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

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|---|---|
| Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI,<br><br>Plaintiffs,<br>vs.<br><br>US AIRLINE PILOTS ASSOCIATION, US AIRWAYS, INC.,<br>Defendants, | Case No. 2:08-cv-1633-PHX-NVW (Consolidated)<br><br>**DEFENDANT'S REPLY IS SUPPORT OF ITS MOTION TO SUPPLEMENT THE RECORD** |
| Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI,<br><br>Plaintiffs,<br>vs.<br><br>Steven H. BRADFORD, Paul J. DIORIO, Robert A. FREAR, Mark. W. KING, Douglas L. MOWERY, and John A. STEPHAN,<br><br>Defendants. | Case No. 2:08-cv-1728-PHX-NVW |

In reply to Plaintiffs' response brief (Doc. # 519) Defendant states the following to each of Plaintiffs' two arguments and its request for sanctions:

First, to Plaintiffs' response that the "PowerPoint information is already in the record," this is simply not accurate and without the PowerPoint there is no way to verify that claim. Plaintiffs do not cite to the record to support their claim that the Powerpoint was read verbatim into the record. A review of the Plaintiffs' closing argument does not indicate a verbatim reading. (Tr. 1947-1992). And indeed, the record shows that during the Plaintiffs' closing the Court had to correct Mr. Harper for mis-reading on more than one occasion (Tr. 1962:9, 1975:24 – "Counsel, you misread that", 1987:6) and in particular for getting the "slide" (a reference to the PowerpPoint) wrong (Tr. 1979:22–23 "Could you go back to that last slide, counsel? Because it appears you have the wrong date on it."). And Mr. Harper at one point stated on the record that the Powerpoint was not accurate. (Tr. 1980:1 – "I'm sorry. There's a typo up there"). The "slides" or PowerPoint became relevant after Plaintiffs' closing when the Court, *sua sponte*, instructed counsel on them (Tr. 1994:3). The Court stated its concern as:

> Mr. Harper, you can correct me, but I believe in one of the **slides** that you presented to the jury you quoted that but you left out the introductory qualifying phrase, "in this case" which I feared could leave an impression that these objectives are generally improper, inappropriate as opposed to merely not supplying a justification for the changed Seniority List in this case. (Tr. 1994:12-18). [emphasis added]

The PowerPoint was used to emphasize, albeit selectively, the jury instructions. That much is plain. But what is also apparent is that Defendant will make the jury

instructions the subject of post-trial motions and appeal stemming from Defendant's on-the-record comprehensive and vigorous objections. (*See*, Doc. # 449; trial transcript, Day 9, May 8, 2009, Tr. 1892-1907). Just as there is no requirement to object to parts of the record in order to be able to reference it, so it is not relevant that the PowerPoint was not objected to *per se* at trial. The PowerPoint is part and parcel of the closing argument, and that is relevant to Defendant's objections to the jury instructions. Plaintiffs' argument that the PowerPoint is not evidence is beside the point. The issue here is simple – will this Court and a reviewing Court have a full and accurate record?

Moreover, it is not accurate to say or to imply, as Plaintiffs do, that there was no objection to Plaintiffs' closing argument. The Court itself repeatedly warned Mr. Harper against personally vouching (Tr. 1948:2, 1949:10, 2071:25, 2074:5), and Mr. Seham entered in more than one objection for violation of the Court's ruling on Defendant's motion in limine (Tr. 2074:23, 2078:17) and for vouching (Tr. 2079:11).

Lastly, Plaintiffs' reliance on the Federal Rules of Appellate Procedure is misplaced. FRAP 10 and the 9th Cir. Local Rule 10-2(a)(1) both make any "papers ... filed in District Court" part of the record. That is what this motion seeks to enable. Defendant, as an appellant, has the burden to present the record but it cannot do so where there is a willful refusal to supply papers that could be filed if supplied. Anything presented to, or considered by, the trial court is fair game whether in evidence or not. *See e.g.*, *U.S. v. Burke*, 781 F.2d 1234, 1245-46 (7th Cir. 1985) (record is matters presented to court even if not evidence); *Waldorf v. Shuta*, 142 F.3d 601, 620 (3rd Cir.

