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11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE DISTRICT OF ARIZONA**

13 Don Addington, et al.,

14 Plaintiffs,

15 vs.

16 US Airline Pilots Ass'n, et al.,

17 Defendants.

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

**PLAINTIFFS' SUMMARY OF
EVIDENCE**

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I. OVERVIEW

1
2 The seniority provisions in the 2005 Transition Agreement (“2005 TA”) require US
3 Airways and USAPA to cooperate with implementation of the Nicolau Award as part of
4 any contract that provides a single set of wages and other terms of employment for all US
5 Airways pilots (the “Single Agreement”). [Ex. 113.] MOU #2 is such a contract because
6 it provides such wages and terms of employment. [Ex. 24.] The requisite preponderance
7 of evidence shows that USAPA drafted ¶ 10.h in MOU #2 to nullify the 2005 TA
8 seniority integration provisions and that it did so for no legitimate union purpose.
9 [Ex. 115.] This establishes that USAPA breached its duty of fair representation.

10 The evidence also proves that USAPA has an unwaivable conflict of interest with
11 the West Pilots on the issue of East/West seniority integration. This establishes that the
12 West Pilots are entitled to separate and independent representation in the process of
13 integrating seniority between the US Airways and American pilots.

II. OBLIGATION TO USE THE NICOLAU AWARD

14
15 The 2005 TA defined procedures for creating and implementing an integrated
16 East/West seniority list. [Ex. 113 at ¶ VI.A; Ex. 115 at 6:4 to 6:20.] Those procedures
17 will be in effect until sometime after the effective date of the American Airlines Plan of
18 Reorganization (“POR Date”). [Dean Colello (East Pilot Chairman of USAPA
19 Negotiating Advisory Committee (“NAC”)).] MOU #2 states that “each term of the MTA
20 [essentially, the America pilots’ contract] shall be applicable to all US Airways pilots at
21 the earliest practicable time” and “[o]nce the MTA has been fully implemented, it shall
22 fully displace and render a nullity any prior collective bargaining agreements applicable
23 to US Airways pilots [such as the 2005 TA].” [Ex. 24.] Without ¶ 10.h, MOU #2 does not
24 directly impact the 2005 TA seniority integration provisions and does not specify when
25 the TA will overall be rendered a nullity. [*Id.*] Absent ¶ 10.h (as it is read by USAPA),
26 the TA seniority provisions will be in effect for some time.

27
28

1 **III. USAPA PRIMARILY EXISTS TO PREVENT IMPLEMENTATION OF**
2 **THE NICOLAU AWARD.**

3 **A. USAPA was formed to avoid implementation of the Nicolau Award.**

4 Stephen Bradford, current Vice President, former President and principal founder of
5 USAPA, and Robert Davison, member USAPA Merger Committee, formed USAPA to
6 prevent implementation of the Nicolau Award in the US Airways/America West merger;
7 and in any subsequent merger with a third airline. [Bradford; Davison.] In a May 2007
8 email, Mr. Bradford wrote: (1) the East Pilots must “leave ALPA if Nic stands”; (2) they
9 “want a say in the next merger”; and (3) “We will write our own merger policy into our
10 bylaws . . . even if we are out-voted by ALPA in another election as a result of a merger.”
11 [Ex. 36.] USAPA’s goal from the start, therefore, was to get better pay for East pilots
12 (either in the 2005 merger or a subsequent merger) but only if it could do so without
13 implementing the Nicolau Award. [Bradford.] USAPA believes it accomplished this with
14 MOU #2. [*Id.*]

15 **B. USAPA’s constitution precludes implementation of the Nicolau Award.**

16 Date-of-hire East/West seniority integration is USAPA’s “centerpiece.” [*id.*] That
17 principal is “enshrined” in USAPA’s constitution. [*Id.*] Implementing an unmodified
18 Nicolau Award would violate that principal. [Paul DiOrio, deposition (former NAC
19 chairman, current member USAPA Board of Pilot Representatives (“BPR”)); Steve
20 Crimi, deposition (East Pilot BPR member).]

