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**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’ FOURTH MOTION IN
LIMINE SEEKING TO PRECLUDE
USAPA FROM USING MR.
SZYMANSKI AS A SOURCE OF
EVIDENCE EITHER BY TESTIMONY
OR IN THE COURSE OF ORAL
ARGUMENT**

Plaintiffs move for an order *in limine*, precluding USAPA from using Mr. Szymanski as a source of evidence, either by testimony or in the course of oral argument.

I. Factual Background

Ken Holmes, a member of the USAPA Negotiating Advisory Committee, testified that at a non-confidential MOU Road Show meeting Mr. Szymanski said that USAPA was going to do “whatever [it] can to see that Nicolau never sees the light of day” and that the Nicolau Award was “essentially dead.” [*Holmes Depo.*, 83:21 to 84:9 (Aug. 28, 2013) (also stating Holmes kept a contemporaneous record of this meetings).]¹ His testimony is supported by an East Pilot’s contemporaneously written recollection of that meeting. [*Email from Bill Glynn*, at 3 (Jan. 22, 2013) (stating “Szymanski said the Nic

¹ Attached as Exhibit “A.”

1 was dead”) (Plts.’ Trial Ex. 123).]² Yet, at the May 14, 2013, hearing Mr. Szymanski
2 told this Court that he did not “recall that statement.” [RT at 9:7 to 9:9.]

3 But Mr. Szymanski has never provided sworn testimony on that point. Indeed, when
4 asked, he refused to timely submit to a deposition. [*O’Dwyer Ltr. to Harper* (Sep. 17,
5 2013)]³ After at least two discussions with USAPA’s counsel by telephone, the West
6 Pilots agreed to: (1) take Mr. Szymanski’s deposition in Washington, DC; (2) limit it to
7 three hours; (3) respect attorney-client privilege and work-product; and (4) restrict
8 questions to Mr. Szymanski’s role as merger counsel from May 2012 to February 8,
9 2013. [*Harper email to Martin* (Sep. 26, 2013 3:32 PM).] USAPA, however, did not
10 agree to such terms until after the close of discovery. [*Szymanski email to Harper* (Oct. 2,
11 2013 at 9:58 AM).] Consequently, Mr. Szymanski was not deposed. [*Harper email to*
12 *Szymanski* (Oct. 2, 2013 at 10:07 AM).]

13 **II. Legal Argument**

14 “The privilege which protects attorney-client communications may not be used both
15 as a sword and a shield.” *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir.
16 1992). Courts will “bar a litigant from testifying later about matters previously hidden
17 from discovery through an invocation of the [Fifth Amendment] privilege.” *United States*
18 *v. Certain Real Property and Premises Known As: 4003-4005 5th Ave., Brooklyn, N.Y.*,
19 55 F.3d 78, 85 (2d Cir. 2003). Likewise, courts should bar a litigant from introducing by
20 evidence or argument matters that were hidden from discovery by the assertion of
21 attorney-client privilege.

22 USAPA refused to have Mr. Szymanski timely submit to deposition. Having used
23 privilege and work-product to resist such discovery, USAPA cannot have Mr. Szymanski
24 provide evidence by testimony, or as he did on May 14, in the course of oral argument.

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27 ² Attached as Exhibit “B.”

28 ³ Copies of this letter and the emails that followed are attached as Exhibit “B” to
Plaintiffs’ First Motion in Limine.

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III. Requested Relief

Plaintiffs ask this Court to issue an order in limine precluding USAPA from using Mr. Szymanski as a source of evidence, whether in direct testimony or in the course of oral argument. A proposed form of order is attached and a copy in Word format is being emailed to chambers.

Dated this 11th day of October, 2013.

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By /s/ Andrew S. Jacob

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October 2013, 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 _____