

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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| 4 | US Airways, Inc., a Delaware |) | |
| 5 | corporation, |) | |
| 6 | |) | |
| 7 | Plaintiff, |) | |
| 8 | |) | |
| 9 | vs. |) | CV 10-01570-PHX-ROS |
| 10 | |) | |
| 11 | Don Addington, an individual, et |) | |
| 12 | al., |) | |
| 13 | |) | Phoenix, Arizona |
| 14 | Defendants. |) | December 1, 2011 |
| 15 | |) | 10:37 a.m. |
| 16 | and |) | |
| 17 | |) | |
| 18 | US Airline Pilots Association, |) | |
| 19 | |) | |
| 20 | Defendants. |) | |
| 21 | _____ |) | |

BEFORE: THE HONORABLE ROSLYN O. SILVER, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SCHEDULING CONFERENCE

Official Court Reporter:
Elaine Cropper, RDR, CRR, CCP
Sandra Day O'Connor U.S. Courthouse
401 West Washington Street,
Suite 312, Spc. 35
Phoenix, Arizona 85003-2150
(602) 322-7245

Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

APPEARANCES

1
2 For the Plaintiff US Airways, Inc., a Delaware corporation:

ROBERT A. SIEGEL, ESQ.

3 O'Melveny & Myers, L.L.P.
4 400 Hope Street, Suite 1227
5 Los Angeles, CA 90071-2899
6 213.430.6005/(fax) 213.430.8144

KAREN GILLEN, ESQ.

7 US Airways, Inc.
8 111 W. Rio Salado Parkway
9 Tempe, AZ 85281
10 480.693.5835/(fax) 602.778.3750

11 For the Defendant US Airline Pilots Association:

BRIAN O'DWYER, ESQ.

12 O'Dwyer & Bernstein, L.L.P.
13 52 Duane St., 5th Floor
14 New York, NY 10007
15 212.571.7100/(fax) 212.571.7124

JENNIFER LYNN KROLL, ESQ.

16 Martin & Bonnett, P.L.L.C.
17 1850 N Central Ave., Suite 2010
18 Phoenix, AZ 85004
19 602.240.6900/(fax) 602.240.2345

PATRICK J SZYMANSKI, ESQ.

20 Patrick J Szymanski, P.L.L.C.
21 1900 L St. NW, Suite 900
22 Washington, DC 20036
23 202.721.6035/(fax) 602.478.1646

SUSAN JOAN MARTIN, ESQ.

24 Martin & Bonnett P.L.L.C.
25 1850 N Central Ave., Suite 2010
Phoenix, AZ 85004
602.240.6900/(fax) 602.240.2035.

For the Defendants US Airways West Pilots:

MARTY HARPER, ESQ. (Telephonically)

ANDREW S. JACOB, ESQ.

KELLY J. FLOOD, ESQ.

KATHERINE V. BROWN, ESQ. (Telephonically)

Polsinelli Shughart, P.C.
1 E. Washington Street, Suite 1200
Phoenix, AZ 85004
602.650.2000/(fax) 602.264.7033

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P R O C E E D I N G S

1 (Court was called to order by the courtroom deputy.)

2 (Present via phone are Mr. Marty Harper and Ms.
3 Katherine Brown.)

4 (Proceedings begin at 10:37.)

10:36:59

5 THE COURT: Please be seated.

6 COURTROOM DEPUTY: This is case number CV-10-1570, *US*
7 *Airways, Inc., v. Addington, et al.*, on for scheduling
8 conference.

9 Counsel, please announce for the record.

10:37:08

10 MR. SIEGEL: Good morning, Your Honor. Robert Siegel
11 for US Airways. And with me is Karen Gillen.

12 THE COURT: Thank you.

13 MS. MARTIN: Good morning, Your Honor. Susan Martin
14 for defendant US Airline Pilots Association.

10:37:16

15 And with me is Patrick Szymanski and Brian O'Dwyer
16 and also Jennifer Kroll.

17 THE COURT: All right.

18 MS. FLOOD: Good morning, Your Honor. Kelly Flood of
19 Polsinelli Shughart on behalf of the West Pilot class. I have
20 with me in the courtroom Andrew Jacob, and Marty Harper and
21 Katie Brown are on the phone.

10:37:30

22 THE COURT: Thank you.

23 Did you say Jennifer Kroll?

24 MS. KROLL: That's me.

10:37:47

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1 THE COURT: Okay. And you are here? 10:37:48

2 MS. KROLL: On behalf of the US Airlines Pilots
3 Association.

4 THE COURT: All right.

5 And on the phone? 10:37:54

6 MR. HARPER: Your Honor, this is Marty Harper. I am
7 in a deposition in Dallas, so I am participating by phone.
8 Katie Brown is here but we are only on one land line, so she's
9 just going to listen in over my shoulder.

10 THE COURT: Okay. Thank you. 10:38:09

11 Counsel, I have from you, and supplemented today by
12 West Pilots, a supplement to the joint case management plan,
13 also and USAPA's objection to the classification. Because
14 that's new, I will resolve that independently. I noticed there
15 are some differences. There will be a class notice, by the 10:38:38
16 way, even though 23(b)(1) does not necessarily require one.

17 Okay. And then there was a request to join
18 additional parties. Apparently, that is unopposed but let me
19 ask the West Pilots why that's necessary.

20 MR. JACOBS: Your Honor, there were some objections 10:39:01
21 that the class representatives that we had didn't go as high on
22 the list as they might. So we added three pilots who were at
23 the very top of our list. So we have representatives at each
24 point of the seniority list.

25 THE COURT: Okay. That's fine. It's granted, then. 10:39:27

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1 What I am having a problem understanding is what kind 10:39:37
2 of discovery does USAPA really think you need. Now, this is
3 the posture of the case as I see it. There was the Nicolau
4 determination and then there was the lawsuit before Judge Wake
5 and US Air was not a part of that lawsuit. It went up to the 10:40:01
6 Court of Appeals. the Court of Appeals found the case was not
7 ripe and remanded the case to Judge Wake to dismiss it. It was
8 dismissed. Then it was brought in this Court and it is before
9 me. It is before me in a declaratory judgment. I understand
10 the three issues that have been presented to me by US Air and 10:40:22
11 those will be resolved in that fashion. What happens
12 afterwards I don't know, but there will be a judgment on all of
13 those issues.