21 West Pilot John Scherff, chairman of the Phoenix domicile and BPR member, made
22 repeated attempts to amend the USAPA Constitution to make it seniority neutral or to
23 allow for implementation of the Nicolau Award. [Scherff; Ex. 22, 73.] Each time, the
24 East Pilot BPR majority blocked such efforts. [*Id.*] Indeed, East Pilot BPR members
25 would oppose any such efforts in the future to make the USAPA Constitution “seniority
26 neutral.” [DiOrio.] There is no question, therefore, that USAPA’s union constitution
27 precludes implementation of an unmodified Nicolau Award.
28

1 **C. The East Pilot majority can prevent implementation of the Nicolau**
2 **Award.**

3 USAPA has never used, and has no plans to use, a neutral process such as
4 arbitration by an unconflicted third-party to decide a fair method of East/West seniority
5 integration (something akin to the Nicolau arbitration or the arbitration that would be
6 conducted under McCaskill-Bond). [Pauley.] Indeed, as many witnesses testified,
7 USAPA would have to amend (or ignore) its constitution before it could do so. Rather,
8 USAPA will decide East/West seniority integration by majority rule: “It’s a democratic
9 organization, West pilots are represented, they are represented on the merger committee,
10 they’re represented on the BPR, they have votes” and “Majority gets to rule . . . within
11 the confines of the law.” [Bradford.]

12 Any decision by USAPA to implement the Nicolau Award in the context of the
13 American merger would have to pass multiple levels of approval, each of which is
14 controlled by the East Pilot majority. First, the USAPA Merger Committee must make a
15 recommendation to the BPR on East/West seniority integration that will be consistent
16 with the direction it has received from the BPR. [Jeff Koontz (member of the USAPA
17 Grievance Committee and frequent attendee at BPR meetings); Scherff; Jess Pauley (East
18 Pilot chairman of USAPA Merger Committee).] That recommendation is predetermined
19 because the BPR directed the Merger Committee to recommend a date-of-hire order. [*Id.*]
20 And to ensure that the Merger Committee makes a date-of-hire recommendation, it has a
21 four to two East Pilot majority (who are subject to removal by the President Hummel).
22 Second, the Merger Committee’s recommendation on East/West seniority integration
23 must be approved by a majority of the BPR (which has an eight to three East Pilot
24 majority). Third, approval by the BPR must then be ratified by a majority of the rank-
25 and-file (which has a two to one East Pilot majority). [Gary Hummel, deposition
26 (USAPA President).] Consequently, there is no chance that this process would ever result
27 in the approval and implementation of an unmodified Nicolau Award in the context of
28 integration with the American Pilots. [Koontz; Scherff; Pauley.]

1 Evidence that USAPA has been fair to West Pilots in other contexts and/or has
2 provided somewhat proportionate representation to West Pilots on the BPR and
3 committees is beside the point. [Hummel.] The East/West seniority integration dispute is
4 unique because it has no externalities. By setting up a “democratic” process to decide that
5 issue USAPA has created a predetermined result where a “tyranny of the majority” is
6 empowered to impose a seniority integration that a neutral arbitrator found was neither
7 fair nor equitable. [Ex. 114.]

8 **D. USAPA’s officers are elected based upon their commitment to prevent**
9 **implementation of the Nicolau Award.**

10 When USAPA officers campaign, they promise unconditional support for date-of-
11 hire and suppression of the Nicolau Award. For example, January 20, 2012 campaign
12 materials for Mr. Hummel stated: (1) “My position is, and has always been in support of
13 the USAPA constitution requirement for date of hire with conditions and restrictions”;
14 and (2) “My position on seniority is, and has always been in support of date of hire with
15 conditions and restrictions. However, our seniority will be determined by the courts and
16 should no longer be a contentious issue for anyone.” [Ex. 2.]

17 As another example, March 16, 2012, campaign material stated: “Gary Hummel,
18 Steve Bradford and Steve Smyser remain focused on an impending airline merger and
19 achieving an industry standard contract that merges our seniority list based on date of
20 hire. We unconditionally support DOH with conditions and restrictions as prescribed in
21 the USAPA Constitution.” [Ex. 3.]

