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

12 US AIRWAYS, INC., a Delaware
13 corporation, *et al.*,

14 *Plaintiff,*

15 vs.

16 Don ADDINGTON; John BOSTIC;
17 Mark BURMAN; Afshin IRANPOUR;
18 Roger VELEZ; Steve WARGOCKI;
19 Michael J. SOHA; Rodney Albert
20 BRACKIN; and George MALIGA, on
21 behalf of themselves and the certified
22 WEST PILOT CLASS,

23 and

24 US AIRLINE PILOTS ASS'N, an
25 unincorporated association,

26 *Defendants.*

CASE NO. 2:10-cv-01570-PHX-ROS

27 **WEST PILOTS' RESPONSE IN**
28 **OPPOSITION TO USAPA'S**
RULE 56(d) MOTION

(Oral argument requested)

22 Don ADDINGTON, John BOSTIC, Mark BURMAN, Afshin IRANPOUR,
23 Roger VELEZ, Steve WARGOCKI, Michael J. SOHA, Rodney Albert BRACKIN,
24 and George MALIGA, on behalf of themselves and the certified WEST PILOT
25 CLASS (collectively, the "West Pilots"), respond in opposition to USAPA's Rule
26 56(d) Motion, Doc. 162.

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1 **Memorandum of Points and Authorities**

2 **I. Issue**

3 To obtain Rule 56(d) relief, USAPA must explain how discovery could
4 obtain evidence that might defeat the West Pilots' pending summary judgment
5 motion. That motion relies exclusively on undisputed and uncontroverted facts.
6 And evidence that USAPA might obtain through additional discovery cannot
7 controvert those facts or otherwise defeat judgment for the West Pilots. Should
8 the Court deny USAPA's Rule 56(d) motion?

9 **II. Factual Background**

10 As shown in the West Pilots' *Response to USAPA's Motion for Summary*
11 *Judgment*, Doc. 158, the West Pilots' motion largely relies on facts that are fully
12 supported by USAPA's Statement of Facts ("SOF"), doc. 161. Although a few
13 facts are only partly supported by USAPA's SOF, none are directly disputed,
14 and all are otherwise supported by uncontroverted evidence cited in the West
15 Pilots' SOF ("WP SOF"). Those facts are as follows:

- 16 (1) "[T]he Chapter 11 confirmed plan directed the airlines and ALPA to
17 implement the merger." Doc. 158 at 2:1 to 2:2.¹
- 18 (2) "[T]he stated purpose of [ALPA Merger Policy] arbitration is to
19 determine a 'final and binding' seniority integration." Doc. 158 at
20 2:12 to 2:13.²

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23 ¹ See WP SOF at ¶ 3 ("The Confirmed Plan for US Airway's Chapter 11
24 bankruptcy directed the airline and ALPA to enter into a merger according to a
25 contract referred to as the Transition Agreement."). This fact is discussed but
not disputed by USAPA. Doc. 161 at 3.

26 ² See WP SOF at ¶ 19 ("ALPA Merger Policy states: 'The Award of the
27 Arbitration Board shall be final and binding on all parties to the arbitration
28 and shall be defended by ALPA.'"). This fact is discussed but not disputed by
USAPA. Doc. 161 at 7-8.

1 (3) “[A]fter it considered the East Pilot appeal, ALPA ordered the East
2 Pilots to implement the arbitration.” Doc. 158 at 2:22 to 2:23.³

3 (4) “USAPA’s seniority list puts hundreds of West Pilots at risk of
4 furlough ahead of the East pilots who were on furlough at the time of
5 the merger.” Doc. 158 at 3:1 to 3:2.⁴

6 **III. Legal Argument**

7 **A. The Court should deny USAPA’s Rule 56(d) motion because** 8 **USAPA fails to explain how any evidence that it might** 9 **discover could defeat the West Pilots’ summary judgment** 10 **motion.**

11 To obtain Rule 56(d) relief, USAPA must explain how discovery could
12 obtain evidence that might defeat the West Pilots’ pending summary judgment
13 motion. That motion relies exclusively on undisputed and uncontroverted facts.
14 And evidence that USAPA might obtain through additional discovery cannot
15 controvert those facts or otherwise defeat judgment for the West Pilots. The
16 Court, therefore, should deny USAPA’s Rule 56(d) motion.

