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

18 Don Addington, *et. al.*,)
19)
20 *Plaintiffs,*)
21 v.)
22)
23 US Airline Pilots Association, *et. al.*,)
24 *Defendants.*)
25)
26)

Case No.: CV-13-00471-PHX-ROS
**US Airline Pilots Association's
Opposition to Plaintiffs' Second
Motion in Limine (Doc. 208)**

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1 Defendant US Airline Pilots Association (“USAPA”) hereby opposes Plaintiffs’
2 Second Motion *in Limine*, Doc. 208. The motion should be denied.

3 **Plaintiffs Make No Showing Justifying Their Motion *in Limine***

4 Plaintiffs’ motion is improper as it fails to comply with this Court’s order that
5 “**only** those motions in limine that might result in a substantial saving of time or effort
6 during trial should be filed.” First Amended Scheduling Order, Doc. 195 (emphasis in
7 original); *see also Crane-Mcnab v. Cnty. of Merced*, CIV. 1:08-1218, 2011 WL 94424
8 (E.D. Cal. Jan. 11, 2011) (“The first purpose of a motion *in limine*, protecting the jury, is
9 inapplicable in the context of a bench trial.”) (*citing United States v. Heller*, 551 F.3d
10 1108, 1112 (9th Cir. 2009) (in a bench trial, the need for an advanced ruling on a motion
11 *in limine* to exclude evidence is “generally superfluous”). Plaintiffs make no such
12 showing, and indeed cannot.

14 Plaintiffs’ Claim One and this motion both proceed from an entirely erroneous and
15 thoroughly debunked notion that Nicolau is somehow binding on USAPA when the Court
16 has already ruled (a) that it is not binding, and (b) that USAPA does not violate its duty
17 of fair representation merely by simply proposing or negotiating for another seniority
18 regime. Order, 2:10-cv-01570-ROS, Doc. 193, pp. 1, 7-8 (D. Ariz. Oct. 11, 2012). There
19 are many reasons USAPA had for agreeing to defer seniority integration issues in
20 accordance with the process set forth in paragraph 10 of the MOU. While USAPA has
21 shown in its summary judgment motion that Plaintiffs cannot satisfy their burden to show
22 that USAPA breached its duty of fair representation by entering into a seniority neutral
23 MOU, USAPA nevertheless contends that even if it were somehow required to resolve
24 seniority integration in the MOU, it would not have been required to include Nicolau for
25 a variety of reasons, some of which are discussed below, including because the
26 detrimental effect of the Nicolau list on East Pilots and unwarranted windfall for West
27 Pilots at the expense of East Pilots meant it would never be ratified. Whether that is
28

1 characterized as “a fairness consideration” or an equitable situation, USAPA is entitled to
2 show that Plaintiffs’ claims must fail because it would surely fall within USAPA’s “wide
3 range of reasonableness” to take into account the impact of the Nicolau list on its
4 membership as a whole. Indeed not to do so and to simply adopt a non-binding
5 arbitration decision that was a bargaining proposal with US Airways nine years after the
6 merger snapshot utilized by Nicolau without consideration of its impact in the context of
7 seniority integration with APA would not be consistent with acting in the best interest of
8 the membership. *Hendricks v. Airline Pilots Ass’n Int’l*, 696 F.2d 673 (9th Cir. 1983) (no
9 breach of duty of fair representation by agreement to eliminate contract provision
10 enabling pilots to earn extra compensation in light of changed circumstances). *See also*
11 *Hays v. Nat’l Elec. Contractors Ass’n, Inc.*, 781 F.2d 1321, 1324 (9th Cir. 1985)
12 (rejecting claim for breach of duty of fair representation where collective bargaining
13 agreement changed due to changed job opportunities).¹ Plaintiffs’ assertion that they
14 should be permitted to sue on Nicolau but Defendant should somehow not be permitted to
15 address it is baseless. For example, it would be fundamentally unfair to permit Plaintiffs
16 to present “graphics that illustrate the East/West distribution of seniority by date-of-hire
17 and by the Nicolau Award, as it was in 2007 and as it is today, and how seniority position
18 impacts a pilot’s ability to have a more desirable, higher paying position” (Doc. 206-1, at
19 54, testimony from “shall call” witness Brian Stockdell) while denying USAPA the
20 ability to present evidence about the effect of the Nicolau Award, both in 2007 and now,
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23 ¹ Plaintiffs cannot have it both ways. They cannot avoid this Court’s prior ruling that
24 USAPA was not required to negotiate for Nicolau and at the same time preclude USAPA
25 from offering all relevant evidence about why it determined or would determine not to
26 negotiate for Nicolau. Their quotation of one sentence in the Court’s ruling, that Nicolau
27 is “evidence” of fairness, ignores the holding in that case that USAPA is free to negotiate
28 another seniority regime and further ignores what Plaintiffs’ counsel conceded at the
preliminary injunction hearing, that there are many fair seniority regimes. Reporter’s
Transcript of Court Hearing (In-Court Hearing re Proposed Scheduling Order), Doc. 162,
pp. 55-56 (Aug. 15, 2013).

1 on the legitimate unmerged career expectation of the pilots it represents.

2 The purpose of testimony to be offered primarily by Robert Davison and Jess
3 Pauley concerning seniority is to explain to the Court, among other things, (1) how the
4 Nicolau Award would have affected the pilots represented by USAPA had it been
5 implemented in 2007 when it was issued and (2) how the Nicolau Award would affect the
6 pilots if it were implemented today. USAPA believes that any legitimate discussion of
7 seniority begins with the two lists that were in existence before the 2006 merger between
8 US Airways and America West and that are still in existence today, not with the Nicolau
9 list which was the result of an internal ALPA process, was never included in any
10 collective bargaining agreement as contemplated by the 2005 Transition Agreement, was
11 never ratified and has never gone into effect. It is critical to USAPA's position in this
12 case that the Court understand the effect the Nicolau Award would have on the pilots to
13 demonstrate the level of dissatisfaction with the Award, why an MOU that contained
14 Nicolau would have made ratification impossible (which is a reason that the company did
15 not want the MOU to contain any reference to seniority integration other than it would be
16 governed by McCaskill-Bond, and why it was reasonable for USAPA to agree to an
17 MOU that was neutral with respect the Nicolau Award). Being precluded from
18 presenting this evidence, as Plaintiffs request, would prejudice USAPA and would keep
19 from the Court facts clearly relevant to the matters at issue in this case.
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21 Moreover, it is unfair and prejudicial to allow Plaintiffs to adduce the evidence
22 they intend to present through witness Brian Stockdell while precluding USAPA from
23 presenting similar evidence from Robert Davison. Brian Stockdell is being presented by
24 Plaintiffs as an "expert" with respect the seniority lists and graphics based on those lists.
25 Robert Davison is in all respects his counterpart for USAPA, presenting evidence
26 concerning the seniority lists and the effect of the Nicolau Award. Plaintiffs should not
27 be allowed to present evidence through witness Stockdell while Robert Davison is
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CERTIFICATE OF SERVICE

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I hereby certify that on October 16, 2013, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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