. Under ALPA Merger Policy, there is no required timetable for  
2 implementation of a seniority integration arbitration award.

3 157. **Plaintiffs' Objection:** Although ALPA Merger Policy did not  
4 have an express timetable, the Transition Agreement had an implied  
5 covenant of good faith and fair dealing that required all parties to make  
6 reasonable good faith efforts to timely implement a seniority integration  
7 arbitration award. This language is misleading because it suggests, as a  
8 legal conclusion, that no such obligation existed. Any small probative  
9 value is outweighed by prejudice. Rule 403.

10 158. In the years preceding the Nicolau Award, there had been broad-based  
11 support among both East and West pilots for an independent union. Many  
12 East and West pilots shared the concern that ALPA, as a multi-carrier  
13 union, might act contrary to the interests of their airline-specific pilot  
14 groups.

15 159. **Plaintiffs' Objections:** Rule 401, 403 relevance, waste of time  
16 confusion of the issues; prior history and pilot concerns re ALPA hearsay,  
17 lacking foundation, and a waste of time. *See Plts.' MIL #3.*

18 160. In the years preceding the Nicolau Award, West MEC Chairman John  
19 McIlvenna formed an independent union as an alternative to ALPA due  
20 to ALPA's lack of democracy institutions, lack of political accountability,  
21 and concern that ALPA's multi-carrier structure compromised its  
22 representation of the West pilots' interest. McIlvenna's independent union  
23 effort came close to obtaining endorsement from a majority of West pilots.

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25 161. **Plaintiff's Objections:** Rule 401, 403 relevance, waste of time,  
26 confusion of the issues; prior history and pilot concerns re ALPA hearsay,  
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1           lacking foundation. States past allegations as if they are established fact.  
2           *See Plts.’ MIL #3.*

3 162. In the early 1990’s, the East pilots came close to succeeding in the  
4 formation of an independent union in reaction to ALPA’s failure to  
5 properly represent the East group and its sabotage of a British Airways  
6 investment plan, which would have enhanced the East pilots’ employment  
7 opportunities.

8           163.       **Plaintiffs’ Objections:** Rule 401, 403 relevance, waste of time,  
9 confusion of the issues; prior history and pilot concerns re ALPA hearsay,  
10 and lacking foundation. States past allegations as if they are established  
11 fact. *See Plts.’ MIL #3.*

12 164. During US Airways bankruptcy proceedings pre-dating the formation of  
13 USAPA, ALPA agreed to terminate the East pilots’ pension plan without  
14 allowing a prior vote by the pilot rank-and-file.

15           165.       **Plaintiffs’ Objections:** Rule 401, 403 relevance, waste of time  
16 confusion of the issues; prior history and pilot concerns re ALPA hearsay,  
17 lacking foundation, and a waste of time. Prior concessions and bankruptcy  
18 proceedings not relevant and are prejudicial to Plaintiffs who were  
19 working for a viable airline at the time of the merger. *See Plts.’ MIL #1.*

20 166. During US Airways bankruptcy proceedings pre-dating the formation of  
21 USAPA, and for the purpose of providing financial assistance to the  
22 carrier, ALPA agreed to changes in the East CBA’s scope provisions that  
23 significantly increased outsourcing of pilot jobs to US Airways’ wholly-  
24 owned subsidiaries.

25           167.       **Plaintiffs’ Objections:** Rule 401, 403 relevance, waste of time  
26 confusion of the issues; prior history and pilot concerns re ALPA hearsay,  
27 lacking foundation, and a waste of time. Prior concessions and bankruptcy  
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proceedings not relevant and are prejudicial to Plaintiffs who were working for a viable airline at the time of the merger. *See Plts.’ MIL #1.*

168. USAPA announced its creation on or about August 6, 2007, with a broad platform of political objectives, including: a) a constitutional pilot bill of rights, b) membership ratification of all contracts and side letters, c) increasing the level of democratic control by the members, including direct election of national officers, d) the creation of a carrier-specific union that could better pursue the objectives of the pilot group, e) reducing wasteful spending of the members’ dues money, and f) obtaining better collective bargaining agreements.