22 And as a final example, in a January 31, 2012, message, Mr. Bradford wrote: “Gary
23 . . . supports Date of Hire as enshrined in our constitution. . . . I would not support anyone
24 who did not hold this goal and centerpiece of our union ideals in the vanguard. I was
25 steadfast in support of this concept from the start of our union and I have not deviated
26 from it one bit. I support Gary Hummel and he supports Date of Hire. Why would I help
27 create a union with Date of Hire as a centerpiece and then abandon that creed.” [Ex. 42.]
28

1 **E. To ensure East Pilot support, USAPA consistently misinforms its**
2 **members that it has a sound legal basis to prevent implementation of an**
3 **unmodified Nicolau Award.**

4 From its earliest beginnings, USAPA told the East Pilots that it had a sound legal
5 basis to refuse to implement the Nicolau Award. [Bradford.] In June 2007, for example,
6 Mr. Bradford wrote to the East Pilots: (1) “Nicolau will die if ALPA dies” and USAPA is
7 elected; (2) DFR claims are “hard to prove and difficult to make absent fraud and other
8 criminal activity”; (3) “We have a majority as long as we don’t go too far, we can de-
9 termine seniority via the collective bargaining agreement”; and (4) only “if we leave
10 ALPA, can we get protection in future mergers.” [Ex. 40, 41.]

11 Mr. Bradford and other USAPA leaders continued to misinform the East Pilots after
12 this Court issued its order, in October 2012, terminating the declaratory judgment action
13 (the “October Order”). [Ex. 151.] This order cautioned USAPA that it must have a
14 legitimate union purpose if it makes a contract that abandons the Nicolau Award. It also
15 cautioned USAPA that it must give reasonable and fair consideration to implementing the
16 Nicolau Award in negotiations with US Airways. [*Id.*] Those cautions were well
17 understood by US Airways. [Ex. 13.] They went unheeded by USAPA.

18 For example, after meeting with counsel to discuss the October Order, Mr. Bradford
19 wrote to Mr. Pauley that the order establishes that “USAPA’s [sic] free to use any
20 seniority list it wants . . . provided that there’s a legitimate union purpose for deviating
21 from the Nic.” [Ex. 20.] But Mr. Bradford subsequently gave little thought to legitimate
22 purpose. Rather, he asserted “it is safe to say that there is no legal basis for USAPA to be
23 forced to use the Nicolau award.” [Ex. 17.] He also made statements such as: “There is
24 no basis in law for USAPA to use the Nic.” [*Id.*] And in an October 16, 2012, email he
25 wrote: “I attended a special meeting between our lawyers and the Officers last week after
26 the decision. We have left NOTHING OUT! The win is conclusive and complete.”
27 [Ex. 140 (emphasis in original).]

28

1 In an email copied to USAPA officers, which was written shortly after the October
2 Order, Mr. Bradford wrote as follows: (1) “We won and the company is under a positive
3 duty”; (2) “When Judge Rosslyn Silver said we were free to negotiate for the Nicolau
4 Award she was making a legal order”; (3) “There is no legal basis for USAPA to be
5 forced to use the Nicolau award. NONE”; (4) “There is no basis in law for USAPA to use
6 the NIC”; and (5) “This is a bigger win than you can imagine. It means that the Nicolau
7 award has no special legal standing and that USAPA is free to negotiate something
8 different.” [Ex. 17 (emphasis in original).]

9 In another email, Mr. Hummel told the chairman of USAPA’s Communications
10 Committee: “Brief your crew . . . no more legal opinions or debates emanating from
11 USAPA. We won, it’s over and we are moving on. That’s all that needs to be said.”
12 [Ex. 18.] A USAPA pilot-to-pilot communication written on October 8, 2012, stated:
13 (1) USAPA “is free to use whatever seniority list we want”; and (2) “Finally, is the NIC
14 gone? President Hummel said that based on Judge Silver’s proposed ruling it is in terms
15 of USAPA not having to use it.” [Ex. 19.]

16 In the same time frame, USAPA published a Charlotte domicile update, that stated:
17 (1) “Common sense would dictate that Judge Silver obviously believes there are
18 legitimate union purposes for setting aside the Nicolau award”; (2) “There is no question
19 that USAPA has a legitimate union purpose – in fact many good reasons – for a seniority
20 proposal different from the Nicolau Award”; and (3) “It is legitimate to integrate
21 seniority based on date of hire.” [Ex. 152.]