14 So the question is, what is the status of the Nicolau
15 arbitration in this court and whether or not that issue is to 10:40:45
16 be re-litigated in this court, meaning is that a matter of only
17 persuasive authority? Does it -- is there any indication in
18 the law that I should consider something else that was not
19 presented to Judge Wake at the time Judge Wake considered
20 whether or not to accept or reject that award? 10:41:20

21 Now, I understand what you're offering, at least in
22 principle, and what you're offering in principle is this
23 concept of reasonable expectations of the party which reminds
24 me of other areas of the law where that issue is relevant and
25 that an expert witness would be necessary to establish 10:41:45

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1 reasonable expectations. That's new to me. I am not presaging
2 a ruling on whether or not reasonable expectation experts are
3 appropriate in that context because I haven't looked at the
4 law. I haven't decided whether or not discovery is really
5 necessary in that area.

10:41:48

10:42:07

6 So as a precursor to my deciding whether there should
7 be additional discovery, if there should be additional
8 discovery, I need to know what is the status in front of this
9 court of the decision of Judge Wake as to whether or not that
10 Nicolau agreement is binding or only persuasive on the Court?

10:42:25

11 My sense is that it would be -- because the case was
12 dismissed, it would only be persuasive on the Court. I don't
13 know. And that the second thing is, there's an entirely new
14 issue, it seems to me, that wasn't presented to Judge Wake, so
15 I'm wondering why. What happened in the interim that would
16 allow what seems to be a legal issue, not a factual issue? And
17 that's the first determination, as to whether or not I should
18 allow, assuming that I can allow, a consideration of a new
19 issue of reasonable expectations of the party in determining
20 whether or not to accept or reject the arbitrator's decision.

10:42:49

10:43:15

21 And then the second issue, and I don't think I can
22 certainly resolve it at this time but I will listen to the
23 parties. It will be interesting to hear your oral argument on
24 this is why that issue is even relevant to a review of an
25 arbitrator's decision and then also why in two respects. Why

10:43:37

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1 is it legally relevant or would have been legally relevant 10:43:43
2 before Judge Wake and then, secondly, why it wasn't raised to
3 Judge Wake at the time when he was considering whether or not
4 to accept or reject the Nicolau agreement.

5 Okay. Seems to me I need to hear from the Union. 10:44:00

6 MR. SYZMANSKI: Your Honor, as the case management
7 plan sets out, we think that there are two separate issues or
8 claims in this case. One is the legal status of the Nicolau
9 determination, which was presented before Judge Wake, but Judge
10 Wake's decision was vacated by the Ninth Circuit. And as a 10:44:25
11 result, his decision, in our view, has no effect on what's
12 before the Court in this case.

13 THE COURT: Okay. I agree that it was dismissed and
14 we have a new lawsuit.

15 I think counsel agree that there are -- at least you 10:44:47
16 agree on this, that if I allow discovery, then in many respects
17 additional discovery would not be needed. It could be
18 perpetuated from the previous lawsuit; right?

19 MR. SYZMANSKI: That's right. Your Honor. We don't
20 have an objection to using the discovery or even the testimony 10:45:05
21 from the Addington crowd.

22 THE COURT: So what's this new issue that wasn't
23 presented to Judge Wake that you now think is appropriate for
24 me to consider?

25 MR. SYZMANSKI: As the Court's decision in denying 10:45:22

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1 the motion to dismiss said, the question before the Court here 10:45:25
2 is the status of this dispute at the present time.

3 And we've had, at this point, two and a half years
4 since the Addington trial took place, more than that since the
5 discovery was completed in the Addington case. And we think 10:45:44
6 that -- and let me back up and say I said one issue is the
7 Nicolau determination. The second one is the claim that,
8 according to the case management plan, the West Pilot Class
9 wants to litigate, which is a duty of fair representation claim
10 against the Union. And that, in our view at the present time, 10:46:06
11 depends on the present circumstances and includes what has
12 happened over the two and a half years since the Addington case
13 went to trial.

14 THE COURT: So what you're saying is that the duty of
15 fair representation that is now claimed by the West Pilots has 10:46:30
16 two components? And that would be at the time when the Nicolau
17 agreement, or the Nicolau decision, was made? Because the
18 facts that existed then are the facts I would consider, it
19 seems to me.

20 But are you saying, then, that the question is 10:46:53
21 whether or not the West Pilots continue or have a separate
22 argument, that since that decision, that there continues to be
23 unfair representation? Because that is what your argument is,
24 that there's going to be additional discovery concerning
25 whether or not there was unfair representation? I really 10:47:17

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1 haven't seen that but I'll hear from them in a moment. 10:47:22

2 Let me just ask, are you arguing that there are new
3 facts which represent additional unfair representation that
4 would really bifurcate the issue of unfair labor disputes, and
5 unfair labor practices? Excuse me. 10:47:47

6 MR. HARPER: Judge Silver, this is --

7 THE COURT: Yes? Who is this?

8 MS. FLOOD: That was Marty, yes.

9 THE COURT: I don't hear him.

10 MR. HARPER: Well, I'm here, Judge. I don't know 10:48:02
11 who -- you were asking that discovery question to.

12 THE COURT: Well, there was a silence and thoughtful
13 look in the courtroom by Mr. Jacobs, I believe. So he may --
14 are you deferring to Mr. Harper?

15 MR. JACOBS: Always. 10:48:24

16 THE COURT: All right. So Mr. Harper, you are on.

17 MR. HARPER: Well, let me -- we do not think -- let
18 me maybe start at the Nicolau award in the first case because
19 we are the only lawyers that really litigated that in the
20 courtroom although there were observers there that can report 10:48:40
21 it back. But, Judge, the Nicolau award and the fact of it was
22 not an issue in the first case at all. Judge Wake took the
23 position that that award was final and binding and fair and
24 equitable. So there was never an attack or any discovery that
25 went to how that decision was made. And we don't think that is 10:49:08

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1 appropriate to go into that at this particular point in time. 10:49:14

2 THE COURT: Okay. Let me stop you there and I'll --
3 we'll take this a piece at a time here.

4 So what your position is, is that the same legal
5 issue on whether or not that award should have been upheld or 10:49:30
6 should have been adopted by Judge Wake is precisely the same
7 issue before me? Can you answer that yes or no?

