

1 Andrew S. Jacob (#22516)  
[ajacob@polsinelli.com](mailto:ajacob@polsinelli.com)  
2 Jennifer Axel (#023883)  
[jaxel@polsinelli.com](mailto:jaxel@polsinelli.com)  
3 **POLSINELLI P.C.**  
CityScape  
4 One East Washington St., Suite 1200  
Phoenix, AZ 85004  
5 Phone: (602) 650-2000  
6 Fax: (602) 264-7033  
*Attorneys for Plaintiffs*

Marty Harper (#003416)  
mharper@polsinelli.com  
Marty Harper, PLLC  
One East Washington St., Suite 1200  
Phoenix, AZ 85004  
Phone: (602) 650-2000  
Fax: (602) 264-7033  
*Attorneys for Plaintiffs*

8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE DISTRICT OF ARIZONA**

10 Don Addington, et al.,

11 Plaintiffs,

12 vs.

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

14 Defendants.  
15

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

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

16  
17 USAPA's response to Plaintiffs' Motion to Strike fails to offer any explanation as  
18 to why it disregarded the Court's ruling on Captain Hummel's testimony. Without leave  
19 of the Court to do so, USAPA has now filed on two different occasions a Declaration of  
20 Captain Hummel and then relied on this "evidence" for every post-trial briefing it has  
21 submitted. Doc. 260 (Summary of Evidence), Doc. 264 (Response to Plaintiffs'  
22 Summary of Evidence); Doc. 269-1 (Response to US Airways Motion for Summary  
23 Judgment). Not surprisingly, USAPA still fails to offer support from a physician or  
24 anyone else involved with Captain Hummel's treatment stating that he could not testify  
25 via telephone during trial. The only medical professional that has weighed in on the  
26 issue, Captain Hummel's surgeon Dr. Gleason, told the Court on October 17, 2013 that

1 Captain Hummel could testify telephonically during trial. Despite multiple opportunities  
2 to provide this information to the Court, USAPA has declined to do so and instead  
3 attempts to somehow infer that Plaintiffs are the party that is being unreasonable by  
4 refusing to allow Captain Hummel's declaration into evidence. As discussed below and  
5 previously briefed to the Court, the declaration of Captain Hummel draws serious  
6 questions about its veracity and would, at a minimum, need to be put to the test of cross-  
7 examination. USAPA's attempts to hold open the record in this case, when it knows that  
8 time is of the essence, must be seen for what it is – another delay tactic. The Court should  
9 grant the Motion to Strike.

10 **A. USAPA has offered no reason for its violation of the Court's ruling.**

11 No one disputes that Captain Hummel had unexpected bypass surgery on October  
12 14, 2013. The events subsequent to Captain Hummel's surgery are what are germane to  
13 the Court. USAPA did not make a motion to continue the trial until October 15, 2013,  
14 five days after it knew of Captain Hummel's condition. Doc. 221. In support of this  
15 continuance, USAPA did not offer a declaration from Captain Hummel or his physicians -  
16 it relied only on the declarations of USAPA's General Counsel, Brian O'Dwyer and its  
17 Merger Counsel and Trial Counsel Pat Szymanski. *Id.* Both Plaintiffs and US Airways  
18 opposed the Motion to Continue because delay could not be afforded given the pending  
19 merger and more importantly because Captain Hummel's deposition revealed he knew  
20 little of the pertinent facts for this litigation. *See* Plaintiffs' Opposition to Motion for  
21 Continuance, Doc. 222. The Court ordered an emergency hearing regarding the Motion  
22 to Continue and ordered that Captain Hummel's doctor be available for a conference call.  
23 Doc. 230. On this call, Dr. Gleason told the Court (and the parties) that Captain Hummel  
24 could testify via telephone on October 22-23, 2013. **To date, there has been no**  
25 **testimony or evidence from anyone associated with Captain Hummel's care to the**  
26 **contrary.**

27 As discussed in Plaintiffs' Motion to Strike, the Court was unequivocal on the  
28 procedure that was to be followed regarding admitting any declaration from Captain

