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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
Reply in Further Support of Motion
to Continue Trial Date Due to
Serious Illness of Principal
Witness/Party Designee**

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1 Defendant US Airline Pilots Association (“USAPA”) submits this reply with
2 respect to its motion for continuance (Doc. 221) and the opposing papers filed by
3 Plaintiffs (Doc. 222) and US Airways (Doc. 223).

4 In its motion for continuance, USAPA demonstrated that it satisfied the four
5 factors courts consider on motions for continuance. USAPA established that it has been
6 diligent, that the continuance would serve a useful purpose for USAPA and that there was
7 no inconvenience or prejudice asserted by either Plaintiffs or US Airways. *See Armant v.*
8 *Marquez*, 772 F.2d 552, 556 (9th Cir. 1985), citing *United States v. Flynt*, 756 F.2d 1352,
9 1358 (9th Cir.1985).

10 Neither Plaintiffs nor US Airways challenge that USAPA has established the
11 criteria for a continuance. Critically, neither Plaintiffs nor US Airways assert that they
12 will suffer any inconvenience or prejudice if the Court grants the motion. Given that there
13 are at least 11 weeks until the District Court in the DOJ anti-trust lawsuit will even hear
14 closing arguments in that case and given that the parties to that case agreed that they will
15 not complete the planned merger for at least seven days following entry of judgment,
16 USAPA’s request that the trial be continued to enable Capt. Hummel to attend causes no
17 harm to any party to this litigation.¹

18 The entirety of Plaintiffs’ opposition rests on the spurious claim that, despite the
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21 ¹Indeed, this should have been a matter of simple professional courtesy. *See, e.g.*, Andra
22 Barmash Greene, *No Good Deed Goes Unrewarded: Why Professional Courtesy*
23 *Advances your Client’s Cause*, 39 ABA Litig. J. No. 1 (Winter 2013) (defining
24 professional courtesy as “granting appropriate continuances” especially when
25 necessitated by extenuating circumstances where, as the case here, doing so does not
26 harm the client’s position.) *See also* David Grenardo, *Making Civility Mandatory:*
27 *Moving From Aspired to Required*, 11 Cardozo Pub. L. Pol’y & Ethics J. 239, 275-76
28 (Spring 2013) (in support of argument for mandatory civility codes citing as an example,
of failing to temper zealous advocacy with civility, a lawyer who, knowing his client will
not be prejudiced if a summary judgment motion is heard a few weeks later than
currently scheduled, debates the tactical advantages of refusing to agree to a request for a
continuance similar to the one sought here).

1 centrality of Capt. Hummel as a witness in USAPA's defense (which USAPA long
2 signaled by identifying Capt. Hummel in its initial disclosures), Capt. Hummel denied
3 having personal knowledge about some matters Plaintiffs assert are material to this case.
4 Not only does Plaintiffs' cherry-picked review of Capt. Hummel's deposition give a
5 misleading portrayal of the extent of his knowledge about matters that are at the heart of
6 this matter, many of the matters he will testify to are matters key to USAPA's defense
7 which he was not questioned about at all in his deposition. These are issues that are
8 equally critical for the Court to hear and to create a full record with respect to the matters
9 in contention. Further, USAPA will suffer prejudice and its ability to question witnesses
10 will be severely undermined if Capt. Hummel is not able to participate in the trial and to
11 hear and confer with counsel regarding the testimony presented. Capt. Hummel was
12 present (and in some cases the only USAPA officer present) during many conversations,
13 statements and meetings that are relevant to this case. Contrary to US Airways'
14 argument, the harm in proceeding in the absence of USAPA's designated representative
15 cannot be remediated by providing that the parties travel at some future date to Capt.
16 Hummel's location to permit him to testify.²

18 USAPA makes some preliminary observations before addressing Plaintiffs'
19 mischaracterizations of Capt. Hummel's deposition testimony. First, USAPA is not
20 bound by the questions asked by *Plaintiffs* at Capt. Hummel's deposition and should not
21 be constrained to rest on those questions asked in the manner that they were asked. No
22 one anticipated this event: Capt. Hummel's deposition was not taken in lieu of trial
23 testimony and USAPA did not examine him, fully expecting that he would be available
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25
26 ² Nor does that make sense. As Mr. Szymanski stated in the conference call with
27 Chambers, Capt. Hummel cannot participate in a deposition for at least 4 weeks
28 following surgery but should be able to travel 6 weeks after surgery. It makes no
sense to disrupt the continuity and flow of the proceedings to the prejudice of USAPA
for a difference in two weeks between allowing Capt. Hummel to testify and allowing
him to attend the entire trial as USAPA is requesting.