22 In contrast, USAPA repeatedly denied Mr. Scherff opportunity to correct such
23 misinformation in a Phoenix domicile update. For example, Mr. Scherff was not allowed
24 to include any commentary in his update on the October Order [Ex. 45], while the
25 Charlotte domicile was allowed to publish partisan commentary such as this “common
26 sense” language. [Scherff.]
27
28

1 **F. USAPA rejected a contract that would have used the Nicolau award.**

2 US Airways' 2007 Kirby proposal has always been open to acceptance by USAPA.
3 [DiOrio.] That proposal, if it had been accepted by USAPA, would have implemented the
4 Nicolau Award. [Koontz.] It would now be paying about the same wages that will be paid
5 under MOU #2. [Bradford.] So USAPA's claim that MOU #2 has "unprecedented"
6 benefits is not supported by the facts. Rather, by turning down a comparable contract
7 offer made back in 2007 because it would have led to implementation of the Nicolau
8 Award, USAPA caused its members to lose many hundreds of millions of dollars in
9 income. Indeed, other than delaying implementation of the Nicolau award, USAPA has
10 not accomplished anything concrete since it took over in April 2008. [*Id.*]

11 **IV. NEGOTIATION OF MOU #2**

12 **A. In August 2012, USAPA expected that this Court would decide, in the**
13 **declaratory judgment action, whether it had to implement the Nicolau**
14 **Award in the merger with American.**

15 In January 2012 campaign materials, President Hummel stated that whether the
16 pilots would be ordered according to the Nicolau Award or by date-of-hire would be
17 "determined by the courts" and was not something to be decided by USAPA itself. [Ex.
18 2.] As late as mid-December 2012, Mr. Hummel was making similar statements to the
19 NAC. [Ken Holmes (member of the NAC).]

20 Consistent with the views then expressed by Mr. Hummel, when the BPR rejected
21 MOU #1 on August 21, 2012, and directed further negotiation of terms, it expressed no
22 concerns with the seniority language in MOU #1. [Scherff.] The BPR gave no instruction
23 to the NAC, "not one word," to further negotiate the seniority language in MOU #1.
24 [Holmes.] Although, such instructions would go to the Merger Committee [Dean Colello
25 (East Pilot chairman of the NAC)], USAPA provided no evidence that any such
26 instructions were given. Indeed, Mr. Pauley, the Chairman of the Merger Committee,
27 provided no such evidence in his testimony.

28

1 **B. When MOU negotiations resumed on December 10, 2012, USAPA sought**
2 **to include language that would nullify the seniority integration**
3 **procedures in the 2005 TA.**

4 USAPA proposed language for MOU #2 that would have declared that MOU #2
5 was not the “Single Agreement” referenced in § VI.A of the 2005 TA. [Doc. 206-1 at 22,
6 fact #95.] The evident purpose for this language was to prevent the West Pilots from
7 establishing that MOU #2 was the Single Agreement (*i.e.*, was a CBA that provided a
8 single set of wages and working conditions for all US Airways pilots) and to use that to
9 compel implementation of the Nicolau Award during the interval between MOU
10 ratification and full implementation of the MOU (sometime on or after the POR date).

11 Mr. Holmes objected to the “Single Agreement” language after it was proposed by
12 USAPA. [Holmes.] He told Mr. Colello and others, including USAPA’s merger counsel
13 Pat Szymanski, that no West Pilot would vote to ratify an agreement that had such
14 language. [*Id.*] In response to that objection, Mr. Szymanski (presumably with input from
15 USAPA leaders) drafted alternative language that became ¶ 10.h. [Colello.] Mr.
16 Szymanski did not offer testimony to explain the purpose for that language. No other
17 USAPA leader has admitted knowing that purpose. [Hummel; Bradford; Pauley.]

18 The totality of the evidence shows that, from the resumption of MOU negotiations
19 in mid-December 2012, USAPA intended to use ¶ 10.h to accomplish the same goal as
20 the “Single Agreement” language discussed above, but to do it in a manner that masked
21 such intention from the West Pilots. In other words, Mr. Szymanski and others who have
22 not come clean planned to use ¶ 10.h to achieve what Mr. Bradford began back in 2007—
23 the elimination of the obligation to implement the Nicolau Award in the next contract and
24 in the next merger. Clearly, USAPA thought it had achieved that goal.