1 Hummel to the record – USAPA had to obtain the permission of Plaintiffs. As previously  
2 discussed, Plaintiffs could not agree to the inclusion of the thirteen page declaration of  
3 Captain Hummel because it is apparent that the declaration was not the “testimony” of  
4 Captain Hummel, but rather an attempt by its counsel to inappropriately supplement the  
5 factual record. USAPA has failed to explain how Captain Hummel was in such bad  
6 condition that he could not withstand a telephonic cross-examination on October 23,  
7 2005, but was able two day later to review and analyze 400 pages of testimony and  
8 numerous exhibits and recall with apparent perfect clarity the name and position held by  
9 every West Pilot within USAPA.

10 **B. Plaintiffs would be prejudiced by the inclusion of Captain Hummel’s**  
11 **Declaration or by a deposition sometime in the future.**

12 At its heart this case is about a union unfairly and without a legitimate purpose  
13 subverting a minority group within its constituency. This is not the typical civil case.  
14 This case is about the rights of workers for years to come. Allowing USAPA to include  
15 the Declaration of Captain Hummel without cross-examination would seriously  
16 undermine the adversarial process and be extraordinarily unjust to Plaintiffs.

17 The Court is vested with considerable discretion with respect to examining  
18 witnesses and presenting evidence. Fed.R.Evid. 611. However, that discretion is limited  
19 to creating “procedures effective for determining the truth” and “avoid wasting time.” *Id.*  
20 The Court gave USAPA a number of attempts to introduce Captain Hummel’s testimony  
21 given his medical condition. Plaintiffs attempted to work with USAPA in order to  
22 accommodate Captain Hummel. USAPA ignored these attempts and instead insisted that  
23 they are entitled to supplement the record with a declaration that obviously did not come  
24 from Captain Hummel and which has not been tested by the rigors of cross-examination.  
25 Allowing Captain Hummel’s un-tested declaration into the record would not comport  
26 with Rule 611. Requiring that this matter be further delayed and forcing Plaintiffs to  
27 travel across the country for a second time to depose Captain Hummel would also not  
28 comport with Rule 611.

1 Contrary to USAPA's claims, the "testimony" that Captain Hummel (or really Pat  
2 Szymanski) seeks to give through the Declaration would prompt substantial cross-  
3 examination by Plaintiffs because it is plainly not consistent with the testimony Captain  
4 Hummel gave at his deposition and on its face not testimony that Captain Hummel could  
5 have reasonably given at trial. For example, in the Declaration "Captain Hummel" lists  
6 the names and committees that forty-eight West Pilots allegedly serve on. If Captain  
7 Hummel had been able to testify in Court it is highly improbable that he would have been  
8 able to recall this level of detail. Rather, this is an attempt by USAPA to supplement the  
9 record. Further, a number of these appointments (contrary to Captain Hummel's  
10 declaration) were not made by Captain Hummel or rare no longer current. But there is no  
11 way for Plaintiffs to challenge this testimony because it was given after trial had closed.  
12 Similarly, Captain Hummel's statements in paragraphs 8 and 9 of his Declaration that he  
13 "ran for election as a pragmatist" and that he is a "peacemaker" are not supported by the  
14 evidence that was properly admitted. *See* Plaintiffs' Summary of Evidence, Doc. 259, at  
15 § III(B),(D), (E); Exhibit 2 (Captain Hummel's campaign materials which unequivocally  
16 state he supports date of hire); Exhibit 3, Exhibit 42. Perhaps most egregious is that  
17 Captain Hummel, after his heart surgery, can now testify regarding the intent of ¶ 10.h. of  
18 the MOU, when at his deposition (when he testified he was in good health) he could not.  
19 *See generally* Plaintiffs' Opposition to Motion for Continuance, Doc. 22.

20 The above examples are by no means exhaustive. Almost each one of the  
21 statements made by Captain Hummel would need to be cross-examined, particularly  
22 when he is attempting to undermine the testimony of those individuals who did testify in  
23 front of the Court and were subject to cross-examination. (Hummel Decl., at ¶¶ 16-18,  
24 27-28).