1 for trial. USAPA has a right to present testimony of its witnesses – to say nothing of its
2 key witness -- in the manner it chooses.

3 Second, it is critical for the Court to hear directly from Capt. Hummel in person at
4 trial, in part to show the Court that USAPA has acted reasonably and responsibly and
5 consistent with its duty of fair representation considering the longstanding dispute and the
6 unanticipated opportunity presented to USAPA for long overdue wage and benefit
7 increases in connection with the merger.

8 Turning then, to the premise of Plaintiffs’ argument – that Capt. Hummel had no
9 personal knowledge about critical areas – this assertion is contrary to the facts. While
10 Plaintiffs cherry-pick some areas of questioning (not all relevant) to which Capt. Hummel
11 did not know the answers, there were many other key areas that were addressed in his
12 deposition that show he has personal knowledge of the limited facts Plaintiffs chose to
13 adduce during the deposition, including the following:

- 14 • appointments of West Pilots to the Merger Committee and the reasons for
15 the appointments (Hummel Dep. (Sept. 17, 2013), 10-14);
- 16 • meeting and telephone conversations both individually and jointly with US
17 Airways officials and representatives from the American Airlines pilots
18 union at which he was the sole USAPA officer present including in
19 discussions in which the those parties voiced their concerns that seniority
20 had to be addressed solely through a process consistent with McCaskill-
21 Bond (*i.e.* seniority neutral) (*Id.* at 48-50);
- 22 • discussions with, and directives to, members of the USAPA NAC and
23 others regarding various paragraphs of the MOU, including 10(h) and his
24 specific instructions to the effect that the MOU had to be seniority neutral,
25 that he would obtain a solution to the seniority issue, and that the NAC
26 should address other issues, among other matters (*Id.*, at 132-37, 146);
- 27 • composition of the merger committee and why it is fair and equitable in
28 terms of representing the West Pilots in seniority integration with the APA
 (*Id.* at 107-110);
- USAPA’s “legitimate union purpose” for not dealing with seniority in the

1 MOU other than to provide for a process consistent with McCaskill-Bond
2 (*Id.* at 155)

- 3
- 4 • BPR authority given to the Merger Committee (*Id.* at 18);
 - 5 • why Change of Control was important, that the Company want it waived,
6 that it was something only the East Pilots had and that it was his position
7 that it should be waived in return for economic benefits for all the pilots
8 (*Id.* at 65-68);
 - 9 • discussions with the National Mediation Board regarding negotiations with
10 US Airways as part and parcel of the reasons the MOU benefits all US
11 Airways' pilots (*Id.* at 85-87);
 - 12 • matters that occurred in Dallas from mid-December through Christmas,
13 2012 when MOU II was being negotiated (*Id.* at 127-29).

14 Some of these areas were not fully developed by Plaintiffs and/ or were inquiries
15 made through inadmissible questions. USAPA has the right to fully develop through
16 admissible evidence the testimony of Capt. Hummel on these issues. In addition to the
17 foregoing matters, there were other material matters that Plaintiffs did not cover in their
18 deposition of Capt. Hummel that will be presented at trial, including critically, statements
19 made and information presented at the various roadshows during the MOU ratification
20 process and discussions regarding efforts to resolve matters regarding seniority with the
21 West Pilots. As reflected in the proposed joint pre-trial order, two of Plaintiffs' seven
22 "shall call" witnesses (Holmes and Scherff) will address what was said or not said at
23 these roadshows (Doc 206-1, at 54). Only Capt. Hummel (for USAPA) was present at all
24 of the roadshows. His assistance and testimony will be critical on this topic and USAPA
25 will suffer prejudice without it.

26 It is also expected that Capt. Hummel will present additional testimony concerning
27 the extent to which the objectives in the USAPA Constitution limit or do not limit
28 proposals that can be made in the seniority integration proceeding with APA and respond

1 to testimony the other parties will present at trial. For example, in the pre-trial order,
2 Plaintiffs indicate that Jeff Koontz (a “shall call” witness for Plaintiffs) will likely testify
3 about the manner in which the West Pilots are “treated” by USAPA in contexts other than
4 the East/West seniority dispute. Capt. Hummel is *the* witness for USAPA on this point;
5 he will testify that under his leadership USAPA reached out immediately after he
6 assumed office and repeatedly thereafter to include West Pilots in various USAPA
7 matters.

