

1 Marty Harper (#003416)  
2 [mharper@polsinelli.com](mailto:mharper@polsinelli.com)  
3 Andrew S. Jacob (#22516)  
4 [ajacob@polsinelli.com](mailto:ajacob@polsinelli.com)  
5 Jennifer Axel (#023883)  
6 [jaxel@polsinelli.com](mailto:jaxel@polsinelli.com)  
7 POLSINELLI PC  
8 CityScape  
9 One East Washington St., Suite 1200  
10 Phoenix, AZ 85004  
11 Fax: (602) 264-7033  
12 Phone: (602) 650-2000  
13 *Attorneys for West Pilots*

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

16 Don Addington; et al.,  
17 Plaintiffs,

18 vs.

19 US Airline Pilots Ass'n, et al.,  
20 Defendants.

No. CV-13-00471-PHX-ROS

**PLAINTIFFS' SECOND MOTION IN  
LIMINE SEEKING TO PRECLUDE  
USAPA FROM PRESENTING  
EVIDENCE OR ARGUMENT THAT  
ITS DATE-OF-HIRE SENIORITY  
SCHEME IS MORE EQUITABLE OR  
FAIR THAN THE NICOLAU AWARD**

21 Plaintiffs move for an order *in limine* that USAPA may not present evidence or  
22 argument that its date-of-hire seniority scheme is more equitable or fair than the Nicolau  
23 Award. This order would preclude, in full, the so-called expert testimony of Robert  
24 Davison, preclude, in part, the testimony of Dean Colello and Jess Pauley, and preclude  
25 the introduction of USAPA's Trial Exhibits Nos. 105-110, 122, 140-141, 146, 217-222,  
26 224-225.<sup>1</sup>

27 <sup>1</sup> Plaintiffs recognize that the Exhibits proposed by USAPA have numbering that  
28 overlaps with the Exhibits proposed by Plaintiffs and that this will need to be corrected  
prior to trial.

1 **I. Factual Background**

2 At the hearing held on May 14, 2013, this Court stated that it “would look at  
3 anything subsequent to my order [referring to the order resolving the 2010 declaratory  
4 judgment action] to determine whether or not there was a violation of the duty of fair  
5 representation [in this case].” [RT at 6:14 to 6:17.] Although, a limited amount of  
6 background facts must be addressed to explain the origins of the current dispute, the  
7 merits or fairness of the 2007 Nicolau Award itself are not at all relevant to the claims  
8 and defenses in this action. Indeed, in the related declaratory judgment action, this Court  
9 correctly stated: “An impartial arbitrator’s decision regarding an appropriate method of  
10 seniority integration is powerful evidence of a fair result.” [Doc. 193 (10-cv-01570-  
11 ROS).] These two statements by this Court make clear that this trial will not be a redo of  
12 the merits of the Nicolau arbitration.

13 USAPA apparently thinks otherwise. In the Proposed Pretrial Order, it states that it  
14 intends to have East Pilot Bob Davison testify to the “effect of the Nicolau Award on his  
15 career and career expectation, and USAPA’s 2008 Conditions and Restrictions proposal  
16 and its effect on pilot career expectations.” [Doc. 206-1 at 59.] USAPA also plans to have  
17 East Pilots Dean Colello and Jess Pauley testify as to “the effect of the Nicolau Award on  
18 [their] career and career expectations.” [*Id.* at 57.] Apparently, USAPA would use these  
19 witnesses to prove that the Nicolau Award is unfair and inequitable. But such testimony  
20 was presented and considered during the Nicolau Arbitration. It can only be used to make  
21 a collateral attack on the merits of the arbitration outcome. The Court must not allow this.

22 USAPA also proposes using a number of exhibits that also could only be relevant to  
23 challenging the fairness of the Nicolau Award. To do this, it plans to use the following  
24 categories of exhibits:

- 25 (1) Materials related to the East Pilots’ 2007 appeal of the Nicolau Award to  
26 ALPA [Def.’s Ex. 105, 106];  
27 (2) Pleadings that were filed in the East Pilots’ 2007 litigation challenging the  
28 Nicolau Award [Def.’s Ex. 107-109, 219];

- 1 (3) Materials related to mergers and merger policies that do not apply to these
- 2 pilots (such as the 2009 version of ALPA Merger Policy and the
- 3 United/Continental arbitration award) [Def.'s Ex. 110, 122, 146, 224];
- 4 (4) US Airways Group 10-K and 10-Q filings from 2006 and 2007 [Def.'s Ex.
- 5 139-140]; and
- 6 (5) Lengthy spreadsheets that USAPA produced without any foundational
- 7 disclosures and that appear to analyze the equities of the Nicolau Award
- 8 [Def.'s Ex. 271-218, 220-222, 225].

9 USAPA has not (and surely cannot) explain how such testimony and exhibits could  
10 impact an element of the West pilots' claims, which are based on actions taken by  
11 USAPA beginning in 2012 (or could impact an element of USAPA's affirmative defenses  
12 to those claims). These materials can be used only to re-litigate the merits of the Nicolau  
13 seniority arbitration that was completed more than six years ago. That must not be  
14 allowed.

15 To the extent that USAPA wants to show that there are substantial differences  
16 between the Nicolau Award and its date-of-hire seniority list, there is no need to do so.  
17 No one disputes that point. Indeed, that is why we are here now and have been in almost  
18 continual litigation since 2008. It is because of that substantial difference that USAPA  
19 must have a legitimate union purpose to abandon the commitment in the 2005 Transition  
20 Agreement to implement the Nicolau Award. But, that difference cannot itself provide  
21 the basis for a legitimate purpose. This Court, therefore, should preclude USAPA from  
22 introducing evidence that can only be used to challenge the equity of the Nicolau Award.

## 23 **II. Requested Relief**

24 Plaintiffs ask this Court to issue an order in limine precluding: (1) Mr. Davison  
25 from testifying; (2) Mr. Colello and Mr. Pauley from testifying as to the impact of the  
26 Nicolau Award on their career expectations; (3) USAPA from introducing Defendant's  
27 Trial Exhibits Nos. 105-110, 122, 140-141, 146, 217-222, 224-225 into evidence; and (4)  
28 USAPA's counsel from arguing at trial that the Nicolau Award is inequitable or unfair. A

1 proposed form of order is attached and a copy in Word format is being emailed to  
2 chambers.

3 Dated this 11th day of October, 2013.

4 **POLSINELLI PC**  
5 By /s/ Andrew S. Jacob  
6 Marty Harper  
7 Andrew S. Jacob  
8 Jenifer Axel  
9 CityScape  
10 One East Washington St., Ste. 1200  
11 Phoenix, AZ 85004  
12 *Attorneys for West Pilots*

13 **CERTIFICATE OF SERVICE**

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

17 */s/ Andrew S. Jacob*  
18 By \_\_\_\_\_  
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