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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; and Steve WARGOCKI,

Plaintiffs,

vs.

US AIRLINE PILOTS ASSOCIATION,
US AIRWAYS, INC.,

Defendants.

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

**FIRST JOINT WRITTEN
SUMMARY OF
DISCOVERY DISPUTE
BY DEFENDANT
IN DAMAGES TRIAL**

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

Plaintiffs,

vs.

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

Defendants.

CV08-1728-PHX-NVW

ISSUE:

Whether, pursuant to Rule 26(c)(1)(D), Defendant should be granted a Protective Order forbidding Plaintiffs from any discovery inquiry into the matter of election or certification activity by USAPA or individuals; Or in the *alternative*, whether Defendant should be granted leave to file a written motion to argue for the same remedy?

MOVANT'S (DEFENDANT'S) POSITION:

Plaintiffs' Rule 26(a)(1) damage-trial disclosures indicate that they identify 11 persons that Plaintiffs say are relevant for their knowledge of "actions to support" or "activities taken" to "form USAPA" or to assist USAPA's "efforts to become the collective bargaining agent for the US Airways pilots." ("Plaintiffs' Supplemental Disclosure Statement For Damage Trial" June 15, 2009, § A. 2.). Plaintiffs seek discovery into this matter but such inquiry exceeds the scope of discovery allowed under Fed. R. Civ. P. 26(b)(1). There is no claim challenging the election or certification of USAPA, nor does the Duty of Fair representation arise prior to certification. This Court has already observed, "There is no challenge to the election or certification" (Doc. # 361, p. 1:1), and "Pre-certification conduct cannot be the basis for liability" (Doc. # 361, p. 3:21). Irrelevant discovery about non-party individuals' "activity" or "actions" taken to exercise their individual statutory right (45 USC § 152, Third, Fourth) to choose and elect their own bargaining agent penalizes or chills that right. Without this order these individuals, and USAPA, will incur unnecessary expense if Plaintiffs are allowed to depose 11 persons, most of whom are not USAPA officers, employees or agents, on this subject.

RESPONDING PARTY'S (PLAINTIFFS') POSITION:

This issue is fully addressed in *Plaintiffs' Response In Opposition To Defendant's Rule 56 Summary Judgment Motion On Plaintiffs' Damages Claims* (doc. 507). Plaintiffs will establish at trial that USAPA is jointly and severally liable for injury caused by others with whom, after April 18, it acted in concert to prevent integration of pilot operations using the Nicolau Award. Plaintiffs can prove "acting in concert" with evidence that USAPA: shared a common design or goal with these others; encouraged, cooperated and/or assisted these others; knew that these others' conduct was wrongful; and/or allowed itself to be used by these others as a tool to further the common design. *See Restatement (Second) of Torts* § 876 (1979). The contested discovery is relevant to such evidence and, therefore, should be allowed. USAPA's objections to such discovery are immaterial. Because acting in concert does not require contemporaneous actionable conduct, it makes no difference that USAPA's duty did not accrue until April 18. Because one joint tortfeasor can be liable even if "the conduct of the other was ... blameless," *Restatement (Second) of Torts* § 879 cmt (a), it would make no difference if no action lay against the others who acted in concert with USAPA. The Court, therefore, should deny the protective order sought here by USAPA.

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JOINT CERTIFICATION

Pursuant to LRCiv 7.29(j), the parties jointly agree and state that both have made sincere efforts through consultation to resolve this dispute and have now reached impasse.

For Moving Party:

For Responding Party:

/s/ Nicholas P. Granath, Esq.

/s/ Don Stevens, Esq.

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Respectfully submitted on:

Dated: June 30, 2009

By: /s/ Nicholas P. Granath

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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*,

- JIRST JOINT WRITTEN SUMMARY OF DISCOVERY DISPUTE BY DEFENDANT IN DAMAGES TRIAL
- 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:

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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 22, 2009, by:

/s/ Nicholas P. Granath, Esq.