25 **C. USAPA asserts that ¶ 10.h of MOU #2 nullifies § VI.A of the 2005 TA,**
26 **which requires implementation of the Nicolau Award.**

27 USAPA asserts that “the company and the union and APA and the parties to the
28 MOU [#2] have agreed on a new process for seniority that is not tied to the old transition

1 agreement.” [Bradford.] In effect, USAPA “negotiated, arrived at an MOU . . . which
2 provides for a new seniority process,” and “the Transition Agreement has been
3 amended.” [*Id.*] The MOU purportedly gives USAPA a “clean slate” to create an
4 East/West seniority integration that disregards the Nicolau Award. [Colello.] The MOU
5 seniority integration process, according to USAPA leaders, replaces that in the 2005 TA.
6 [Pauley; Dave Ciabatonni (East Pilot chairman of the USAPA Grievance Committee);
7 Crimi.] In other words, USAPA concedes that it abandoned the requirement in the 2005
8 TA to implement the Nicolau Award as part of a contract that obtains better wages and
9 benefits for US Airways pilots. Having been told, in the October Order, that the device of
10 creating a new union did not wipe the slate clean, USAPA sought to accomplish that end
11 through ¶ 10.h.

12 **D. USAPA did not negotiate additional benefit from the other parties to**
13 **MOU #2 for including ¶ 10.h.**

14 Other parties to MOU #2 (particularly US Airways) wanted a timely and final
15 seniority integration between US Airways and American pilots. [Colello.] US Airways
16 “did not want the seniority to interfere in any way with the merger.” [*Id.*] But there is no
17 evidence that US Airways, American or APA wanted USAPA to have authority to dictate
18 East/West integration without regard to legitimate union purpose. Nor is there evidence
19 that these other parties wanted to exclude the West Pilots from participating in the
20 process of integrating the seniority of the American and US Airways pilots.

21 There was never any discussion or other evidence that USAPA put ¶ 10.h in MOU
22 #2 in exchange for additional money or other benefits. [Holmes.] USAPA did not
23 negotiate the \$40 million payment as part of MOU #2. It came with MOU #1 and was
24 part of MOU #2 from the very start of negotiations in December 2012. [*Id.*] The better
25 pay rates and other improvements in MOU #2 were terms in the 2012 APA CBA (the
26 contract for the American pilots that would eventually apply to US Airways pilots
27 whether or not here was a ratified MOU). [*Id.*] And USAPA negotiated the improvement
28 in retrospective pay terms at least a week after ¶ 10.h was in final form. [*Id.*]

1 Consequently, there is no basis for USAPA to pin ¶ 10.h on US Airways or any other
2 party to MOU #2.

3 US Airways never expressed that it wanted to delay East/West pilot integration
4 during the pendency of the American merger. [Scherff.] In the course of negotiation of
5 MOU #2, there was no deal (or even discussion) with West Pilots to exchange East Pilot
6 waiver of their change of control for West Pilot waiver of the Nicolau Award. [John
7 Owens (East Pilot a member of the NAC).] Rather, ¶ 10.h was a unilateral effort by
8 USAPA to block implementation of the Nicolau Award as required by the 2005 TA.

9 **V. USAPA SERIOUSLY MISLED WEST PILOTS IN REGARD TO MOU #2.**

10 When Mr. Holmes objected to the language in ¶ 10.h and asked Mr. Szymanski why
11 it has to be in the MOU, Szymanski told him only that “it just needs to be in the MOU.”
12 [Holmes.]. He also told Mr. Holmes not to be concerned because MOU #2 had a
13 “completely neutral” effect on East/West seniority integration. [*Id.*] Indeed, witnesses
14 from both sides testified that USAPA told its members that MOU #2 was “seniority
15 neutral.” [Owens; Pauley]

16 Mr. Holmes also voiced serious concerns about ¶ 10.h to Mr. Hummel. [Holmes.]
17 Despite Mr. Holmes repeatedly urging Mr. Hummel to explain ¶ 10.h to the West Pilot
18 BPR members, Mr. Hummel refused to do so. [*Id.*] Indeed, after Mr. Hummel missed
19 three opportunities to provide such an explanation, he told Mr. Holmes in an emphatic
20 manner: “We’re done. This is it. I do not want to hear another word about it.” [*Id.*]