8 MR. HARPER: Yes. We think that that award has been
9 decided and, by agreement of the parties, ought to be included
10 in what we call Section 22 of any collective bargaining 10:49:56
11 agreement.

12 THE COURT: I understand that. But you understand
13 that that case was dismissed so that I can reconsider each and
14 every legal issue that was raised in that case again? That
15 doesn't mean that I won't agree with Judge Wake but it also -- 10:50:14
16 I am open-minded to legal arguments as to why I should not.
17 And that assumes that I will only consider the legal issues
18 that were raised at that time and nothing new and different.
19 Is that right? Mr. Harper?

20 MR. HARPER: That is our position. 10:50:45

21 THE COURT: Okay. So, then, now, tell me what you
22 understand, however, to be Mr. Szymanski's position concerning
23 whether or not there have been circumstances, facts, evidence
24 that have evolved since that decision that would allow for this
25 court to reconsider or -- not reconsider, but consider whether 10:51:08

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1 or not since that time there still has been unfair
2 representation. 10:51:15

3 MR. HARPER: Well, let me break these -- I understand
4 his position to be perhaps broken down most easily into two
5 parts. First, he started off, and you started off, with the 10:51:31
6 reasonable expectations. And our position is, Your Honor, that
7 nothing since the Addington trial is appropriate with respect
8 to pilot expectations because those expectations, to the extent
9 that they needed to be judged, were all judged prior to the
10 time that Mr. Nicolau entered his order in May of 2007. So 10:51:52
11 reasonable expectations, unmerged expectations, premerger
12 expectations were all of the issues that were fully litigated,
13 and correctly so, before the Nicolau award came down. So
14 that's the point --

15 THE COURT: Okay. Let me stop you there. And even 10:52:13
16 if they weren't raised before the Nicolau award, they should
17 have been?

18 MR. HARPER: And indeed, Your Honor, they were. They
19 were.

20 THE COURT: They were. Okay. So that was something 10:52:23
21 that was then raised by the Union and considered as part of the
22 decision of the arbitrator Nicolau; right? I'm just repeating.

23 MR. HARPER: Yes, Your Honor. More precisely, the
24 West Pilots presented their evidence on their expectations and
25 the East Pilots did the same on their expectation and then 10:52:47

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1 Mr. Nicolau took all of that and came out with his opinion 10:52:50
2 taking all of that into consideration.

3 THE COURT: And that was something that Judge Wake
4 took into consideration when he made his decision, rightly or
5 wrongly; right? 10:53:04

6 MR. HARPER: Yes.

7 THE COURT: Okay. So now let me ask Mr. Szymanski,
8 have I misunderstood that what you're saying now is that
9 there's a separate argument that is being made by the West
10 Pilots that since that decision, two decisions, once the 10:53:16
11 Nicolau arbitrator decision but also since Judge Wake's
12 decision and then after that, there is essentially a new
13 allegation by the West Pilots that there is -- has been unfair
14 representation, that there has been violation of the labor laws
15 by the Union? Is that what you're saying? 10:53:46

16 MR. SYZMANSKI: Your Honor, I have to back up and I
17 think there's one thing that has been missing from the
18 discussion at this point. And that is that the Union that was
19 party to the proceedings that led to the Nicolau determination
20 is not my client. There was a vote. There is a new Union 10:54:03
21 certified by the National Mediation Board and as we've
22 explained, the black letter law under the Railway Labor Act is
23 that a newly certified Union has full bargaining rights without
24 regard to whatever had happened before.

25 THE COURT: I understand. So this Union was not part 10:54:28

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1 and did not litigate the -- its position before Nicolau; right?

10:54:30

2 MR. SYZMANSKI: That's correct.

3 THE COURT: Okay. Let me ask you this, then:

4 According to Mr. Harper, in that, whether or not the Union was
5 there or not and represented as a Union, the Union today, was
6 the issue of reasonable expectations raised?

10:54:48

7 MR. SYZMANSKI: It was, Your Honor.

8 THE COURT: Okay. And is it your position that the
9 Union at that time did not adequately represent the employees
10 in raising that in? It was -- because that's what Mr. Harper
11 is saying, whether it was this Union or a different Union at
12 the time of the presentation of this issue before Arbitrator
13 Nicolau, it was raised, it was resolved, and then the matter
14 was presented to Judge Wake.

10:55:06

15 So what is your position about the representation of
16 all of the pilots by the Union that existed at the time the
17 matter was presented to Nicolau?

10:55:29

18 MR. SYZMANSKI: Your Honor, the representation was
19 good; but subsequent to the issuance of that determination, the
20 East Pilot Master Executive Council, a division of ALPA, the
21 former Union, filed a lawsuit in DC Superior Court to overturn
22 that decision, have it rejected because it didn't, in their
23 view, comport with the ALPA merger policy that it was issued
24 under. In other words, they thought at that point that the
25 decision was inconsistent with the authority granted the

10:55:51

10:56:14

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1 arbitrator.

10:56:17

2 That case did not go to judgments because while that
3 case was pending, the US Airline Pilots Association was
4 certified as a new representative and as a result, the previous
5 parties to that case, the West MEC and the East MEC divisions
6 of ALPA disappeared and there were no parties to carry on that
7 case.

10:56:33

8 THE COURT: When you say there were no parties, the
9 case had been dismissed before this occurred?

10 MR. SYZMANSKI: No, Your Honor. It was pending at
11 the point.

10:56:49

12 THE COURT: Well, then, why didn't US Airline Pilots
13 Association substitute in that case?

14 MR. SYZMANSKI: Because as a new representative, they
15 have a right, under the Railway Labor Act, to negotiate a
16 seniority provision without regard to whatever might have been
17 binding on the prior Union, so they had no need to set aside or
18 attack the award because it was not binding on them. They were
19 not a party to that proceeding. They didn't sign any of the
20 agreements that led to it. They certainly weren't governed by
21 the Airline Pilots Association constitution and bylaws that
22 provided for the integration proceeding and required the West
23 MEC and the East MEC to proceed.