169. **Plaintiffs’ Objections:** primary contested issue of fact; relevance, argumentative; conflicts with true motives expressed in other documents; published information and witness testimony is the best evidence of USAPA’s objectives.

170. USAPA’s Constitution, which was posted on its website during its campaign, provided that it was an “objective” of USAPA: “To maintain uniform principles of seniority based on date of hire and perpetuation thereof, with reasonable conditions and restrictions to preserve each pilot’s un-merged career expectations.”

171. **Plaintiffs’ Objections:** primary contested issue of fact; relevance, argumentative; conflicts with true motives expressed in other documents; published information and witness testimony is the best evidence of USAPA’s objectives. *See Plts.’ MIL # 5.*

172. During the inter-union election campaign that proceeded certification by the National Mediation Board, USAPA campaigned for the votes of East and West pilots through mailings, its website, and roadshows in Philadelphia, Charlotte and Phoenix. During these campaign activities,

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USAPA communicated to East and West pilots its policy objectives, including its constitutional objective related to seniority integration.

173. **Plaintiffs’ Objections:** primary contested issue of fact; relevance, argumentative; conflicts with true motives expressed in other documents; published information and witness testimony is the best evidence of USAPA’s objectives. *See Plts.’ MIL # 5.*

174. During the inter-union election campaign, USAPA communicated to West pilots that USAPA would protect their interests by, among other things: a) obtaining a better contract, b) providing more democratic and efficient union representations, and c) protecting West pilots in their existing positions.

175. **Plaintiffs’ Objections:** primary contested issue of fact; relevance, argumentative; conflicts with true motives expressed in other documents; published information and witness testimony is the best evidence of USAPA’s objectives.

176. During the inter-union election campaign, USAPA communicated to West pilots that USAPA wanted them to become dues-paying members and be actively involved within the USAPA political structure.

177. **Plaintiffs’ Objections:** primary contested issue of fact; relevance, argumentative; conflicts with true motives expressed in other documents; published information and witness testimony is the best evidence of USAPA’s objectives.

178. Subsequent to USAPA’s certification, the America West Airlines Pilots Protective Alliance (AWAPPA) – a corporation formed to promote West pilots’ interests – commenced a campaign to “destroy” USAPA. The AWAPPA campaign included concerted efforts to jam USAPA’s information and safety hotlines in order to disrupt USAPA’s operations

1 and to inflict financial harm on USAPA. The AWAPPA campaign also  
2 involved a highly successful campaign to persuade the approximately  
3 1800 West pilots not to become members of USAPA or pay either dues or  
4 agency fees. To date, only about 6 percent of the West pilots have been  
5 USAPA members in good standing.

6 179. **Plaintiffs' Objections:** Subject of *Plts.*' MIL # 6; Rule 401 and  
7 403 relevance, misleading, prejudicial, no probative value; no defense to  
8 DFR claims; AWAPPA 's conduct not at issue.

9 180. AWAPPA also engaged in a program of intimidating West pilots –  
10 through threats of physical harm, threats to property, economic coercion,  
11 and telephonic harassment – who expressed an interest in participating in  
12 USAPA's political structure.

13 181. **Plaintiffs' Objections:** Subject of *Plts.*' MIL # 6; Rule 401 and  
14 403 relevance, misleading, prejudicial, no probative value; no defense to  
15 DFR claims. AWAPPA conduct not at issue.

16 182. The AWAPPA-coordinated dues boycott and intimidation frustrated  
17 USAPA's efforts to obtain the participation of West pilots on the USAPA  
18 Board of Pilot Representatives, Negotiating Advisory Committee, and  
19 Merger Committee.

20 183. **Plaintiffs' Objections:** Subject of *Plts.*' MIL # 6; Rule 401 and  
21 403 relevance, misleading, prejudicial, no probative value; no defense to  
22 DFR claims; AWAPPA's conduct not at issue.

23 184. Since the date of its certification, USAPA's collective bargaining  
24 objective has been to obtain agreement with the Company on a single  
25 collective bargaining agreement that would enhance wages, benefits, and  
26 working conditions and implement a date-of-hire seniority list with  
27 conditions and restrictions designed to protect each pilot's unmerged  
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career expectations. Pursuant to USAPA’s Constitution, USAPA’s Merger Committee developed a seniority integration proposal that combined a date-of-hire seniority list with conditions and restrictions, substantially limiting the exercise of date-of-hire seniority by East pilots, which conditions and restrictions were designed to protect each pilot’s unmerged career expectations.