21 Mr. Holmes, therefore, was not given sufficient information to make an informed
22 decision whether to withhold his recommendation for MOU #2 based on ¶ 10.h.
23 Consequently, he reasonably believed that MOU #2 “amend[ed] certain aspects of the
24 Transition Agreement” but did not modify provisions that control “merging the East and
25 West pilots.” [*Id.*]

26 USAPA seriously misled its West Pilot members as to how it planned to use ¶ 10.h.
27 Mr. Holmes and Mr. Scherff attended all the meetings where Mr. Szymanski explained
28 the MOU to USAPA members (East and West) prior to MOU ratification. [Holmes and

1 Scherff.] They observed that Mr. Szymanski told a predominately East Pilot audience that
2 “the Nic. is dead.” [*Id.*] This was confirmed by contemporaneous personal notes made by
3 Mr. Holmes [Ex. 131] and by a contemporaneous email [Ex. 123] written by East Pilot
4 Glynn, a strong date-of-hire advocate. Mr. Owens did not hear Mr. Szymanski make such
5 a statement. [Owens.] But he was not present for all the meetings. [*Id.*] USAPA did not
6 offer anyone else to refute the testimony by Mr. Holmes and Mr. Scherff.

7 In contrast, when talking to a predominately West Pilot audience, Mr. Szymanski
8 said only that the MOU was “neutral” on seniority. [Holmes and Scherff.] Neither Mr.
9 Szymanski nor anyone else from USAPA told the West Pilots that this meant only that
10 “Nicolau” and “date-of-hire” do not appear in the MOU. [*Id.*] Mr. Szymanski never told
11 the West Pilots that he intended to use MOU #2 “to take away the requirement to use the
12 Nicolau.” [*Id.*] Neither Mr. Szymanski nor anyone else at USAPA informed West Pilots
13 how they should vote if they wanted to preserve their claims to implement the Nicolau
14 Award. [Colello; Ex. 78.]

15 Rather, USAPA repeatedly gave a grammatically obtuse instruction, drafted by Mr.
16 Szymanski, advising pilots to disregard their position on implementation of the Nicolau
17 Award when they voted: “MOU is completely neutral with respect to the Nicolau Award.
18 ... So no East pilot should vote against the MOU because they fear that ratifying the
19 MOU will implement the Nicolau Award, and no West pilot should vote for the MOU
20 because they believe the MOU will implement the Nicolau Award.” [Ex. 78, 124, 125.]
21 The NAC did not “put out any materials whatsoever about the Nicolau Award being
22 waived by the MOU.” [Owens.]

23 The totality of the evidence shows that USAPA intentionally obfuscated its
24 intention to put language into MOU #2 that it could later use to prevent the West Pilots
25 from asserting the right, under § VI.A of the 2005 TA, to have the Nicolau Award
26 implemented. That this obfuscation was intentional is shown by the clarity with which
27 MOU #2 (and MOU #1 before it) provided plain and clear notice that it had a provision
28

1 waiving the scope provisions in the East and West CBAs and waiving the change-of
2 control provision in the East CBA. [Ex. 96.]

3 On the eve of the MOU ratification, West Pilot leaders encouraged “West Pilots to
4 consider voting to ratify the MOU in light of the fact that we do not believe it harmful to
5 our mission of protecting and enforcing the Nicolau award.” [Ex. 158.] These West Pilot
6 leaders stated that the MOU “moves us towards ripeness” of the DFR claim because it
7 “appear[s] to allow USAPA . . . to amend (abandon) our TA which demands the Nic.”
8 [Ex. 159.] Given what USAPA failed to tell the West Pilots about MOU #2 and its
9 intentions, this was reasonable advice.