10:56:59

10:57:21

24 THE COURT: I see. But was this raised by USAPA?
25 Was it raised in front of Judge Wake?

10:57:43

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1 MR. HARPER: Your Honor, this is Marty. 10:57:45
2 THE COURT: Wait, wait, wait.
3 Now, Mr. Harper. I am talking to Mr. Szymanski.
4 Was that raised?
5 MR. SYZMANSKI: Yes, Your Honor. 10:57:52
6 THE COURT: It was? And rejected?
7 MR. SYZMANSKI: It was rejected.
8 THE COURT: Okay. So that's a legal issue. As far
9 as you're concerned, Judge Wake made the wrong decision?
10 MR. SYZMANSKI: Yes, Your Honor. It was part of the 10:58:03
11 appeal to the Ninth Circuit but the Ninth Circuit, because of
12 it's decision, didn't reach that issue.
13 THE COURT: That's right. So that's back here in a
14 new case and that's what I have to decide.
15 MR. SYZMANSKI: That is the first claim. 10:58:16
16 THE COURT: Okay. It's a legal issue?
17 MR. SYZMANSKI: Yes.
18 THE COURT: So after I decide that legal issue and
19 whether or not Judge Wake was correct on that, what do we have
20 left? Let's assume that I rule that Judge Wake was correct, 10:58:29
21 then what do we have left?
22 MR. SYZMANSKI: You have the claim that the West
23 Pilot Class is seeking to litigate here, which is the duty of
24 fair representation issue, which is not the legal requirement
25 of US Airline Pilots Association to follow the Nicolau 10:58:48

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1 determination but whether or not we breached the duty of fair
2 representation, we act beyond our discretion in making a
3 proposal that is not the Nicolau determination. And to do
4 that, that is a factual determination. They have to show that
5 our action is arbitrary, discriminatory or in bad faith.

10:58:54

10:59:13

6 And our position is not that they are raising a new
7 argument about why we've breached our duty of fair
8 representation, but that our defense to that claim entitles us
9 to bring forward facts up to the present time which would
10 include changes in operations that affect the East Pilots and
11 the West Pilots at US Airways, number one. And, number two, to
12 the extent that we have reached out and tried to include West
13 Pilots in discussions about our current proposal and
14 potentially changing our current proposal to the proposal that
15 would hopefully go forward and be part of a collective
16 bargaining agreement.

10:59:39

10:59:58

17 THE COURT: So what you're saying is what has
18 occurred afterwards supplants -- assuming that the Judge Wake
19 decision is accurate, it supplants his decision and then the
20 Court has to find that there is no -- there was no violation of
21 the duty of fair representation? I mean, you're saying it has
22 to supplant it and that what you're saying is, it doesn't
23 exist, even though if I find that he was accurate at the time,
24 what the Union has done subsequently has overcome anything that
25 you did previously.

11:00:14

11:00:39

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1 MR. SYZMANSKI: We think Judge Wake's decision about 11:00:41
2 this at the time that he made the decision two and a half years
3 ago was wrong, to be sure.

4 THE COURT: Sure.

5 MR. SYZMANSKI: And I know the Court understands 11:00:51
6 that.

7 THE COURT: Right. And that's the first question.

8 MR. SYZMANSKI: That's the first question. And the
9 second question is, and I think if you look at the Ninth
10 Circuit's decision about it, the Ninth Circuit's decision 11:00:58
11 clearly says that the duty of fair representation, at least in
12 the Ninth Circuit's decision, is judged at the point where the
13 collective bargaining agreement is ratified and goes into
14 effect and that the changes that occur during the collective
15 bargaining process are relevant to the decision of whether or 11:01:18
16 not the Union has breached its duty of fair representation.

17 THE COURT: Okay. I gotcha.

18 Prove for me what the changes have been.

19 MR. SYZMANSKI: There have been a number of changes
20 at US Airways including base closures, hiring furloughs. 11:01:33

21 THE COURT: And how has that, let's say, benefited
22 the West Air Pilots and caused the Union to retreat from its
23 position previously?

24 MR. SYZMANSKI: Actually, Your Honor, one of the
25 underlying issues in the Nicolau determination was a question 11:01:54

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1 of what the economic viability was at the time of the West
2 operation, which was America West, and the East operation,
3 which was US Airways. And in that determination, Arbitrator
4 Nicolau indicated his view at that particular point in time
5 that the West economic outlook was much stronger than the
6 economic outlook at US Airways.

7 And, in fact, subsequent events have shown just the
8 opposite as a result of 9-11. As a result of economic problems
9 that have happened, the amount of flying in the West has, in
10 fact, decreased and the flying in the East has remained
11 relatively stable, such that at this point there are a number
12 of traditional East routes that are being flown by West Pilots.
13 And that's important because, as I said, an underlying
14 factor -- and the principal underlying factor --

15 THE COURT: I'm sorry to interrupt but let me make
16 sure I understand. So what you're saying is now, because of
17 the economy, essentially, to be very simplistic about it, is
18 that the West Pilots are flying more. What does that have to
19 do with the Union?

20 MR. SYZMANSKI: They are not flying more. In fact,
21 if there were two separate airlines at this point, they would
22 be flying less because we have statements that have been made
23 at different points by the -- by US Airways representatives
24 that 24 percent of the flying that has been doing -- that is
25 traditional East flying is being performed by the West pilots.

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1 And if they weren't performing that flying, then that number of 11:03:50
2 pilots would be out of work.

3 So --

4 THE COURT: Does that really relate to damages as
5 opposed to the issue of whether or not there's unfair 11:03:59
6 representation? I mean, in other words, the circumstances,
7 independent of the Union, have changed the complexion of who is
8 flying and who is not flying as opposed to whether or not the
9 Union has reached its hand out to the West Pilots and said,
10 okay, let's work this out? 11:04:23

11 MR. SYZMANSKI: Your Honor, the relevance of this is
12 the Union, as the representative, operates in real time. We're
13 operating today in terms of our proposals and negotiations with
14 the company. And it's constantly in flux and it is legitimate
15 for the Union to take into account all of these things that 11:04:44
16 happen on a real-time basis in terms of making its proposal.

17 So even if -- and I'm not for a minute admitting
18 this. But even if, at some point in the past, the Union's
19 position may not have been justified, the question is whether
20 or not the Union's position is justified today. And that is 11:05:08
21 important in defending against the claim that the West class is
22 making that we breached our duty to fair representation. It's
23 legitimate for us to show that our position currently at the
24 present time, as I think the Court said in denying the motion
25 to dismiss, was the relevant time period that the Court is 11:05:28

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1 looking at. We have the right to discuss and present to the
2 Court information about what the subsequent events and the
3 effect that they have had and why it's legitimate at this point
4 for the Union to be taking its position which it is taking.

