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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.

Case No. 2:13-cv-00471-ROS

**PLAINTIFFS' MOTION TO STRIKE
DEFENDANT USAPA'S MOTION TO
INCLUDE THE DECLARATION OF
GARY HUMMEL**

21 Once again, USAPA has demonstrated to the Court that it cannot understand or
22 respect this Court's orders, whether from seven days ago or last October. The declaration
23 that USAPA moves the Court to admit in to evidence was not the declaration provided to
24 Plaintiffs' counsel last Friday, which itself was strenuously objected to by Plaintiffs. To
25 be clear, USAPA has just moved the Court to admit a declaration into evidence that is not
26 the same as Plaintiffs were previously provided. USAPA's attempt to admit a declaration
a week after trial closed in direct violation of the Court's directive is completely
inappropriate and a blatant attempt by USAPA to skew the record in this matter after trial
was completed seven days ago.

1 The Court was unequivocal in its ruling that USAPA was to:

2 submit the information by affidavit that he [Captain Hummel] would testify
3 to, provide it to plaintiffs' counsel, Mr. Harper. If Mr. Harper is inclined to
4 say, well, he would have many questions to ask him based upon what he
5 would testify to and that cannot – that really takes care of it, then his
6 testimony will not be considered by the Court.

6 Trial Transcript, Day 2, at 359:19-360:2.

7 After the initial (unsigned) declaration was provided to Plaintiffs' counsel on
8 Friday, October 25, 2013, Plaintiffs indicated that they would not agree to its inclusion in
9 the record and indeed asked how Captain Hummel was well enough to review the trial
10 transcript in detail despite Mr. Szymanski's representation to the Court two days prior
11 that Captain Hummel was not healthy enough to testify. Plaintiffs received no response
12 over the weekend so they filed with the Court on Monday, October 28, 2013, a notice that
13 it did not agree to the declaration being submitted to the Court.

14 Although USAPA continues to assert that "Mr. Hummel was medically unable to
15 testify by telephone on October 23, 2013", it has provided **no evidence** to the Court from
16 Captain Hummel's surgeon that this was the case. It is directly contrary to what Dr.
17 Gleason told the Court and Plaintiffs' counsel during the call held on October 17, 2013.
18 It is also inconsistent with Captain Hummel having the capacity to provide a detailed
19 fourteen-page long declaration two days later.

20 USAPA was afforded several opportunities by the Court to establish, via a
21 physician, that Captain Hummel was unable to testify. It failed to do so, after which the
22 Court provided specific guidance on how additional testimony "might be provided."
23 Instead of following the Court's directive, USAPA now demands the Court allow Captain
24 Hummel's "declaration", which is nothing more than an attempt by counsel to include
25 evidence not admitted at trial so that USAPA can make a closing argument on evidence
26 that is not in the record. It is also a blatant attempt to undermine the credibility of
27 Plaintiffs' witnesses, without allowing Plaintiffs' to spontaneously cross-examine Captain
28 Hummel or give the Court the opportunity to judge Captain Hummel's credibility.

1 USAPA's attempt to take advantage of Captain Hummel's illness is yet another, in a very
2 long line, of unethical and untrustworthy behavior by USAPA and its counsel.

3 Captain Hummel's "declaration" purports to include detailed evidence of the
4 number of pilots eligible to vote (without providing who or where this information came
5 from) and the names of each West committee member, much of which is inaccurate and
6 stale information. It is apparent that the recitation of this type of information is not
7 something Captain Hummel would have offered if he was on the witness stand. This is
8 an attempt by USAPA to supplement the record with information contained in documents
9 which it neither admitted at trial nor produced in discovery. This information is also the
10 type of evidence that could have been offered by any of the other USAPA officers –
11 Captain Bradford, Steve Smsyer or Rob Streble. Yet, USAPA chose not to call any of
12 these individuals and instead wait a week until after trial to attempt to include this
13 evidence via Captain Hummel's declaration.

14 That USAPA claims Plaintiffs are benefitting from a "windfall" if Captain
15 Hummel's declaration is excluded is on its face absurd. To the contrary, Plaintiffs would
16 have preferred if Captain Hummel had been available to testify at trial and as
17 demonstrated by Exhibit B to USAPA's Motion, attempted to work with USAPA's
18 counsel to make that happen.¹ It will come as no surprise to the Court that the email that
19 is now Exhibit B to USAPA's Motion was never responded to by USAPA's counsel. In
20 this email, USAPA makes a vague offer to make Captain Hummel available for a
21 deposition when he is able to leave his house, sometime in early November. The Court
22 has set deadlines for the parties to file briefing on October 31, 2013, November 6, 2013
23 and November 13, 2013. The Court should not hold this matter in abeyance to some
24 point in the future when USAPA makes a unilateral determination that Captain Hummel
25 has been "sandpapered" sufficient to allow him to withstand "aggressive" cross-
26 examination.

27
28 ¹ As indicated on the record, Plaintiffs also were anticipating that Captain Bradford
would testify in-person. USAPA did not bring him.

1 As the Court is aware, USAPA has repeatedly tried to delay the merits of this
2 litigation and its Motion now is nothing more than an attempt one more time to do so.
3 The fact that this Motion was not filed sooner and comes the day after US Airways
4 announced that it would be going to mediation with the Department of Justice is simply
5 more evidence of its bad faith. One additional issue for the Court to note, which was
6 previously addressed in Plaintiffs' response to USAPA's Motion to Continue Trial, Doc.
7 222, is that Captain Hummel did not have first-hand knowledge of most of the matters
8 relating to this litigation when deposed in mid-September. At this point, it's clear that
9 Captain Hummel was "sandpapered" to know nothing. Now they intend to reverse the
10 direction of the sandpapering and make him a "know-it-all"

11 The practical effect of what USAPA is proposing is to extend this trial by a lot
12 more than just a few hours. If what has been submitted is really Captain Hummel's
13 declaration, and not Mr. Szymanski's vision on how he wished the trial would have
14 ended, then Plaintiffs' counsel will need to explore just how Captain Hummel was able to
15 analyze, digest and comment on over 400 pages of trial testimony in the 48 hours after
16 the trial closed at 4:45 p.m. on Wednesday, October 23, 2013. Just that and much more
17 will take time.

18 As shown to the Court at trial, USAPA will do anything it possibly can to avoid a
19 resolution on the merits of this litigation. This latest attempt, which is a blatant violation
20 of the Court's rulings on these issues, is simply a further extension of this attitude and
21 underscores the need for the Court to make a swift determination on this Motion. It also
22 demonstrates that the Court must unequivocally order that USAPA use the Nicolau Award
23 because USAPA has shown the Court that it cannot be trusted to act in an ethical or fair
24 way towards the West Pilots. Plaintiffs' respectfully request the Court strike USAPA's
25 Motion.
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RESPECTFULLY SUBMITTED this 30th day of October, 2013.

POLSINELLI, PC

By: /s/ Jennifer J. Axel

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2013, I electronically transmitted the foregoing document to the U.S. District Court Clerk’s Office by using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing on all parties to this case who are registered participants of the CM/ECF System.

By: /s/ Jennifer J. Axel

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