

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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4	Don Addington, et al.,)
)
5	Plaintiffs,)
) No. CV 13-471-PHX-ROS
6	vs.)
) Phoenix, Arizona
7	US Airline Pilots Association,) August 15, 2013
	et al.,) 2:08 p.m.
8)
	Defendants.)
9)

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REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ROSLYN O. SILVER
(In-Court Hearing re Proposed Scheduling Order)

22 Court Reporter: Gary Moll
23 401 W. Washington Street, SPC #38
24 Phoenix, Arizona 85003
25 (602) 322-7263

Proceedings taken by stenographic court reporter
Transcript prepared by computer-aided transcription

A P P E A R A N C E S

1
2
3 For the Plaintiffs:

Marty Harper, Esq.
Jennifer J. Axel, Esq.
POL SINELLI, P.C.
One East Washington St.
Suite 1200
Phoenix, Arizona 85004
(602) 650-2000

7 For the Defendant US Airline Pilots Association:

8 Patrick J. Szymanski, Esq.
9 PATRICK J. SZYMANSKI, P.L.L.C.
10 1900 L Street, NW
Suite 900
Washington, D.C. 20036
(202) 721-6035

11 Gary Silverman, Esq.
12 O'DWYER & BERNSTIEN, L.L.P.
13 52 Duane Street
5th Floor
14 New York, New York 10007
(212) 571-7100

15 Susan J. Martin, Esq.
16 MARTIN & BONNETT, P.L.L.C.
17 1850 N. Central Avenue
Suite 2010
Phoenix, Arizona 85004
(602) 240-6900

18 For the Defendant US Airways, Inc.:

19 Robert A. Siegel, Esq.
20 O'MELVENY & MYERS, L.L.P.
21 400 S. Hope Street
Suite 1277
22 Los Angeles, California 90071-2899
(213) 430-6000

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24
25

P R O C E E D I N G S

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3 THE COURT: Please be seated.

4 THE CLERK: This is civil case 13-471, Addington, et
5 al., versus United States Airline Pilots Association, et al. 14:08:29

6 This is the time set for in-court hearing regarding the
7 proposed scheduling order.

8 Counsel, please announce.

9 MR. HARPER: Your Honor, Marty Harper and Jen Axel for
10 the plaintiffs. 14:08:40

11 THE COURT: Thank you.

12 MR. SZYMANSKI: For defendant U.S. Airline Pilots
13 Association, Patrick Szymanski, Susan Martin, and Gary
14 Silverman.

15 THE COURT: Thank you. 14:08:48

16 All right. Let me ask you, do all counsel believe
17 that the Department of Justice's lawsuit has no merit?

18 MR. SZYMANSKI: I have no way of telling, Your Honor.
19 I'm not an antitrust expert and I'm not in the case, so I'm not
20 prepared to say that the Department of Justice and the 14:09:07
21 government lawyers --

22 THE COURT: Well, let me ask you on behalf of your
23 client, don't you think, after all, if in fact they have a --
24 they have a viable lawsuit of some sort, that it seems to me
25 that the position of you and your client in this case is moot, 14:09:24

1 am I right?

2 In other words, if in fact the merger doesn't go
3 forward, that based upon the -- the lawsuit, or what remains in
4 this case after my rulings, following the Ninth Circuit ruling,
5 is that we don't have a case, or you -- or the plaintiffs don't
6 have a case. 14:09:44

7 MR. SZYMANSKI: That's correct, Your Honor, but I have
8 absolutely no way of telling how this case is going to turn
9 out. I mean, the government's brought the case. I know it's
10 going to be vigorously defended by the -- by U.S. Airways and
11 American. It's going to be in the District of Columbia. 14:09:59

12 THE COURT: So do you -- is it your position or not
13 that now that this lawsuit has been filed that this case is
14 moot?