185. **Plaintiffs’ Objections:** argumentative; relevance, negotiations are confidential; hearsay; self-serving; Rule 403 prejudice, misleading, waste of time and confusion of issues. *See Plts.’ MIL #4.*

186. The conditions and restrictions contained with the USAPA Merger Committee seniority integration proposal: a) created protected positions for West pilots within West operations that severely limited the ability of East pilots to use their date-of-hire seniority over a ten-year period; b) created recapture rights that protected a West pilot’s ability to return to his/her original home domicile in the event of a displacement result from an economic downturn; c) provided that the conditions and restrictions would protect West pilots from encroachment on their positions by pilots from other airlines in the event of a future merger; d) created the ability to reallocate protected positions to EMB 190 aircraft in the event of a carrier decision to operate that aircraft in the West domiciles of Phoenix or Las Vegas; e) allowed senior West pilots to use their seniority, without restriction, to bid into widebody flying opportunities not available within West operations; f) created a reduction ratio system to ensure that West captains would not suffer demotions disproportionate to their number within the combined system.

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187. **Plaintiffs' Objections:** argumentative; relevance, negotiations are confidential; hearsay; self-serving; Rule 403 prejudice, misleading, waste of time and confusion of issues. *See Plts.' MILs #1, #4.*

188. The USAPA Merger Committee presented its seniority integration proposal to US Airways on September 30, 2008. The Company has not yet responded to the USAPA seniority integration proposal. In order for the seniority integration proposal to be implemented, the following would have to happen: 1) USAPA's Negotiating Advisory Committee and US Airways would have to reach a tentative agreement on a single collective bargaining agreement, 2) the USAPA Board of Pilot Representatives would have to approve the tentative agreement on a single collective bargaining agreement by a majority vote, and 3) USAPA members in good standing would have to approve the single collective bargaining agreement by a majority of votes cast.

189. **Plaintiffs' Objections:** argumentative; relevance, negotiations are confidential; hearsay; self-serving; Rule 403 prejudice, misleading, waste of time and confusion of issues. *See Plts.' MIL #4.*

3. The following issues of law are uncontested and stipulated to by the parties:

The parties have not been able to agree on uncontested issues of law.



1            Plaintiffs Contend: The Court has already determined the relevant scope  
2 of USAPA's duty of fair representation and, therefore, this should be an  
3 uncontested issue of law for this liability trial.  
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5            Defendant Contends: No issues of law are uncontested.  
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7        **D.        CONTESTED ISSUES OF FACT AND LAW**

8            1.        Did USAPA discriminate against Plaintiffs in a manner that was  
9 intentional, severe, and unrelated to any legitimate union objective, in  
10 violation of its duty of fair representation, by committing itself to  
11 disregarding the Nicolau Award in favor of a seniority policy that was  
12 substantially less favorable to West Pilots than the Nicolau Award?  
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14            2.        Did USAPA act in bad faith toward Plaintiffs in a manner that was  
15 fraudulent, deceitful, or dishonest, and unrelated to any legitimate union  
16 objective, in violation of its duty of fair representation, by committing  
17 itself to disregarding the Nicolau Award in favor of a seniority policy that  
18 was substantially less favorable to West Pilots than the Nicolau Award?  
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20            3.        Did USAPA discriminate against Plaintiffs in a manner that was  
21 intentional, severe, and unrelated to any legitimate union objective, in  
22 violation of its duty of fair representation, by adopting and promoting a  
23 seniority policy that was substantially less favorable to West Pilots than  
24 the Nicolau Award?  
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26            4.        Did USAPA act in bad faith toward Plaintiffs in a manner that was  
27 fraudulent, deceitful, or dishonest, and unrelated to any legitimate union  
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1 objective, in violation of its duty of fair representation, by adopting and  
2 promoting a seniority policy that was substantially less favorable to West  
3 Pilots than the Nicolau Award?