17 **1. To obtain Rule 56(d) relief, USAPA must explain how** 18 **discovery could obtain evidence that might defeat the** 19 **West Pilots’ pending summary judgment motion.**

20 To obtain Rule 56(d) relief, “[t]he requesting party must show: (1) it has set
21 forth in affidavit form the specific facts it hopes to elicit from further discovery;
22 (2) the facts sought exist; and (3) the sought-after facts are essential to oppose
23 summary judgment. Failure to comply with these requirements is a proper

24 ³ See WP SOF at ¶¶ 36-38 (correspondence from ALPA’s president). This
25 fact is discussed but not disputed by USAPA. Doc. 161 at 11-13.

26 ⁴ See WP SOF at ¶ 70 (“The USAPA List offers no West Pilot protections
27 against furloughs because the Airline would implement all furloughs and
28 recalls on a date-of-hire basis.”). This fact is discussed but not disputed by
USAPA. See Doc. 161 at 25-26.

1 ground for denying discovery and proceeding to summary judgment.” *Family*
2 *Home and Finance Center, Inc. v. Federal Home Loan Mortgage Corp.*, 525 F.3d
3 822, 827 (9th Cir. 2008) (internal quotation marks and citation omitted). “The
4 burden is on the party seeking additional discovery to proffer sufficient facts to
5 show that the evidence sought exists, and that it would prevent summary
6 judgment.” *Blough v. Holland Realty, Inc.*, 574 F.3d 1084, 1091 n.5 (9th Cir. 2009).

7 It is not enough to identify information. A rule 56(d) movant must explain
8 how such information would make a material difference. *Tandberg, Inc. v.*
9 *Advanced Media Design, Inc.*, 2009 WL 3669739, *2 (E.D. Va. 2009) (denying
10 Rule 56(d) motion because “the issues identified as requiring discovery, even
11 assuming their truth, would not preclude an award of partial summary
12 judgment as a matter of law.”). And, it should go with out saying that discovery
13 is never needed to address issues that should be decided as pure questions of
14 law. *Utica Mut. Ins. Co. v. Hall Equipment, Inc.*, 73 F. Supp. 2d 83, 93 (D. Mass.
15 1999) (“such evidence is irrelevant and immaterial to the purely legal question
16 raised in Utica's motion for partial summary judgment”).

17 In other words, USAPA must explain how the discovery it would take
18 would affect the determination of a material issue that cannot be decided as a
19 pure question of law.

20 **2. The West Pilots’ motion relies exclusively on undisputed**
21 **and uncontroverted facts. And evidence that USAPA**
22 **might obtain through additional discovery cannot**
23 **controvert those facts or otherwise defeat summary**
24 **judgment for the West Pilots.**

25 **a. The West Pilots’ motion relies exclusively on**
26 **undisputed and uncontroverted facts that support**
27 **seven propositions of law.**

28 In Section II, *Supra.*, the West Pilots demonstrate that their motion relies
on undisputed and uncontroverted facts. These facts support arguments that

1 rely, in turn, on seven propositions of law. All of the issues raised by the West
2 Pilots' arguments can be decided as questions of law, either because they are
3 pure questions of law or because they involve undisputed facts. These seven
4 propositions, with citation to the West Pilots' motion, are as follows:

5 (1) A bargaining unit cannot evade its union's duty of fair representation
6 by electing another in its place. Doc. 150 at 7:25 to 7:25.

7 (2) The duty of fair representation bound ALPA to implement the Nicolau
8 arbitration. *Id.* at 9:1 to 9:3.

9 (3) USAPA must have an objectively legitimate purpose to justify
10 dishonoring the Nicolau arbitration. *Id.* at 12:7 to 12:9.

11 (4) An objectively legitimate union purpose must benefit the bargaining
12 unit as a whole, such as by improving wages, working conditions, or
13 negotiating leverage. *Id.* at 12:21 to 12:28.

14 (5) Abiding by a strong preference of a majority faction, to the detriment
15 of the minority, is not by itself a legitimate union purpose. *Id.* at 14:6
16 to 14:15.

17 (6) Abiding by a self-imposed date-of-hire constitutional mandate, to the
18 detriment of the minority, is not by itself a legitimate union purpose.
19 *Id.* at 14:20 to 14:24.

20 and

21 (7) Federal policy favors enforcing a valid arbitration of an airline merger
22 seniority dispute. *Id.* at 15:23 to 16:8.