5 THE COURT: In other words, steadfastly that you
6 continue not to have engaged in unfair representation
7 independent of the decision of Judge Wake?

8 MR. SYZMANSKI: That is correct, Your Honor.

9 THE COURT: And as a consequence of that -- so it has
10 nothing to do with whether or not the East Pilots or the
11 decision on who flies and when they fly, that is seniority or
12 who was previously -- had the most air time. That is totally
13 irrelevant?

14 MR. SYZMANSKI: No, it's not totally irrelevant, Your
15 Honor. Those are all considerations to be taken into account
16 in determining how the two seniority lists ought to be merged
17 and integrated.

18 THE COURT: Okay. That's interesting because I was
19 wondering about that. Have you offered something to integrate
20 them? I was thinking about this for some time. In other
21 words, have you retracted from your position that was -- it
22 seemed pretty hard that the East Pilots had more seniority than
23 they fly and the West Pilots, despite the fact that they have
24 had more air time, that they are subordinate. Do you have a
25 different agreement now to allow both of them to fly fairly

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1 based upon what the economic situation is today?

11:07:20

2 MR. SYZMANSKI: We think so, Your Honor. Let me say
3 two things about this. There is a current proposal out there
4 which, although it has a date of hire seniority list, has
5 conditions and restrictions. And I might say that there's a
6 repeated misrepresentation I think by the West Pilot Class
7 representatives and their counsel about this proposal. They
8 keep calling it a date-of-hire proposal, which it is, but it's
9 not a strict date-of-hire proposal which was proposed at the
10 time that Arbitrator Nicolau was holding these hearings. It's
11 substantially different.

11:07:37

11:07:57

12 THE COURT: Tell me the difference and why it is much
13 more beneficial than that one.

14 MR. SYZMANSKI: Well, I'll give you one example, Your
15 Honor. You may be aware that US Airways is the result of a
16 series of begets, mergers that have happened over the years
17 among different airlines as most airlines today really are.
18 One of the airlines that is part of US Airways was Pacific
19 Southwest whose pilots were primarily in the western United
20 States. That was a previous merger, the result of a previously
21 pilot integration proceeding. It's not at issue here.

11:08:10

11:08:34

22 But those pilots, Pacific Southwest pilots, are on
23 the US Airways list. As the Court understands, this airline is
24 essentially operating with two separate lists at this point by
25 separate bids and so forth, but they are on the East list. If

11:08:59

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1 this was a strict date-of-hire proposal by US Airline Pilots
2 Association, then those former Pacific Southwest pilots would
3 be able to displace current West pilots who didn't have the
4 same seniority, lesser seniority from their positions at the
5 Phoenix domicile.

11:09:03

11:09:23

6 In fact, there is a condition and a restriction that
7 is part of the current US Airline Pilots Association proposal
8 which says you cannot do that. It's significant because as the
9 Court may know, that pilots commute. And a 30-minute commute
10 is very small compared to the commutes that some pilots make
11 from homes that they maintain in San Francisco to go to
12 Charlotte or Philadelphia to start their line of flying. They
13 go across the country and those Pacific Southwest pilots would
14 certainly much rather commute not to Philadelphia or Charlotte.
15 They would rather commute to Phoenix which would be much closer
16 for them. But the condition and restrictions which part of the
17 current US Airline Pilots Association proposal, does not allow
18 that and protects the West pilots with respect to West flying.
19 And there are a number of other conditions and restriction that
20 are like that, but that is just one example.

11:09:45

11:10:08

11:10:26

21 And then the second thing I want to say about this
22 and the other aspect that we want discovery on, we think we're
23 entitled to discovery on, is over the course of the past two
24 and a half years, since the Addington, we've made a number of
25 overtures to try to engage West pilots in discussing this

11:10:46

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1 proposal and telling us what additional changes we should make 11:10:52
2 to further protect them, things that aren't adequate to protect
3 their interests and so on and so forth.

4 Unfortunately, during the course of that, those
5 several attempts, we have been obstructed by certain members of 11:11:09
6 the West class of pilots who inform and put out communications
7 to other West pilots saying, "Don't do it. Don't participate
8 in these discussions. Tell US Airline Pilots Association that
9 it's the Nicolau award or nothing," and we think that our
10 efforts to go out and engage West Pilots in this discussion 11:11:36
11 indicates that we're not engaged in a breach of duty of fair
12 representation and, in fact, that the obstruction by the West
13 Pilots indicates that as well. And that's relevant and
14 discoverable and it's something that has happened since the
15 Addington trial. 11:11:56

16 THE COURT: Mr. Harper?

17 MS. BROWN: Yes, Your Honor.

18 THE COURT: Response?

19 MR. HARPER: I feel left out. Let me try to cover a
20 number of these points that I have written down here. 11:12:09

21 If you don't mind, Your Honor, I would like to start
22 where Mr. Szymanski said it was black letter law that USAPA is
23 not bound by anything that ALPA did. We strongly disagree with
24 that and we think that he is absolutely incorrect in that legal
25 position. And one of the issues that will be briefed, and you 11:12:28

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1 need to decide, is whether or not that is true because if they
2 are not free, Your Honor, to do something -- they are not free
3 to do anything but the Nicolau award, then that is an extremely
4 important decision that you have to make in this case. We
5 think it's one that will be teed up early.

11:12:32

11:12:52

6 So we think they are absolutely bound by the Nicolau
7 award. And you understand, Your Honor, that the Nicolau award,
8 when it was entered in May of 2007, was designed to handle
9 precisely what is happening in this environment right now. It
10 was to set the rules for what the pilot seniority list would
11 look like as this airline, on a merged basis, matured, changed,
12 merged, or whatever it did. That is what the Nicolau was
13 intended to do is to allocate rights, seniority rights, between
14 the West and East into the future.

11:13:13

15 The practical issue of that is being presented to the
16 Honor in the form of discovery is a collateral attack on the
17 Nicolau award by claiming that new facts, after they were
18 legally obligated to implement the award, now justifies them
19 disregarding it. So what they are asking is to be rewarded,
20 Your Honor, for the four or five years that the Union has
21 refused to implement the Nicolau award claiming that these new
22 events and the change in the operations of US Airways somehow
23 justifies a deviation from the Nicolau award.