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5 These issues include the following questions:

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7 5. Was USAPA created so that the East Pilots could disregard the  
8 Nicolau Award?

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10 6. Did USAPA promise that, if elected as the bargaining  
11 representative, it would disregard the Nicolau Award?

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13 7. Did USAPA disregard the Nicolau Award?

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15 8. Did the parties to the Transition Agreement, representing the three  
16 distinct interests of the East Pilots, the West Pilots, and US Airways, agree  
17 to treat the outcome of the Nicolau Arbitration as a final and binding  
18 integration of the East Pilot and West Pilot seniority lists for purposes of  
19 the Transition Agreement?

20  
21 **E. LIST OF WITNESSES**

22 **1. Plaintiffs' Witnesses**

23 **a.** Witnesses who shall be called at trial:

24 **Stephen H. Bradford:** Fact: History

25 **Ken Stravers:** Fact: History

26 **Afshin Iranpour:** Fact: History

27 **Doug Dotter:** Fact: History

28 **Mark Burman:** Fact: History

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**Russ Payne:** Fact: History; deposition topics

**Al Hemenway:** Fact: History and deposition testimony.<sup>1</sup>

**Brian Stockdell:** Fact: History and factual analysis of the data listed on the seniority list generated by the Nicolau List and the same analysis applied to the USAPA seniority list.

**Tania Bziukiewicz,** as a foundational witness for the video clips that are part of Plaintiff’s exhibits.

**Brice LeCarre,** as a foundational witness for the video clips that are part of Plaintiff’s exhibits

**b.** Witnesses who may be called at trial:

Don Addington: Fact: History and effect of USAPA’s actions

John Bostic Fact: History and effect of USAPA’s actions

Roger Velez Fact: History and effect of USAPA’s actions

Steve Wargocki Fact: History and effect of USAPA’s actions

Bob Mann (Rebuttal on issues of US Airways and AWA financial status at the time of merger, as testified to in Nicolau Arbitration, with exhibits and demonstrative exhibits.)

Dan Aiken (Rebuttal on issues of fairness/unfairness of Nicolau Award if the Court permits USAPA to challenge the Nicolau Award or introduce testimony about the

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<sup>1</sup> Mr. Hemenway will be out of the country the first week of trial. Plaintiffs intend to call him as part of their case-in-chief, but he may not be able to appear until during the second week of trial. Plaintiffs request USAPA's cooperation in allowing them to call him as soon as practicable. Plaintiffs reserve the right to introduce Mr. Hemenway's deposition testimony in the event he is not available at all, and will exchange potential page and line designations with USAPA for that purpose.

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benefits and protection in the Conditions and Restrictions of the current proposal.

- Mark W. King: Fact: History; deposition topics
- Jamie Javurek: Fact: History and communications by him
- Scott Theuer; Fact: History; deposition topics
- Bob Davison, Fact: History; deposition topics
- Doug Mowery, Fact: History; deposition topics
- Randy Mowrey, Fact: History; deposition topics
- Michael Cleary, Fact: History; deposition topics

- c. Witnesses who are unlikely to be called at trial:
  - Eric Ferguson Fact: History and effect of USAPA’s actions
  - Jeff Koontz Fact: History and effect of USAPA’s actions

**2. Defendant’s Witnesses**

- a. Witnesses who shall be called at trial:

Name	Address	Fact or Expert	Subject
Cleary, Michael	445 Hamilton Av. # 1204 White Plains, NY 10601	Fact	History
Davison, Bob	445 Hamilton Av. # 1204 White Plains, NY 10601	Fact	Seniority proposal
Diorio, Paul	445 Hamilton Av. # 1204 White Plains, NY 10601	Fact	Bargaining
Fallon, David	445 Hamilton Av. # 1204 White Plains, NY 10601	Fact	Intimidation
Flores, Michael	445 Hamilton Av. # 1204 White Plains, NY 10601	Fact	Other employee groups