10 There is no evidence that West Pilots intended to waive their rights to the Nicolau
11 Award when they voted to ratify MOU #2. Mr. Holmes voted to ratify because he hoped
12 to get a new bargaining agent in the American merger. [Holmes] Mr. Scherff voted to
13 ratify to obtain the pay raises. [Scherff.] Again, given what USAPA failed to tell them
14 about MOU #2 and its intentions, their votes were not a knowing and intentional waiver
15 of the right to enforce the Nicolau Award. Finally, for a variety of circumstances, more
16 than 500 West Pilots with positions on the Nicolau Award list did not have a right to cast
17 a vote on ratification of MOU #2. [*Id.*]

18 **VI. INTEGRATION WITH AMERICAN PILOTS**

19 **A. Absent intervention from this Court, USAPA will negotiate and/or** 20 **arbitrate an integration with the American pilots that puts the East and** 21 **West Pilots in USAPA’s date-of-hire order.**

22 USAPA does not deny that, unless ordered otherwise by this Court, it will
23 eventually advance a single date-of-hire East/West list for the US Airways pilots in the
24 coming McCaskill-Bond process. Nonetheless, Mr. Pauley inexplicably evaded
25 recognizing that intention when he provided trial testimony. [Pauley] Rather, he testified
26 that USAPA would keep the East and West lists separate during that process. [*Id.*] Yet he
27 could see no problem (if he is to be believed) with having one committee and one counsel
28 represent the pilots on the two lists. [*Id.*] Moreover, he was unable to explain how it

1 would benefit anything other than East Pilot interests in date-of-hire seniority integration
2 with West Pilots to use two separate lists in the integration with the American pilots.

3 **B. The current US Airways pilot roster yields substantially different**
4 **seniority rights when ordered according to the Nicolau Award than when**
5 **ordered by date-of-hire.**

6 There are substantial material differences between the Nicolau Award seniority
7 order and USAPA's date-of-hire seniority order, even when taking into account
8 USAPA's proposed conditions and restrictions. [Brian Stockdell (West Pilot with
9 experience in finance and engineering).] Most importantly, far more higher paying
10 positions could be open to West Pilots if they had seniority based on the Nicolau Award.
11 [*Id.*] Assuming that each pilot bid for and held the highest paying position possible
12 ("stovepipe" analysis), each West Pilot would average about \$187,000 additional income
13 over the six-year life of the MOU if they had seniority based on the Nicolau Award. [*Id.*]

14 Conditions and restrictions (as proposed by USAPA with its date-of-hire seniority
15 order) need not survive a merger with another pilot group. [*Id.*] Given that and other
16 uncertainties that were only briefly touched on during testimony, it is impossible to
17 determine the full impact on West Pilots of using date-of-hire rather than the Nicolau
18 Award. But such impact would surely be quite substantial. Consequently, as long as the
19 ultimate East/West seniority integration is unsettled, there is a material conflict of
20 seniority interests between the East and West pilot groups.

21 In addition, in the event of furloughs, the impact will fall on West Pilots who were
22 active in 2005 if the US Airways pilots are in a date-of-hire seniority order. In contrast,
23 the impact will fall on East Pilots who were on furlough in 2005 if these pilots are in the
24 Nicolau Award seniority order. [*Id.*]

25 **VII. LEGITIMATE UNION PURPOSE**

26 The incremental value of ratifying MOU #2 was far less than the \$1.6 billion quoted
27 by USAPA. [Johann DeVicq (West Pilot member of the USAPA Business advisory
28 Committee).] Had MOU #2 not been ratified, US Airways pilots would begin to receive

1 the MOU pay scale (the pay scale in the 2012 APA CBA) in about 18 months to 2 years.
2 [*Id.*, Collelo.] The incremental value of ratifying MOU #2, therefore, is the value of the
3 additional compensation and payments that would flow to US Airways pilots on account
4 of ratification. [DeVicq.] It is the sum of: (1) the \$40 million payment on account of a
5 favorable ratification vote; (2) retrospective pay from February 8, 2013, to the POR date
6 on account of unanimous BPR approval; and (3) compensation at the higher pay scale
7 from the POR date until APA becomes the bargaining agent for the US Airways pilots.
8 [*Id.*] This totals to about \$290 million. [*Id.*] None of these benefits, in other words, were
9 tied in any way to negotiation of ¶10.h. Because East Pilots outnumber West Pilots two to
10 one and because they have a lower pay scale under their current CBA, most of this \$290
11 million of incremental value of MOU ratification will accrue to the East Pilots.

