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*LITIGATION HOLD LETTER*

Dear Mr. Brian,

Last Friday, September 12, Roger Velez sent USAPA and its four National Officers a demand on behalf of the West Pilots. This litigation hold letter is related to that demand. This letter is to provide notice to you, USAPA, and USAPA's leadership to immediately take steps necessary to issue a litigation hold to all of your National Officers, other members of USAPA leadership, pertinent committees and their members, and any staff to preserve all "electronically stored information" (ESI), and other documents, on whatever storage media, device or location, in your possession or control, or the possession or control of those at USAPA that create, control or maintain ESI relating to the claims and defenses to the above referenced matter, and that you avoid spoliation of this ESI. This includes a demand to USAPA and the pertinent personnel at USAPA to suspend all document retention or destruction policies, including but not limited to back up, restoration, deletion, destruction, and tape recycling.

Background:

USAPA has been decertified as the bargaining representative of the US Airways pilots. As such, USAPA, its officers, representatives, and agents have lost many of the federal labor law protections they have enjoyed and of which they have taken advantage since April 2008. After decertification, the individual managers, representatives and agents are all personally charged with fiduciary obligations under both state and federal laws applicable to unincorporated membership organizations. Those who assist, help or aide the managers of USAPA to breach any of their legal duties to the former US Airways pilots, including but not limited to the West Pilots, may subject themselves to individual liability for state tort claims. Any and all such

claims expose all wrongdoers to personal financial risk.

Thus, this litigation hold letter is directed not only to USAPA, but also to the four National Officers, the former East members currently on the BPR, (and those who may be appointed to the BPR,) the members of the USAPA Merger Committee, and their advisors. We demand that all of these entities and individuals maintain and preserve all of the information identified below, whether created, controlled or maintained on USAPA or personal electronic devices.

We expect, based on conduct observed so far, that the individuals in USAPA leadership subject to this demand may not fully understand the risks to which they are exposing themselves, their families, and personal resources if they continue, after decertification, to harm the West Pilots as they and USAPA have, ever since April, 2008.

This morning's statement by the National Officers reflects their intent to deny the West Pilots the means and resources necessary, and to which they are undoubtedly entitled, to pursue their interests in the upcoming pilot seniority integration.

In light of the above, the West Pilots demand the following with respect to document preservation:

*All types of ESI are discoverable*

Courts have unequivocally made it clear that all ESI available on storage media and devices, wherever located, is discoverable. "The law is clear that data in computerized form is discoverable even if paper 'hard copies' of the information have been produced .... [T]oday it is black letter law that computerized data is discoverable if relevant." *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94-2120, 1995 U.S. Dist. LEXIS 16355, at 4 (S.D.N.Y. Nov. 3, 1995); *see also, McPeck v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001); *Linnen v. A.H Robins Co.*, No. 97-2307, 1999 Mass. Super. LEXIS 240 (Mass. Super. Jun. 16, 1999); *Crown Life Ins. Co. v. Craig*, 995 F.2d. 1376 (7th Cir. 1993).

Some of the different types of ESI discoverable, but not limited to, were noted by the Court in *Kleiner v. Burns*, No. 00-2160, 2000 U.S. Dist. LEXIS 21850, at \*11-12 (D. Kan. Dec. 22, 2000):

As used by the advisory committee, 'computerized data and other electronically-recorded information' includes, but is not limited to: voice mail messages and files, back-up voicemail files, e-mail messages and files, backup e mail files, deleted e mail, data files, program files, backup and archival tapes, temporary files, system

history files, Web site information stored in textual, graphical or audio format, Web site log files, cache files, cookies, and other electronically-recorded information. The Court noted that they did not intend the list to be exhaustive. *Id.* at 4 n.6.

You are instructed to advise the leadership and personnel of USAPA that even if paper copies of potentially relevant ESI are available that the electronic data still needs to be preserved. In addition, any and all hard copy or electronic materials necessary to understand, translate or interpret the electronic data are required to be preserved.

#### Litigation Hold

A litigation hold is a directive to USAPA, and any officers, directors, personnel, volunteers and staff to preserve ESI or other information pertaining to the dispute with the West Pilots. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y.2003)(" [o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents"); *Wiginton v. CB Richard Ellis*, No. 02-6832, 2003 U.S. Dist. LEXIS 19128, at \*23-24 (D. Ill. Oct. 27, 2003) ("[o]nce a party is on notice that files or documents in their possession are relevant to pending litigation, the failure to prevent the destruction of relevant documents crosses the line between negligence and bad faith, even where the documents are destroyed according to a routine document retention policy"); *Phillips v. Netblue, Inc.*, No. 05-4401, 2007 WL 174459, at \*2 (N.D. Cal. Jan. 22, 2007) ("to preserve means 'to keep safe from injury, harm, or destruction.' Webster's Third New International Dictionary (Unabridged), at 1794 (1976)"); *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443, 449 (C.D. Cal. 2007) (organizations have a duty, without being so ordered by a court, to preserve documents that they reasonably anticipate may be discoverable in anticipated litigation).

#### Time Is of the Essence

It is essential that you act immediately so that USAPA and its leadership, personnel, volunteers and staff preserve this ESI, since electronic information on hard drives and other storage media can be changed, overwritten, or obliterated by normal everyday computer use. The simple acts of booting up a computer, opening a

file, adding new data onto a hard disk, or running a routine maintenance program on a network can alter or destroy existing data without the user's knowledge.

You are also instructed to advise USAPA and its leadership, personnel, volunteers and staff to preserve and not destroy any passwords, decryption procedures (including, if necessary, the software to decrypt the files); network access codes, ID and usernames, manuals, tutorials, written instructions, decompression or reconstruction software, and any and all other information and things necessary to access, view and (if necessary) reconstruct the electronic data relating to the claims or defenses of this matter.