25 **C. This matter should not be further delayed.**

26 That USAPA seeks to delay resolution of this dispute once again should come as  
27 no surprise to the Court. USAPA has sought to delay resolution of the merits of this  
28 lawsuit (putting aside the previous six years) no less than eight times since this case was

1 filed in March of this year. [Doc. 9 (motion for six week extension to answer  
2 complaint); Doc. 26 (motion to transfer to Bankruptcy Court for the Southern District of  
3 New York); Doc. 27 (motion to suspend all deadlines pending resolution of motion to  
4 transfer); Doc. 32 (motion for extension of time to respond to Plaintiffs' Motion for Class  
5 Certification and Motion for Preliminary Injunction); Doc. 44 (Motion to Dismiss); Doc.  
6 153 (moving the Court to dismiss with prejudice after Department of Justice filed anti-  
7 trust suit); Doc. 183 (Motion for Reconsideration); Ninth Circuit Case No. 13-73215,  
8 Doc. 1-1, 3 (Petition for Writ of Mandamus seeking reversal of Court's orders moving  
9 forward with trial date and Motion to Stay pending resolution of Writ).

10 USAPA's attempt to require Plaintiffs to depose Captain Hummel in Pittsburgh or  
11 offer his testimony in front of the Court at some point in the future is yet another example  
12 of its delay tactics. Resp. at pg. 4-5. USAPA's claim that there is "ample" time for  
13 Plaintiffs' to take the deposition of Captain Hummel at some point in the next few weeks  
14 is simply not true. The merger of American Airlines and US Airways is scheduled to  
15 close in mid-December, less than a month away. *See* Consented Motion to Postpone Oral  
16 Argument in Ninth Circuit Case No. 13-15000, Doc. 42-1, attached hereto as Exhibit A.  
17 Any time thereafter (and most likely shortly thereafter) US Airways will convene a  
18 meeting to discuss the protocol for the McCaskill-Bond process. Assuming that the  
19 parties could work out a day in the next few weeks to take Captain Hummel's  
20 declaration, it would not be in front of the Court for at least a month (if not longer with  
21 supplementing the record) after which time the merger will have closed. If the Court  
22 grants either of Plaintiffs' requested relief (ordering USAPA to use the Nicolau Award or  
23 granting Plaintiffs' declaratory judgment allowing participation in McCaskill-Bond) after  
24 the process starts, Plaintiffs will be seriously disadvantaged.

25 USAPA had more than ample opportunity to demonstrate to the Court that it had a  
26 legitimate union purpose for abandoning the Nicolau Award. It failed to do so. It should  
27 not be permitted to supplement the record against Plaintiffs' objections and in violation  
28 of the Court's rulings on the issue. Plaintiffs respectfully request that the Court grant

1 Plaintiffs' Motion to Strike. Plaintiffs also request that the Court strike from the record  
2 all references to Captain Hummel's Declaration in Documents 260, 264, 269, 269-1.

3 RESPECTFULLY SUBMITTED this 20th day of November, 2013.

4  
5 **POLSINELLI, PC**

6 By: /s/ Jennifer J. Axel

7 Andrew S. Jacob

8 Jennifer Axel

9 1 E. Washington Street, Suite 1200

10 Phoenix, AZ 85004

11 Attorneys for Plaintiffs

12  
13 **MARTY HARPER, PLLC**

14 By: /s/ Marty Harper

15 Marty Harper

16 One E. Washington St., Ste. 1200

17 Phoenix, AZ 85004

18 Attorneys for Plaintiffs

19  
20 **CERTIFICATE OF SERVICE**

21 I hereby certify that on November 20, 2013, I electronically transmitted the  
22 foregoing document to the U.S. District Court Clerk's Office by using the CM/ECF  
23 System for filing and transmittal of a Notice of Electronic Filing on all parties to this case  
24 who are registered participants of the CM/ECF System.

25  
26 By: /s/ Jennifer J. Axel