23 **b. USAPA does not explain how evidence that it might**
24 **obtain through additional discovery could defeat**
25 **judgment for the West Pilots**

26 In order to obtain relief on its Rule 56(d) motion, USAPA must explain how
27 its discovery would obtain evidence that could controvert a fact material to the
28 West Pilots' motion. *Family Home and Finance Center*, 525 F.3d at 827. It fails
to do so. USAPA merely identifies the areas in which it would conduct discovery

1 and claims (wrongly and without explanation) that these subjects are material
2 to its opposition to the West Pilots' motion.

3 These subject matter areas, with citation to USAPA's Rule 56(d) motion,
4 are as follows:

5 (1) "operational and financial matters, including furloughs and recalls,
6 aircraft population, hours of flying and the volume of traditional East
7 routes being flown by West pilots (and vice versa)," Doc. 163-1 at 3:8
8 to 3:10;

9 (2) "efforts by certain West Pilots and the 'Army of Leonidas' to obstruct
10 and frustrate USAPA in its efforts to work with all members of the
11 bargaining unit in fulfillment of its role as the certified bargaining
12 representative," *id.* at 2:17 to 2:20;⁵

13 and

14 (3) "the pre-merger economic conditions of the airlines," *id.* at 2:17 to
15 2:20.

16 None of these subjects are material to the West Pilots' motion because the
17 West Pilots do not argue for relief on the basis that USAPA's duty of fair
18 representation is based on: (1) the economic status of either pre-merger airline;
19 (2) the relative status of the East and West sides of the post-merger Airline; or
20 (3) any USAPA's failure to get West Pilots to agree to dishonor the Nicolau

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23 ⁵ Although not material to deciding the West Pilots' summary judgment
24 motion, it is worth noting that in a recent USAPA election, several West Pilots
25 who are closely involved in the Army of Leonidas received the highest vote
26 totals of all candidates running for the office at issue. Afshin Iranpour and
27 Patrick O'Neill, for example, were elected to the USAPA Appeal Board. And Eric
28 Fergusson, Jeff Koontz, and Ken Holmes will be in run-off elections for the
offices of President, Vice President, and Executive Vice President, respectively.
USAPA, *Nat'l Officer & Appeal Bd. Election Results*, (Feb. 23, 2012) (copy
attached as Exhibit "A").

1 arbitration. Evidence as to any of these subjects, therefore, cannot impact the
2 West Pilots' arguments.

3 **c. After-acquired evidence cannot justify USAPA's**
4 **2008 decision to dishonor the Nicolau arbitration.**

5 Evidence that USAPA would discover, if the Court were to grant its Rule
6 56(d) motion, would be "after-acquired evidence" because it would be acquired
7 six years after USAPA made the decision to dishonor the Nicolau arbitration. In
8 another context, after-acquired evidence cannot justify a prior discriminatory
9 employment practice. *See McKennon v. Nashville Banner Publ'g Co.*, 513 U.S.
10 352, 360-63 (1995). By the same logic, after-acquired evidence in this context
11 cannot justify USAPA's 2008 decision to dishonor the Nicolau arbitration.
12 Having adopted that policy four years ago, having codified that policy in its
13 constitution, USAPA cannot use after-acquired evidence to show that it did so
14 in good faith.

15 **3. The Court, therefore, should deny USAPA's Rule 56(d)**
16 **motion.**

17 In their summary judgment motion, the West Pilots' rely on undisputed
18 and uncontroverted facts to prove that they are entitled to relief. USAPA seeks
19 discovery of evidence that would not dispute these facts and that cannot
20 otherwise defeat summary judgment. Moreover, as a matter of law, any
21 evidence that USAPA would discover now cannot justify a policy decision that it
22 made in 2006 (and refuses to reconsider). The Court, therefore, should deny
23 USAPA's Rule 56(d) motion.

24 **IV. Conclusion**

25 The West Pilots' respectfully ask the Court to deny USAPA's Rule 56(d)
26 motion.

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Dated this 24th day of February, 2012.

POLSINELLI SHUGHART, PC

/s/ Andrew S. Jacob

By _____

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Certificate of Service

I hereby certify that on this 24th day of February 2012, I electronically transmitted the foregoing document to the U.S. District Court Clerk’s Office by using the ECF System for filing and transmittal.

/s/Andrew S. Jacob

By _____