Location of ESI

You are instructed to advise USAPA and its leadership, personnel, volunteers and staff that they have a responsibility to preserve electronically stored information relating to the above referenced matter that is subject to their control regardless of where it may be located or stored. This includes, but not limited to, ESI under your control at suppliers, law firms, consultants, subsidiaries, predecessors, successors, assigns, joint venturers, partners, parents, agents or affiliates located throughout the world. In order to assure that your obligation to preserve documents and things will be met, please forward a copy of this letter to all persons and entities with control or custodial responsibility for the items referred to in this letter.

Residual, Deleted or Ambient ESI

This discovery request also seeks residual or ambient data on storage media and devices such as hard drives, thumb drives and so on used in your computers, which may not be readily available to an ordinary computer user, such as "deleted" files and "file fragments." As you might know, although a user may "erase" or "delete" a file, it remains intact on the storage media or device. However, reformatting, defragmenting, or any other use of the storage media can cause the "deleted" or other ESI to be destroyed. It is imperative that all such activity be stopped because of the critical importance of this ESI to this case.

This residual or "ambient" data generally refers to data that is not generally available to the computer user. It has been defined as follows: Residual Data: Residual Data (sometimes referred to as "Ambient Data") refers to data that is not active on a computer system. Residual data includes (1) data found on media free

space; (2) data found in the file slack space; and (3) data within files that have functionally been deleted in that it is not visible using the application with which the file was created, without use of undelete or special data recovery techniques. The Sedona Principles (2004), Glossary.

### *Specific Computers*

This is notice to refrain from operating (or removing, altering, fixing any storage media or devices) that are reasonably thought to have ESI related to this dispute, including but not limited to, all computer storage media and devices for USAPA, and the computer storage media and devices for all officers, directors, personnel, employees, staff and volunteers.

### *Pack, compress, etc. files*

It is also important that you do not pack, compress, purge or otherwise dispose of ESI files and parts of files unless a true and correct copy of such files is made.

### *Metadata*

Finally, this is to request that all metadata be preserved. There are different kinds of metadata. The Court in *Aguilar v. Immigration & Customs Enforcement Div.*, 255 F.R.D. 350, 353-355 (S.D.N.Y. 2008) defined and identified the different types of metadata: Metadata, frequently referred to as "data about data," is electronically-stored evidence that describes the "history, tracking, or management of an electronic document." ...

There are three types of "metadata."

#### *a. Substantive Metadata*

Substantive metadata, also known as application metadata, is "created as a function of the application software used to create the document or file" and reflects substantive changes made by the user. (citation omitted). This category of metadata reflects modifications to a document, such as prior edits or editorial comments, and includes data that instructs the computer how to display the fonts and spacing in a document. (citation omitted) Substantive metadata is embedded in the document it describes and remains with the document when it is moved or copied

*b. System Metadata*

System metadata "reflects information created by the user or by the organization's information management system." (citation omitted) This data may not be embedded within the file it describes, but can usually be easily retrieved from whatever operating system is in use. .... Examples of system metadata include data concerning "the author, date and time of creation, and the date a document was modified." ... System metadata is relevant . . . if the authenticity of a document is questioned or if establishing "who received what information and when" is important to the claims or defenses of a party. (citation omitted) This type of metadata also makes electronic documents more functional because it significantly improves a party's ability to access, search, and sort large numbers of documents efficiently.

*c. Embedded Metadata*

Embedded metadata consists of "text, numbers, content, data, or other information that is directly or indirectly inputted into a [n]ative [f]ile by a user and which is not typically visible to the user viewing the output display" of the native file .... Examples include spreadsheet formulas, hidden columns, externally or internally linked files (such as sound files), hyperlinks, references and fields, and database information .... This type of metadata is often crucial to understanding an electronic document. For instance, a complicated spreadsheet may be difficult to comprehend without the ability to view the formulas underlying the output in each cell .....

*Reciprocal*

Please be advised that I have instructed my client to similarly preserve all relevant data that resides upon any electronic media within my client's possession or control.

*Paper*

We also seek paper printouts of those documents that contain unique information after they were printed out (such as paper documents containing handwriting,

signatures, marginalia, drawings, annotations, highlighting and redactions) along with any paper documents for which no corresponding electronic files exist.

*Production Format*

ESI and the storage media and devices on which they reside contain relevant, discoverable information beyond that which may be found in printed documents. Therefore, even where a paper copy exists, we seek all documents in their electronic form along with information about those documents contained on the media which is commonly referred to as metadata. (See above regarding the different types of metadata). In order to avoid spoliation of metadata and other ESI, you will need to provide the data requested in its native form on the original media.

*Protect and Chain of Custody of ESI*

It is important that once the ESI has been identified and preserved that it be safeguarded from destruction, alteration or corruption from any cause. This would include taking such security measures, including, but not limited to, restricting physical and electronic access to all electronically stored data directly or indirectly related to the dispute. Further, we would request chain of custody documentation regarding the computer storage media and devices that are the subject of this claim to ensure its authenticity.

*Continuing obligation*

Please advise the USAPA and its leadership, personnel, volunteers and staff that they are under a continuing obligation to preserve ESI relating to the above referenced matter that may come into existence after the date of this letter, or that may exist now or in the future but of which you have no current knowledge.

*Forward Letter*

In order to assure that your obligation to preserve ESI and other documents will be met, you are instructed to forward a copy of this letter to the appropriate officers, directors, employees, staff and volunteers for dissemination to all persons and entities who may have "custody, control or possession" for the ESI relating to this matter.

I look forward to your cooperation in this regard.

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Sincerely,