1	Hall, Roger	445 Hamilton Av. # 1204 White Plains, NY 10601	Fact	History (ALPA)
2				
3	Harris, James	445 Hamilton Av. # 1204 White Plains, NY 10601	Expert	Economics
4				
5	Helton, Frank	445 Hamilton Av. # 1204 White Plains, NY 10601	Fact	Intimidation
6				
7	Hurd, Richard	445 Hamilton Av. # 1204 White Plains, NY 10601	Expert	Labor & Seniority
8				
9	Kirch, Robert	445 Hamilton Av. # 1204 White Plains, NY 10601	Fact	History
10				
11	Koseruba, Dave	445 Hamilton Av. # 1204 White Plains, NY 10601	Fact	Motives for supporting USAPA
12				
13	McIlvenna, John	805 Fifteenth Street N.W., # 1000 Washington D.C., 20005	Fact	History
14				
15	Mowery, Doug	445 Hamilton Av. # 1204 White Plains, NY 10601	Fact	Bargaining and history
16				
17	Mowrey, Randy	445 Hamilton Av. # 1204 White Plains, NY 10601	Fact	Merger policy and USAPA proposal
18				
19	Salamat, Rikk	445 Hamilton Av. # 1204 White Plains, NY 10601	Expert	Finance & statistic
20				
21	Skiles, Jeff	445 Hamilton Av. # 1204 White Plains, NY 10601	Fact	Inequities of Nicolau
22				
23	Stephan, Jack	445 Hamilton Av. # 1204 White Plains, NY 10601	Fact	History
24				
25	Sullenberger, Chesley	445 Hamilton Av. # 1204 White Plains, NY 10601	Fact	History
26				
27	Szpyrka, Steve	445 Hamilton Av. # 1204 White Plains, NY 10601	Fact	Consideration of West interests
28				
	Theurer, Scott	445 Hamilton Av. # 1204 White Plains, NY 10601	Fact	History

## (b) Witnesses who may be called at trial by USAPA

Name	Address	Fact or Expert	Subject
Addington, Don	3636 N. Central Av., # 1200Phoenix, AZ 85012	Fact	Depo subjects
Bostic, John	3636 N. Central Av., # 1200Phoenix, AZ 85012	Fact	Depo subjects
Bradford, Steve	445 Hamilton Av. # 1204 White Plains, NY 10601	Fact	History
Burman, Mark	3636 N. Central Av., # 1200Phoenix, AZ 85012	Fact	Depo subjects
Ciabbatoni, Dave	445 Hamilton Av. # 1204 White Plains, NY 10601	Fact	History
Collelo, Dean	445 Hamilton Av. # 1204 White Plains, NY 10601	Fact	History
Hemenway, Al	400 South Hope Street Los Angles, CA 90071-2899	Fact	History
Hummel, Gary	445 Hamilton Av. # 1204 White Plains, NY 10601	Fact	Impact of integration on safe operations
Iranpour, Afsin	3636 N. Central Av., # 1200Phoenix, AZ 85012	Fact	Depo subjects
King, Mark	445 Hamilton Av. # 1204 White Plains, NY 10601	Fact	history
Krebs, Mark	445 Hamilton Av. # 1204 White Plains, NY 10601	Fact	Consideration of West interests
Kubik, Tom	445 Hamilton Av. # 1204 White Plains, NY 10601	Fact	Impact of integration on safe operations
Parrella, Tracy	445 Hamilton Av. # 1204 White Plains, NY 10601	Fact	Grievances
Payne, Russ	445 Hamilton Av. # 1204 White Plains, NY 10601	Fact	History

1	Portale, Jim	445 Hamilton Av. # 1204 White Plains, NY 10601	Fact	Mid Atlantic issues
2				
3	Stravers, Kenneth	3636 N. Central Av., # 1200Phoenix, AZ 85012	Fact	Depo subjects
4				
5	Thorpe, Mark	445 Hamilton Av. # 1204 White Plains, NY 10601	Fact	History (USAPA)
6				
7	Velez, Roger	3636 N. Central Av., # 1200Phoenix, AZ 85012	Fact	Depo subjects
8				
9	Wargocki, Steve	3636 N. Central Av., # 1200 Phoenix, AZ 85012	Fact	Depo subjects

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11 (c) Witnesses who are unlikely to be called at trial:

12	Name	Address	Fact or Expert	Subject
13	none			

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16 **3.** Each party understands that it is responsible for ensuring that the witnesses it  
17 wishes to call to testify are subpoenaed. Each party further understands that any witness a  
18 party wishes to call shall be listed on that party's list of witnesses; the party cannot rely on  
19 the witness having been listed or subpoenaed by another party.