8
9 Moreover, USAPA will present Capt. Hummel’s testimony concerning matters
10 raised by US Airways’ motion for summary judgment, including: USAPA’s relationship
11 with West Pilots and Capt. Hummel’s inclusion of West Pilots in USAPA Committees
12 and other activities; his view of what the USAPA Constitution allows with respect to
13 seniority; and the scope of authority of the Merger Committee.

14 Finally with respect to Plaintiffs’ opposition, it should be noted their sleight of
15 hand in making their argument. Plaintiffs’ argument herein rests upon an unjustified
16 elevation of the importance of paragraph 10(h) of the MOU, as opposed to the issue as
17 framed by the Court, which is that USAPA breached its duty of fair representation when
18 it entered into the MOU because the MOU does not require USAPA to use the Nicolau
19 Award in the McCaskill-Bond process. (Doc. 122, at 4) Paragraph 10(h) of the MOU is
20 part of this analysis, but not to the extent that Plaintiffs advance. As shown above, Capt.
21 Hummel has first hand knowledge regarding the positions of the companies as to why
22 Nicolau is not part of the MOU and he issued directives to the NAC on this point. The
23 record would be incomplete without hearing from Capt. Hummel on this issue as framed
24 by the Court.

25 US Airways’s opposition (Doc. 223) can be responded to summarily.

26 First, to its point about delay, USAPA has never sought to delay the case merely
27 for purposes of delay. Intervenor’s attempt to equate this request for a continuance due to
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1 Capt. Hummel's cardiac surgery with USAPA's legitimate legal position that no trial
2 should proceed and that the case should be dismissed, *inter alia*, for lack of ripeness and
3 standing (which the Court stated present "very difficult issues regarding standing and
4 ripeness," Doc. 194 p. 4), is uncalled for and inappropriate. While there is no question
5 that USAPA continues to believe trial of this case is premature given the pending DOJ
6 action, it has diligently been preparing for trial. USAPA seeks to protect its interests and
7 preserve its right to present its defenses as planned and prevent the prejudice that will
8 ensue if it is forced to go forward without the assistance and testimony of USAPA's
9 President, its chief officer, key actor, and principal witness.

10
11 Second, US Airways' suggestion that because there is no "guarantee" that Capt.
12 Hummel will be able to attend a trial in precisely six weeks, the continuance should be
13 denied is preposterous coming from a party that is insisting on trying this case despite its
14 clear inability to "guarantee" that it will prevail in the lawsuit seeking to permanently
15 enjoin the merger. All parties to this case have agreed that without the merger, there is no
16 case. Nevertheless, US Airways, citing its own "significant protectable interest" is
17 perfectly comfortable with proceeding in the face of uncertainty about the merger and is
18 apparently content to trample USAPA's significant protectable interest in providing the
19 best defense to Plaintiffs' claims in the process.

20 Third, there is no merit to US Airways' argument that USAPA's motion for
21 summary judgment is inconsistent with its request for continuance. US Airways also
22 made a motion for summary judgment yet fully participated in the drafting of the Joint
23 Pretrial Order and presumably intends to participate in the trial. Indeed, it is opposing the
24 continuance of the trial despite its claim that there are no factual issues in dispute. It is
25 perfectly obvious the motion for summary judgment is an alternative remedy and neither
26 constitutes an implicit or express waiver of the right to provide a full defense to the
27 claims at trial.
28

1 Fourth, US Airways' suggestion for proceeding in the absence of Capt. Hummel
2 fails to address the prejudice to USAPA that will result from having to proceed without
3 the assistance of Capt. Hummel as other witnesses testify about events at which Capt.
4 Hummel was present (including events at which only Capt. Hummel was present on
5 behalf of USAPA) or statements attributed to Capt. Hummel. The effectiveness of
6 USAPA's examination and cross-examination will be adversely affected, which cannot
7 be redressed by having Capt. Hummel testify at some other time. Consequently, USAPA
8 will be prejudiced.

9
10 **CONCLUSION**

11 For the foregoing reasons and those argued in the motion (Doc. 221), USAPA
12 respectfully requests that the Court grant its motion for continuance.

13 Respectfully submitted this 17th day of October 2013.

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I hereby certify that on October 17, 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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