1998) (videos shown to jury should be part of record on appeal); *Barcamerica v. Int'l Tyfield Importers, Inc*., 289 F.3d 589, 594 (9th Cir. 2002) (portions of deposition transcript not filed are not part of the record). And items that were "before the district court and then withdrawn by counsel are still considered to be part of the record on appeal ...", Federal Practice and Procedure: Jurisdiction And Related Matters, *Wright, Miller & Kane*, §3956.1, p. 631 (2008), *citing*, *U.S. v. Ross*, 321 F.2d 61, 65 n. 2 (2nd Cir. 1963), *cert. denied*, 375 U.S. 894 (1963); *Hastings v. Reynolds Metals Co.,* 165 F.2d 484, 486 (7th Cir. 1947).

Errors in completing the record that could have been cured at the district court level can result in a remand for that purpose. *See, e.g., Sweet Life v. Dole*, 876 F.2d 402, 407-08 (5th Cir. 1989).

Second, to Plaintiffs' response that the "Stockdell illustrative exhibit was withdrawn," Defendant replies that this is not pertinent and that it is not clear whether Stockdell's testimony was withdrawn or not.

The simple point of this motion is to complete an accurate record of the trial, both for post-trial motions and for appeal purposes. Just as the Court Reporter does not remove any statements that are withdrawn by a witness from the transcript – unless the Court specifically orders it – for example, so too should visual displays that remained on display during the bench trial and which, in the case of the Stockdell display, a witness was questioned about but which Defendant was precluded from cross examining, be included. Along the same lines the Court stated, "we don't strike

evidence that's insufficient." (May 13, 2009 Tr. 72:4).

While Plaintiffs now state that Stockdell's *exhibit* was withdrawn, they do not state that his *testimony* was withdrawn. That is significant because the Court was under the impression that only the "issue" (Tr. 70:17) or the "contention" was withdrawn (Tr. 70:25, 71:4, 71:8, 71:16). As it stands now, the status of Plaintiffs' presentation on May 13 in the bench trial appears ambiguous. And both the testimony and the exhibit were repeatedly and vigorously objected to at trial (Tr. 7:14, 24:14, 56:3, 48:15, 50:16, 52:22, 53:2, 53:7, 55:17, 56:21, 57:10) and were the subject of a motion to strike (Tr. 70:7). A *full* record should be available to this Court and any reviewing Court, notwithstanding Plaintiffs' refusal to produce what they once said they would voluntarily produce.

Third, to Plaintiffs' request for sanctions, Defendant replies that were the Court to indulge Plaintiffs the Court would be condoning not only Plaintiffs' refusal to assist in making the record complete, but it would be rewarding Plaintiffs' counsel's lack of candor to Defendant and this Tribunal, undermining Arizona Ethics Rule 3.3 "Candor Toward The Tribunal." Here, the record shows that Plaintiffs' counsel made this representation to this Court:

> MR. GRANATH: I would like for your Honor to order the plaintiffs, since they will not voluntarily provide me with a copy of the overview that counsel has just displayed –
>
> THE COURT: You mean the PowerPoint they just did?
>
> MR. GRANATH: Yes, sir. And I would like that for the appellate record, sir.
>
> THE COURT: Okay. You don't have any problem having that in the

record, do you?

MR. JACOB: No.

THE COURT: All right. That will be taken care of.

MR. GRANATH: Will I get that today, your Honor, from plaintiffs?

THE COURT: Counsel, when can you get them a copy of that?

MR. JACOB: As soon as I can get wi fi service out in the hallway I can send it to them.

(Tr. May 13, 2009, at 26:22 – 27:12).

Arizona Ethics Rule 3.3(a)(1) provides: "(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Counsel's statement that he would provide the document was made to the Court and Defendant only brought this motion when Counsel refused to do what he said he would do. To fault Defendant by sanctioning it for bringing this motion would undermine Arizona Ethics Rule 3.3 and reward Plaintiffs for ignoring it. Indeed, Plaintiffs' request for sanctions under these circumstances may itself warrant a reprimand.

Respectfully Submitted,

Dated: June 17, 2009

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

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**CERTIFICATE OF SERVICE**

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

- Defendant's Reply in Support of Its Motion To Supplement The Record
- Certificate of Service

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

| | | |
|---|---|---|
| Marty Harper<br>MHarper@Polsinelli.com | Don Stevens<br>DStevens@Polsinelli.com | Andrew S. Jacob<br>AJacob@Polsinelli.com |
| Kelly J. Flood<br>KFlood@Polsinelli.com | Katie Brown<br>KVBrown@Polsinelli.com | |

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

On June 17, 2009, by:

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