

Marty Harper (#003416)
mharper@polsinelli.com
Andrew S. Jacob (#22516)
ajacob@polsinelli.com
Jennifer Axel (#023883)
jaxel@polsinelli.com
POLSINELLI PC
CityScape
One East Washington St., Suite 1200
Phoenix, AZ 85004
Fax: (602) 264-7033
Phone: (602) 650-2000
Attorneys for West Pilots

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

Don Addington; et al.,
Plaintiffs,

vs.

US Airline Pilots Ass’n, et al.,
Defendants.

No. CV-13-00471-PHX-ROS

**PLAINTIFFS’ FIRST MOTION IN
LIMINE SEEKING TO PRECLUDE
USAPA FROM PRESENTING
EVIDENCE OR ARGUMENT AS TO
WHY PARAGRAPH 10(h) CAME TO
BE IN THE MOU**

Plaintiffs move for an order *in limine*, precluding USAPA from having USAPA presenting evidence or argument as to why Paragraph 10(h) came to be in the Memorandum of Understanding (“MOU”)

I. Factual Background

At their depositions, USAPA officers and committee members testified that Mr. Szymanski was the only source of evidence as to why Paragraph 10(h) came to be part of the MOU. For example, USAPA President Gary Hummel testified that he assigned Mr. Szymanski to deal with the seniority language that became Paragraph 10(h). [*Hummel Depo.*, 133:15 to 134:3 & 136:14 to 136:21 (Sep. 17, 2013).]¹ He also testified that he does not know why Mr. Szymanski put this language into the MOU. [*Id.* at 146:2

¹ Excerpts of deposition transcripts are attached as Exhibit “A.”

1 to 146:8.] Indeed, every other USAPA officer and committee chairman who was deposed
2 gave similar testimony. [*Bradford Depo.*, 150:1 to 150:19 (Sep. 18, 2013) (Vice-
3 President); *Pauley Depo.*, 78:4 to 78:22 & 79:18 to 80:11 (Sep. 18, 2013) (Chairman
4 Merger Committee); *Ciabatoni Depo.*, 57:22 to 57:24 (Sep. 17, 2013) (Chairman
5 Grievance Committee); *Owens Depo.*, 108:15 to 108:19, 112:10 to 112:20 & 116:19 to
6 116:23 (Sep. 19, 2013) (member Negotiation Advisory Committee (“NAC”) and
7 Chairman Business Intelligence Committee); *Colello Depo.*, 70:11 to 71:11 & 72:20 to
8 73:11 (Sep. 20, 2013) (Chairman NAC).]

9 Having failed to obtain an explanation of USAPA’s actual reasons for Paragraph
10 10(h) from its officers and committee chairmen, the West Pilots sought to take the
11 deposition of the person that all said had such information—Mr. Szymanski. But,
12 Mr. Szymanski (through counsel) refused to timely submit to a deposition. [*O’Dwyer Ltr.*
13 *to Harper* (Sep. 17, 2013).]²

14 After at least two discussions with USAPA’s counsel by telephone, the West Pilots
15 agreed to: (1) take Mr. Szymanski’s deposition in Washington, DC; (2) limit it to three
16 hours; (3) respect attorney-client privilege and work-product; and (4) restrict questions to
17 Mr. Szymanski’s role as merger counsel from May 2012 to February 8, 2013. [*Harper*
18 *email to Martin* (Sep. 26, 2013 3:32 PM).] USAPA, however, did not agree to such terms
19 until after the close of discovery. [*Szymanski email to Harper* (Oct. 2, 2013 at 9:58 AM).]
20 Consequently, Mr. Szymanski was not deposed. [*Harper email to Szymanski* (Oct. 2,
21 2013 at 10:07 AM).]

22 **II. Legal Argument**

23 “The privilege which protects attorney-client communications may not be used both
24 as a sword and a shield.” *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir.
25 1992). Courts will “bar a litigant from testifying later about matters previously hidden
26 from discovery through an invocation of the [Fifth Amendment] privilege.” *United States*
27

28 ² Copies of letter and follow up emails attached as Exhibit “B.”

1 v. *Certain Real Property and Premises Known As: 4003-4005 5th Ave., Brooklyn, N.Y.*,
2 55 F.3d 78, 85 (2d Cir. 2003). Likewise, courts should bar a litigant from introducing by
3 evidence or argument matters that were hidden from discovery by the assertion of
4 attorney-client privilege.

5 USAPA used privilege and work-product (and perhaps feigned ignorance) to
6 prevent timely discovery of the actual reasons for Paragraph 10(h). Consequently,
7 USAPA cannot introduce those reasons as evidence or in argument during the trial.

8 **III. Requested Relief**

9 This Court should issue an order in limine precluding USAPA's witness or counsel
10 from offering any evidence or argument as to why Paragraph 10(h) came to be in the
11 MOU. A proposed form of order is attached and a copy in Word format is being emailed
12 to chambers.

13 Dated this 11th day of October, 2013.

14 **POLSINELLI PC**

15 By /s/ Andrew S. Jacob

16 Marty Harper

17 Andrew S. Jacob

18 Jenifer Axel

19 CityScape

20 One East Washington St., Ste. 1200

21 Phoenix, AZ 85004

22 *Attorneys for West Pilots*

23 **CERTIFICATE OF SERVICE**

24 I hereby certify that on this 11th day of October 2013, I electronically transmitted
25 the foregoing document to the U.S. District Court Clerk's Office by using the ECF
26 System for filing and transmittal.

27 */s/ Andrew S. Jacob*

28 By _____