12 The proper valuation of the change-of-control provision must apply a discount for
13 the uncertainty that the provision might not be enforced. [*Id.*] If this provision could be
14 enforced it would provide approximately \$323 million in additional income to the East
15 Pilots from the POR date until APA became their bargaining agent. [*Id.*, Owens.] But,
16 there is substantial doubt that this provision can be enforced. [DeVicq; Owens.] It,
17 therefore, is reasonable to discount its value using a 40% discount factor. [DeVicq.]
18 USAPA did not provide any evidence to the contrary. The properly discounted value of
19 the change-of-control provision, then, is \$129 million. [*Id.*]

20 Based on these calculations, the East Pilots had a substantial net gain exchanging
21 waiver of their change-of-control provision for their incremental gain from ratifying
22 MOU #2. USAPA does not explain why that was not sufficient incentive by itself to get a
23 sufficient number of East Pilots to vote to ratify MOU #2. That, and the fact that USAPA
24 wrongfully raised East Pilot expectations that they were free to abandon the 2005 TA,
25 shows that USAPA did not have a legitimate union purpose to put ¶10.h into MOU #2.

26 **VIII. USAPA IS FIRMLY LOYAL TO EAST PILOT SENIORITY INTERESTS.**

27 USAPA has never been neutral on the issue of East/West seniority. Rather, from
28 creation of the union to the present, it has steadfastly supported the East Pilots' date-of-

1 hire position. It rejects the 2005 TA commitment to use the Nicolau Award and works
2 vigorously to prevent its implementation. Its general counsel, Brian O'Dwyer, impeded
3 the ability of the West Pilots to communicate their position on East/West integration to
4 the rank-and-file. [Ex. 142.] At the same time, USAPA provided a ready forum for East
5 Pilots to promote their position. [Ex. 152.] Knowing that Mr. Scherff was trying to amend
6 the date-of-hire provision in the USAPA constitution [Ex. 22, 73, 75], USAPA's general
7 counsel failed to inform Mr. Scherff that he could start the process by petition, rather than
8 by BPR resolution. [Scherff.] East Pilot BPR members regularly meet with USAPA's
9 merger counsel, Mr. Szymanski to discuss seniority issues out of the presence of West
10 Pilot members. [Bradford; Crimi; Diorio.] USAPA provides no corresponding legal
11 advice to the West Pilots. And perhaps most importantly, its merger counsel, Mr.
12 Szymanski, has long been vigorously defending USAPA's asserted right to use whatever
13 seniority list it wants to integrate East and West Pilots and is leading the defense in this
14 action.

15 **IX. USAPA WITNESSES WERE EVASIVE AND LACKED CREDIBILITY.**

16 In general, USAPA's witnesses were evasive and lacked credibility on key points.
17 These are some examples: (1) despite a record showing that USAPA plans to present a
18 date-of-hire list to integrate with American pilots, Mr. Pauley would not concede that
19 point on cross exam; (2) he also gave misleading testimony that USAPA's May 2013 ad
20 hoc negotiation committee had authority to settle the East/West seniority when, in fact, it
21 came without settlement authority and had to get BPR approval of any agreement that
22 might have been reached; (3) he could not provide a reasoned explanation of how
23 USAPA would merge East with West in the McCaskill-Bond process; (4) USAPA
24 provided no written materials to support his testimony that USAPA told its members that
25 it would go into that process with separate East and West lists; (5) in his deposition, Mr.
26 Hummel denied knowing that USAPA opposed class certification, which is inconsistent
27 with Mr. Bradford's testimony that all such legal decisions are approved either by the
28 BPR or by officer "consensus"; and (6) Mr. Bradford claims he the "point person" for

1 lawyers in this case and is more “conversant” on the issues than Mr. Hummel” but denied
2 all knowledge of the origins and actual purpose for ¶10.h.

3 RESPECTFULLY SUBMITTED this 31st day of October, 2013.

4 POLSINELLI, PC

5 By: /s/

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12 **CERTIFICATE OF SERVICE**

13 I hereby certify that on October 31, 2013, I electronically transmitted the foregoing
14 document to the U.S. District Court Clerk’s Office by using the CM/ECF System for
15 filing and transmittal of a Notice of Electronic Filing on all parties to this case who are
16 registered participants of the CM/ECF System.

17 By: /s/