11:13:37

11:14:01

24 So we strongly urge the Court not to reward them for
25 the delay that has occurred because they refused to abide by

11:14:28

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1 the agreements that the West Pilots, the East Pilots, and US
2 Airways entered into back in 2005 and 2006 through an
3 arbitration that was to be final and binding.

4 The other point that I really need to point out to
5 the Court is that all of the issues about the one offer and the
6 constrictions and conditions and restrictions was presented in
7 spades through various pilots' testimony. Captain Mowrey, for
8 example, went for many hours trying to explain to Judge Wake
9 and the jury why those restrictions were fair and reasonable.

10 And at the end of the day, they were all rejected
11 because the critical point that Mr. Szymanski has not pointed
12 out to the Court is that when it comes to furloughs at Airways,
13 and we expect that there are going to be furloughs, according
14 to the East proposal, and there's only been one on the table
15 and it's one that was presented in September of '08, furloughs
16 was done strictly by date of hire, which means that the first
17 pilots out of Airways was going to be the West Pilots. And
18 that is what Judge Wake focused on, and he found that to be
19 totally unfair and, therefore, rejected their argument that the
20 proposal on the table was fair and equitable to the pilots and
21 that has not changed, Your Honor -- maybe Mr. Siegel can
22 address this -- since it was first put on the table by USAPA in
23 September of 2008.

24 We really do not believe that any of the subsequent
25 developments at Airways by way of operational plans has

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1 anything to do with the root legal question, which is, is 11:16:20
2 USAPA, because of the prior agreements, required to implement
3 the Nicolau award as part of Section 22 of whatever collective
4 bargaining agreement the Union and the company eventually
5 arrive at? 11:16:40

6 So we would urge the Court not to allow a disguised
7 attack on the Nicolau award through subsequent discovery of
8 what has happened in the past two or two and a half years. I
9 don't know --

10 THE COURT: Mr. Harper? 11:16:53

11 MR. HARPER: Yes, Your Honor.

12 THE COURT: You mentioned the word the change in
13 operations of US Airways. In your view, since the decision of
14 Judge Wake, has there been change in operations by US Airways
15 that has effectively been beneficial to the West Pilots? 11:17:09

16 MR. HARPER: No, not at all, Your Honor. The base
17 closures that Mr. Szymanski talks about and stuff like that
18 have all resulted in about 55 or 57, and I think either Andy
19 Jacob or Kelly has the numbers to be laid off, furloughed. So
20 why we had all of our pilots filing at the date of the merger, 11:17:30
21 we now do not have all of our pilots. They have been laid off
22 because -- or furloughed because the Nicolau has not been
23 implemented.

24 On the other side, the 15 or 1700 East Pilots that
25 were on furlough at the time of the award have all now been 11:17:47

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1 called back to work, so there's full employment on the East 11:17:52
2 side and not full employment on the West side.

3 THE COURT: Has there --

4 MR. HARPER: It wouldn't have been --

5 THE COURT: Has there been any improvement in terms 11:18:01
6 of employment on the West side?

7 MR. HARPER: No, not at all, Your Honor. I mean, I
8 don't know what you mean by -- the wages have not changed. I
9 mean, there's been a deterioration because under the Nicolau
10 award, all of the West Pilots should have been flying during 11:18:15
11 this entire period of time and they are not and so they have
12 been damaged in that regard by the Nicolau not being
13 implemented, Your Honor.

14 THE COURT: Okay. So what I was asking, are there
15 more West pilots flying now than before the Nicolau agreement, 11:18:29
16 number one? Are there more?

17 MR. HARPER: No.

18 THE COURT: Okay. And certainly if there are by,
19 let's say, some mathematical formula, then it's your position
20 that that is not a consequence of anything that the Union, 11:18:47
21 that's USAPA, has done; right?

22 MR. HARPER: Well, it's a consequence of USAPA being
23 voted in and then taking the position that they were not going
24 to honor the Nicolau. That is what has caused this to happen.

25 THE COURT: Let me just ask US Airways whether or not 11:19:05

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1 you have any position or any comment. I know you're standing
2 in abeyance waiting for a decision on the three issues you
3 presented to the Court. But is there anything, any comments or
4 potential misstatements by either of the parties?

5 MR. SIEGEL: Thank you, Your Honor. And you are
6 correct, we are pretty much the person in the middle here
7 hoping for a resolution between the two pilot groups. But I
8 think, as I listened to the dialogue, there are a couple of
9 points that I would correct just to aid the Court.

10 First of all, it may not have been clear when you
11 were asking questions about the Nicolau arbitration process and
12 you asked whether the Union represented particular pilots well
13 and so forth. Actually, the way that works, it's an
14 arbitration under the prior union's merger policy where each
15 pilot group hired their own outside lawyers. The Union did not
16 represent the prior Union, did not represent any group in that
17 arbitration.

18 THE COURT: So that means ALPA did not represent
19 either party?

20 MR. SIEGEL: That is correct. ALPA's merger policy
21 called for that final and binding arbitration process but then
22 ALPA doesn't represent either of the groups. Each of the
23 groups hired their own lawyers to present evidence and argument
24 to Arbitrator Nicolau. That is point one that I don't think
25 came across clearly.

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1 THE COURT: Let me stop you. 11:20:44

2 Mr. Szymanski, do you agree? I mean, it seems to me
3 that what is being made clear to me is that by Mr. Siegel is
4 different than what I understood from you. Is that somehow the
5 Union, ALPA, was representing all of the parties so that 11:21:02
6 required the binding effect on USAPA? Am I misunderstanding
7 what you said to me?

8 MR. SYZMANSKI: Your Honor, that whole proceeding was
9 one Airline Pilots Association proceeding. It was conducted
10 under the Airline Pilots, which is an umbrella organization 11:21:23
11 between the Master Executive Council for the West and the
12 Master Executive Council for the East.

13 THE COURT: I am probably being too simplistic and
14 I'm going to learn when I read the law, but I thought you were
15 saying that they were there on behalf of both the 11:21:43
16 organizations, that is both the parties, the West and the East;
17 and as a consequence of that, that the decision was
18 superimposed on USAPA and that that was it.