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21 **F. LIST OF EXHIBITS**

22 **1.** The following exhibits are admissible in evidence and may be marked in  
23 evidence by the Clerk:

24 **a.** Plaintiff's Exhibits:

25 None.

26 **b.** Defendant's Exhibits:

27 None.

28 **2.** As to the following exhibits, the parties have reached the following

1 stipulations:

2 a. Plaintiff's Exhibits:

3 None pending rulings on Motions in Limine

4 b. Defendant's Exhibits:

5 None pending rulings on Motions in Limine

6 3. As to the following exhibits, the party against whom the exhibit is to be offered  
7 objects to the admission of the exhibit and offers the objection stated below:

8 a. Plaintiff's Exhibits

9 Please see attached Exhibit 1 listing Plaintiff's Exhibits, with Defendant's  
10 Objections.

11 b. Defendant's Exhibits

12 Please see attached Exhibit 2 listing Defendant's Exhibits with Plaintiffs'  
13 Objections.

14 4. Each party hereby acknowledges by signing this joint Proposed Final Pretrial  
15 Order that any objections not specifically raised herein are waived.

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17 **G. DEPOSITIONS TO BE OFFERED**

18 1. The parties shall list the depositions that may be used at trial. The portions to  
19 be read or submitted at trial shall be identified by page and line number. Additionally, the  
20 party offering the deposition shall provide the Court with a copy of the offered deposition  
21 testimony. The offering party shall highlight, in color, the portions of the deposition to be  
22 offered. If multiple parties are offering the same deposition, only one copy of such  
23 deposition shall be provided. Such copy shall contain each party's highlighting (each party  
24 should use a different color). Any party objecting to the admission in evidence of any  
25 portion of a deposition shall identify by page and line number the portion to which objection  
26 is made and shall state the grounds of objection specifically.  
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1           **2.     Plaintiffs:** Except as noted, Plaintiffs do not currently anticipate using any of  
2 the following depositions of USAPA witnesses in the case in chief. (But see footnote 1  
3 above in regard to Mr. Hemenway.) Areas of testimony and pending motions in limine may  
4 require the use of one or more depositions for impeachment or cross examination.

5                     Stephen Bradford (cross examination and impeachment)

6                     Mark King (cross examination and impeachment)

7                     Paul Diorio

8                     David Ciabattoni

9                     Tracy Parella

10                    Doug Mowery

11                    Randy Mowrey (cross examination and impeachment); Plaintiffs also intend  
12 to offer Mr. Mowrey's prior testimony at the October, 2008 proceedings.

13                    Jack Stephen

14                    Bob Kirch

15                    Robert Davison (cross examination and impeachment)

16                    Scott Theuer (cross examination and impeachment)

17                    Mike Cleary (cross examination and impeachment)

18                    Jamie Javurek

19           **3.     Defendant:** Except as noted, Defendants do not currently anticipate using any  
20 of the following depositions in the case in chief. Areas of testimony and pending motions in  
21 limine may require the use of one or more depositions for impeachment or cross examination  
22 of the following:

23                    Bostic, John

24                    Burdick, Mark

25                    Dotter, Douglas

26                    Ferguson, Eric

27                    Helton, Frank

28                    Hemenway, Al

- 1 Iranpour, Afshin
- 2 Koontz, Jeffrey
- 3 Lozano, Antonio
- 4 McIlvenna, John
- 5 Payne, Russ
- 6 Stravers, Kenneth
- 7 Stockdell, Brian
- 8 Vasin, Mitch
- 9 Velez, Roger
- 10 Wargocki, Steven

11 **4.** Each party hereby acknowledges by signing this joint Proposed Final Pretrial  
12 Order that any deposition not listed as provided herein will not be allowed, absent good  
13 cause.