19 MR. SYZMANSKI: It was never superimposed on USAPA.
20 That is not our position. That USAPA came after that. USAPA 11:22:09
21 didn't participate at all.

22 THE COURT: I see. Okay. So I did misunderstand
23 you. So what you're saying is that you could start all over
24 again?

25 MR. SYZMANSKI: That we're entitled as a new 11:22:26

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1 bargaining representative, and we've cited in the case 11:22:28
2 management plan Judge Edwards' decision in the DC circuit that
3 I say -- and we'll have this legal argument, obviously, with
4 Mr. Harper and the West class about whether or not, as a new
5 representative, we're entitled to bargaining a new 11:22:43
6 collective --

7 THE COURT: Not a new representative.

8 MR. SYZMANSKI: We are.

9 THE COURT: Because ALPA was not a representative.

10 MR. SYZMANSKI: ALPA was. They were the 11:22:51
11 representative. They were the certified bargaining
12 representative.

13 THE COURT: All right. This definitely,
14 Mr. Siegel --

15 MR. SIEGEL: Let me try to say it in my words if I 11:23:01
16 can, Mr. Szymanski. The prior Union, ALPA was certified
17 representative at the US Airways and at America West. ALPA had
18 a constitution that included something they called their merger
19 policy; and it basically said if you have an ALPA-ALPA merger,
20 which is what we had, the two pilot groups, we called them the 11:23:20
21 East and the West groups, would first meet to try to negotiate
22 an integrated seniority list. If they could not achieve that,
23 they would then, the two groups, would then, through lawyers
24 that each group would hire, not an ALPA lawyer, the two groups
25 would then submit their unresolved seniority integration list 11:23:40

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1 to what the ALPA constitution called final and binding
2 arbitration.

11:23:43

3 The two pilot groups in this case each hired their
4 own lawyers pursuant to the ALPA merger policy, at the time
5 labeled final and binding, and submitted extensive argument and
6 evidence. The company is not party to that arbitration but
7 they submitted. And Mr. Nicolau, who is a nationally known
8 arbitrator, decides.

11:23:57

9 The company then had been asked by the Union, ALPA,
10 to simply sit on the sidelines and to wait and to agree in
11 advance that once Mr. Nicolau rendered his seniority list, the
12 company would -- the Union would present it to the company and
13 the company would be required by contract to accept it so long
14 as certain conditions were met that did not involve excessive
15 expense.

11:24:15

11:24:38

16 So in this case, that is what would -- happened here
17 was after Mr. Nicolau rendered the decision, the Airline Pilots
18 Association, pursuant to the requirements of the collective
19 bargaining agreement, what we call the transition agreement,
20 was required to, and did, present it to US Airways for
21 acceptance and the company accepted it.

11:24:52

22 So --

23 THE COURT: And you had an obligation to do that?

24 MR. SIEGEL: We had an obligation under the terms of
25 the negotiated transition agreement with ALPA to accept it as

11:25:03

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1 long as those conditions were met, that there were no excessive 11:25:07
2 costs.

3 Now, what happens here under the Railway Labor Act is
4 just a little different than what Mr. Szymanski is saying, and
5 I don't think he means to say what he quite said. There's no 11:25:23
6 real dispute that the transition agreement, the collective
7 bargaining agreement, between ALPA and the company is still a
8 binding document to which USAPA succeeded when it became the
9 successor Union. They -- we are living under that collective
10 bargaining agreement. We now call it the US Airways/USAPA 11:25:44
11 agreement. I don't think Mr. Szymanski is arguing that you can
12 simply obviate collective bargaining agreements by changing
13 Union just as the same you can't do that when you change
14 shareholders of a company.

15 I think what we have here right now is a seniority 11:25:58
16 list to which the company was obligated to accept it. The
17 Union presented it. And that is the list that is required
18 currently by the transition agreement.

19 But I believe that, as I understand it, USAPA wants
20 to simply make a -- has made a proposal back in 2008 to the 11:26:17
21 company to change the transition agreement and to allow for a
22 different list. And I think the legal issue that I believe
23 Mr. Harper has identified, and I think that's probably correct,
24 is whether or not the principles of duty of fair representation
25 permit USAPA to make a proposal to change the transition 11:26:42

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1 agreement and to present a list other than Nicolau. 11:26:46

2 So we have the obligation and the question is whether
3 the DFR principles limit or permit this Union to propose to the
4 company a change. They have proposed a change in 2008. They
5 have made one proposal for a list that is completely different 11:27:06
6 than the Nicolau list.

7 Since they made that proposal, the legality of the
8 proposal has been at issue.

9 THE COURT: Okay. All right. I've got it and we
10 don't need to discuss this any more. It's a legal issue and 11:27:23
11 this will presage any other issues I make on whether or not
12 discovery is appropriate from this point forward.

13 So let's get an expedited briefing on that issue and
14 in terms of the Rule 16 order, then I am not going to issue a
15 Rule 16 order other than that because I haven't decided whether 11:27:44
16 or not discovery is necessary at all.

17 So it seems that is the first issue. That is what
18 I'm going to resolve.

19 And now the question is, is how is this to be
20 briefed? 11:28:02

21 My sense is, since both sides have a different point
22 of view, that with respect to the unions, there should be
23 simultaneous briefing and there should be an opportunity,
24 should you choose to do so, Mr. Siegel, and it seems to me that
25 you certainly understand the issue in a neutral way as you wish 11:28:20

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1 to be here today, that you should have an opportunity to also 11:28:26
2 brief the issue.

3 So how do we wish to proceed? What will you propose?
4 Mr. Siegel?

5 MR. SIEGEL: Well, Your Honor, just speaking a bit 11:28:39
6 off the top of my head, as I understand the situation, USAPA
7 has said they want to take discovery before there can be any
8 motions. I'm not sure what discovery exactly they want to
9 take.

10 THE COURT: I'm not going to allow discovery. This 11:28:58
11 is a simple issue and I think even Mr. Szymanski agrees with
12 that, is that the issue is -- the simple issue is whether or
13 not, as you've said, this is whether USAPA and US Airways and
14 this Court is bound by the Nicolau agreement simply. That's
15 where we go or whether or not USAPA can independently litigate 11:29:27
16 it. If I decide there's independent litigation, then we deal
17 with the issue of discovery.