14 **H. MOTIONS IN LIMINE**

15 Motions *in limine* shall be filed as separate pleadings *and responded to in accordance*  
16 *with the instructions contained in the Order Setting Final Pretrial Conference.*

17 **I. LIST OF PENDING MOTIONS**

18 None

19 **J. PROCEDURES FOR EXPEDITING TRIAL**

20 The parties shall discuss and report on all available procedures that might be used to  
21 expedite trial, including but not limited to (a) presenting stipulated summaries of deposition  
22 testimony rather than reading deposition excerpts; (b) editing videotaped depositions to limit  
23 the amount of time required for presentation; (c) using summary exhibits in place of  
24 voluminous documentary evidence; (d) stipulations on authenticity and foundation; (e)  
25 presenting direct expert testimony through summary or written reports; (f) using the  
26 courtroom technology to expedite the presentation of evidence. The parties are invited to  
27 contact Sandra Fredlund, Judge Wake's Courtroom Deputy Clerk, to arrange a time to visit  
28 the courtroom and examine its technology. Information about courtroom technology can also  
be found at [www.azd.uscourts.gov](http://www.azd.uscourts.gov) under Judicial Officer Information. The parties will  
supplement this section after the Court has ruled on the pending motions in limine.

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**K. ESTIMATED LENGTH OF TRIAL**

\_\_\_\_\_ hours for opening statements and closing arguments

22 hours for Plaintiff(s) case, including cross-examination of other parties' witnesses, and rebuttal

22 hours for Defendant(s) case, including cross-examination of other parties' witnesses

44 hours TOTAL ESTIMATED TIME

**L. JURY DEMAND**

A jury trial request was timely and properly made by USAPA..

**M. JOINT STATEMENT OF THE CASE**

In 2005, two airlines—US Airways and America West Airlines—agreed to merge. The merged airline now operates under the name US Airways.

Prior to the merger, each of the two airlines used a pilot seniority list to determine such issues as bidding for schedules, job security, and promotion opportunities. The seniority list for the pre-merger US Airways' pilots is commonly referred to as the East Pilot seniority list. The seniority list for the former America West Airlines is referred to as the West Pilot seniority list.

After the merger of the two airlines, the issue arose as to how the pilots on the East and West Pilot seniority lists should be operationally integrated, including the creation of a single integrated seniority list that included all the pilots, East and West.

Until April 17, 2008, the two pilot groups were represented in labor negotiations by the Air Line Pilots Association ("ALPA"). On April 18, 2008, the defendant US Airline Pilots Association ("USAPA") was certified as the collective bargaining representative of all post-merger US Airways' pilots, replacing ALPA. This case concerns whether USAPA's actions regarding the integration of the East and West Pilot seniority lists comply with its legal duty to represent the West Pilots fairly.

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**N. JOINT PROPOSED VOIR DIRE QUESTIONS**

The Court’s proposed voir dire questions are located on the Court’s website at [www.azd.uscourts.gov](http://www.azd.uscourts.gov) under Judges & Courtrooms/Orders, Forms and Procedures/Judge Wake. Additional questions proposed by the parties shall be drafted in a neutral manner. Initial questions on a subject should call for a “yes” or “no” response. The parties are separately filing proposed voir dire questions.

**O. JOINT PROPOSED JURY INSTRUCTIONS**

The proposed jury instructions shall be accompanied by citations to legal authority. The instructions shall be in accordance with “Guidelines for Jury Instructions in Civil Cases” found at [www.azd.uscourts](http://www.azd.uscourts) under Judicial Officer Information and Judge Wake.

**P. PROPOSED FORMS OF VERDICT**

The proposed forms of verdict shall include any proposed special verdict forms or juror interrogatories. The Parties could not reach a satisfactory agreement to merge the two different proposed forms of verdict each side thought was appropriate, so each side has made a separate proposal submitted herewith.

**Q. DISAGREEMENTS ABOUT PROPOSED STATEMENTS, VOIR DIRE, INSTRUCTIONS, OR FORMS OF VERDICT**

If the parties disagree about any of the proposed statements, voir dire questions, jury instructions, or forms of verdict, the party in favor of the proposal shall set it forth in the joint pleading and the party opposing it shall state the reason for the objection and offer an alternative proposal.