18 MR. SIEGEL: Well, then, it strikes me, then, that
19 the legal issue is one that is appropriate for expedited
20 summary judgment. 11:29:45

21 THE COURT: Absolutely. I agree.

22 MR. SIEGEL: And I -- look, in our schedule we didn't
23 want to impose, so we said we thought the motions could be
24 filed by the end of January. I know that the West pilots each
25 suggested something quicker. But within the -- within a fairly 11:29:59

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1 short period of time I think that the parties -- 11:30:02

2 THE COURT: I think -- you know, this is -- you know
3 this better than I do and I learned something. We are on -- I
4 think it should be the middle of January, of next year. So
5 we're talking -- I think it should be filed no later than 11:30:20
6 January 17 and the participation by all three parties on this
7 issue is the Nicolau agreement binding on this Court with all
8 of the permutations that we have discussed today, and then
9 simultaneous response briefing by February 1.

10 And then after I rule on it, hopefully on an 11:30:52
11 expedited basis, if I decide that it is binding, then I will
12 resolve whether or not we need a status conference, whether or
13 not there's anything that follows from there.

14 MR. SIEGEL: Your Honor, I think that makes sense.
15 And if I understand the Court, that, essentially, the briefing, 11:31:11
16 therefore, is really with regard to Count 1 and 2 of the
17 complaint which would be a summary judgment on those two
18 counts?

19 THE COURT: Absolutely. You got it.

20 MR. SYZMANSKI: Your Honor, I have to say Mr. Siegel 11:31:24
21 says Count 1 and 2 in the complaint. The legal issue about
22 whether the Nicolau award is binding, as I understand it, and
23 as I think we've been talking about it this afternoon, is
24 separate from this duty of fair representation issue which is a
25 factual issue about arbitrary discriminatory or in bad faith. 11:31:45

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1 Am I misunderstanding or are we briefing both of those issues? 11:31:49

2 THE COURT: We're starting with the Nicolau agreement
3 and then as I said -- and I think certainly that Mr. Harper
4 thinks that they are inextricably interrelated.

5 Am I right, Mr. Harper? 11:32:10

6 MR. HARPER: Yes, you are.

7 THE COURT: And it seems to me that although Mr.
8 Siegel hasn't taken a firm position and an official position,
9 he may be moving in that direction but certainly seems to be
10 because it's his position that it would resolve Counts 1 and 2. 11:32:25

11 And I haven't made a decision. I'm not presaging my ruling.

12 But as I mentioned, after I make that decision, let's assume
13 arguendo that I find that the Nicolau agreement is binding,
14 then the question is the depth and breadth of that agreement
15 and that is whether or not it somehow doesn't cover the issue 11:32:52
16 of unfair representation as you have proposed it here today.

17 And that may require consideration and should be
18 considered by the parties, since you've raised it, in this
19 simultaneous briefing now. So you can raise it and you can say
20 even if, alternatively, this Court decides it's binding, then 11:33:20
21 this issue still is -- it's still relevant and it still
22 survives. And if you disagree, then -- and I say Mr. Harper
23 disagrees and Mr. Siegel disagrees, then they can respond to
24 that in simultaneous briefing response.

25 And I will then make all of those decisions, 11:33:41

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1 hopefully, and if I decide it resolves the entire case, that's 11:33:45
2 the end of it, decides that it doesn't, that the Nicolau either
3 for one or two reasons, the Nicolau agreement is not binding or
4 if it is binding, there is still something that survives, then
5 we'll have a status hearing to decide what to do with that. 11:34:04

6 Do you understand?

7 MR. SYZMANSKI: I understand, Your Honor. But given
8 the nature now, which is broader than what I thought we were
9 discussing about what the Court expects briefing on, I would
10 suggest that the responses have at least an extra week because 11:34:22
11 there's going to be, I know, a lot in the West pilot class
12 presentation that they are going to file on the 17th of January
13 that we're going to have to respond to.

14 THE COURT: All right. That's fine.

15 Then you can have another week. We'll make it -- 11:34:38
16 I'll be generous. February 10.

17 MR. SYZMANSKI: Thank you, Your Honor. I appreciate
18 that.

19 THE COURT: All right.

20 Anything else, Mr. Siegel? 11:34:46

21 MR. SIEGEL: No, Your Honor. Thank you.

22 THE COURT: And, Mr. Szymanski, anything else?

23 MR. SYZMANSKI: Your Honor, we have discussed in our
24 papers a request for mediation. But I assume that since the
25 opposition of the West class is that they don't see any reason 11:35:02

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1 to participate, that the Court doesn't see any utility in that. 11:35:05

2 THE COURT: Everybody -- one side is going to stand
3 stiffly against the other. It doesn't make any sense. It's a
4 needless consumption of time. Thank you for raising that.

5 MR. SYZMANSKI: I appreciate that, Your Honor. 11:35:20

6 THE COURT: Mr. Harper?

7 MR. HARPER: We understand, Your Honor, and, yes, we
8 are. We are on board.

9 THE COURT: And so that is the way we'll go and we'll
10 see if we can resolve this case finally. 11:35:30

11 MR. SIEGEL: Your Honor, may I just ask one question?
12 We were served this morning with a motion on the class notice,
13 and we would like to respond and we'll do that very quickly.

14 THE COURT: Oh, you will? Okay. Do it in writing
15 because I want this -- 11:35:43

16 MR. SIEGEL: We'll do that at the start of next week.
17 We'll file our response.

18 THE COURT: Okay. Thank you.

19 We're adjourned.

20 COURTROOM DEPUTY: All rise. 11:35:52

21 (Whereupon, these proceedings recessed at 11:36 a.m.)

22 * * * * *

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C E R T I F I C A T E

1
2
3 I, ELAINE M. CROPPER, do hereby certify that I am
4 duly appointed and qualified to act as Official Court Reporter
5 for the United States District Court for the District of
6 Arizona.

7
8 I FURTHER CERTIFY that the foregoing pages constitute
9 a full, true, and accurate transcript of all of that portion of
10 the proceedings contained herein, had in the above-entitled
11 cause on the date specified therein, and that said transcript
12 was prepared under my direction and control, and to the best of
13 my ability.

14
15 DATED at Phoenix, Arizona, this 2nd day of December,
16 2011.

17
18
19
20 s/Elaine M. Cropper

21 _____
22 Elaine M. Cropper, RDR, CRR, CCP
23
24
25

United States District Court