**R. FORMAT OF SUBMISSIONS**

The joint statement of the case, proposed voir dire questions, proposed jury instructions, and forms of verdict shall be submitted in WordPerfect® 9.0 format either by email to [Wake\\_Chambers@azd.uscourts.gov](mailto:Wake_Chambers@azd.uscourts.gov) or on an IBM-PC compatible disk.

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**S. CERTIFICATIONS**

The undersigned counsel for each of the parties in this action do hereby certify and acknowledge the following:

1. All permitted discovery has been completed as to the issue of class certification.

Separate Statement of Defendant:

Defendant has not been able to complete all discovery necessary to prepare for trial, noting that the Court has considered and rejected motions to continue and for various discovery requests.

2. The identity of each witness has been disclosed to opposing counsel.

Plaintiffs' Separate Statement: On the last possible day, USAPA made a disclosure of approximately thirteen (13) trial witnesses, including three (3) previously undisclosed expert witnesses. USAPA also identified one witness, Robert Davison, who Plaintiffs just recently learned has been working for almost a year on analysis of each of the seniority proposals. USAPA first disclosed approximately 40 CD's of display material that had never been previously produced, including technical and fact analysis and lacked any reasonable identification to allow Plaintiff to fully analyze or rebut the testimony. Plaintiffs have been deprived of the right to adequately examine and rebut this testimony and have filed a Motion in Limine.

Defendant's Separate Statement: Defendant preserves its objection to Plaintiffs calling Tania Bziukiewicz, Brice LeCarre, and Al Hemenway on the ground that these witnesses were not disclosed by the April 1 deadline.

3. Each exhibit listed herein: (1) is in existence; and (2) has been disclosed and shown to opposing counsel.

Plaintiff's Separate Statement: Despite numerous requests and efforts to resolve the discovery issues, Plaintiffs still have not been provided with full

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and fair disclosure of the contents of Mr. Bradford’s flash drive, minutes of the governing Board of Pilot representatives, and the data on which exhibits prepared by Mr. Davison or Mr. Salamat are based. The latter issues are more fully briefed in Plaintiffs’ Motion in Limine on this topic.

4. The parties have otherwise complied in all respects with the mandates of the Court’s Rule 16 Scheduling Order and Order Setting Final Pretrial Conference.
5. The parties have made all of the disclosures required by the Federal Rules of Civil Procedure (unless otherwise previously ordered to the contrary).

Plaintiff’s Separate Statement: Despite numerous requests and efforts to resolve the discovery issues, Plaintiffs still have not been provided with full and fair disclosure of the contents of Mr. Bradford’s flash drive, minutes of the governing Board of Pilot representatives, and the data on which exhibits prepared by Mr. Davison or Mr. Salamat are based. The latter issues are briefed in Plaintiffs’ Motion in Limine on this topic.

6. The parties acknowledge that once this Proposed Final Pretrial Order has been signed and lodged by the parties, no amendments to this Order can be made without leave of Court.

**T. INFORMATION FOR COURT REPORTER**

In order to facilitate the creation of an accurate record, please file a "Notice to Court Reporter" one week before trial containing the following information that may be used at trial:

1. Proper names, including those of witnesses.
2. Acronyms.
3. Geographic locations.
4. Technical (including medical) terms, names or jargon.

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5. Case names and citations.

Please also send (or transmit electronically) to the court reporter a copy of the concordance from key depositions.

The parties have this information collected and will file the Notice on or before the date indicated.

DATED this 16th day of April, 2009.

*/s/ Andrew S. Jacob*

*/s/ Andrew S. Jacob (with permission)*

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Andrew S. Jacob  
POLSINELLI SHUGHART, P.C.  
3636 N. Central Ave., Suite 1200  
Phoenix, AZ 85012  
*Attorney for Plaintiffs*

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Nicholas P. Granath  
SEEHAM, SEHAM, MELTZ & PETERSEN, LLP  
445 Hamilton Ave., Suite 1204  
White Plains, NY 10601  
*Attorney for Defendant*

**IT IS ORDERED** that this Proposed Final Pretrial Order jointly submitted by the parties is hereby **APPROVED** and **ADOPTED** as the official Pretrial Order of this Court.

DATED this 28<sup>th</sup> day of April, 2009.

  
\_\_\_\_\_  
Neil V. Wake  
United States District Judge