15 MR. SZYMANSKI: At this point. At this point, Your
16 Honor, it is. At this point it is. I don't think that the
17 Court has even Article III jurisdiction at this point, given
18 this lawsuit, because without -- 14:10:18

19 THE COURT: Wait a minute. Why don't I have
20 jurisdiction? That's a very important issue, and I -- I don't
21 understand what you're saying. 14:10:42

22 MR. SZYMANSKI: Your Honor, there is no injury to the
23 plaintiffs unless the merger goes forward.

24 THE COURT: Well, I disagree with you on that. If
25 that's your position as to why or why not there is 14:10:59

1 jurisdiction, then I -- I disagree with you. Whether or not
2 there's injury is a decision to be made after the case is
3 presented and the defense is presented. That doesn't have to
4 do -- or has anything to do whether this Court has Article III
5 jurisdiction of this matter before it.

14:11:19

6 MR. SZYMANSKI: But Your Honor, the claim is that
7 we're going to be going to a seniority integration proceeding
8 without using the Nicolau Award. And unless there is a merger,
9 there is no seniority integration proceeding; there is no
10 memorandum of understanding --

14:11:43

11 THE COURT: So you're not talking about jurisdiction,
12 you're talking about moot, right? Talking about
13 jurisprudential jurisdiction of some sort, is that it?

14 MR. SZYMANSKI: Injury in fact, Your Honor. I'm
15 talking about injuries in fact. There is no injury in fact
16 unless --

14:11:56

17 THE COURT: Well, there's no --

18 MR. SZYMANSKI: -- there is a seniority integration --

19 THE COURT: I'm sorry to interrupt you, but there's no
20 injury in fact, the question is then today if there's injury in
21 fact. If I held a -- a trial based upon what we had before,
22 starting September 24th, assuming that this merger was going to
23 go forward, I would decide whether or not there was injury.

14:12:03

24 But we are -- it is potentially tangential as to
25 whether or not I could give the plaintiffs their -- what they

14:12:32

1 have requested as a remedy for the wrong that they have --
2 believe that they have suffered if we have hanging over this
3 Court the question as to whether or not there will be a merger.
4 That I see, but I don't see it in the concept of jurisdiction
5 at all. 14:12:58

6 MR. SZYMANSKI: Well --

7 THE COURT: But -- so your position is, then, tell me
8 what you propose this Court do.

9 MR. SZYMANSKI: Your Honor, we think that in this
10 situation the Court should dismiss the complaint without 14:13:10
11 prejudice, and depending on what happens in the future, the
12 plaintiffs can refile.

13 THE COURT: Thank you.

14 Mr. Harper.

15 MR. HARPER: Yes, Your Honor. 14:13:23

16 THE COURT: In response.

17 I think your position is is that the lawsuit by the
18 Department of Justice will be defeated, and that I should take
19 that into account in determining whether or not this matter
20 should be stayed or, as has been requested by defense counsel, 14:13:43
21 whether it should be dismissed.

22 MR. HARPER: That's -- that's right, Your Honor, and
23 our position is that we've been following it quite closely for
24 the past 48 hours. We're reading what the experts and the --
25 the hired attorneys, Mr. Siegel's partner, are saying about the 14:14:03

1 merits of the litigation and what was said in bankruptcy court
2 this morning in New York. And at least everybody on that side
3 of the argument -- except USAPA -- is of the opinion that
4 eventually the DOJ case will be overcome and that the merger
5 will go forward.

14:14:27

6 And given that likely scenario, it is our position
7 that we ought to go forward with the litigation as now
8 scheduled. Stick to the trial dates that we had, September
9 24-25. Hopefully, get the litigation done in those two days,
10 if -- if we can. And then if you want to pause to decide if
11 you want to go forward or wait a little bit till the -- things
12 clear up if you're bothered by that, then you have, obviously,
13 the -- the right to do that. But perhaps --

14:14:45

14 THE COURT: You mean so I would hold my final decision
15 in abeyance until --

14:15:04

16 MR. HARPER: Perhaps. I mean, if you want to. It may
17 be -- it may be more cleared up by the time we get to the first
18 part of October and it's going to be more probable that the DOJ
19 litigation will be overcome.

20 But, you know, all we have right now, and I think AMR
21 said it well in their pleadings this morning, you've just got
22 allegations by the DOJ that this merger is anticompetitive.
23 Nothing's been proved yet, and there's a solid team standing by
24 right now working very hard to defeat that.

14:15:18

25 Now, if you do (brushing against microphone) -- I'm

14:15:35

1 sorry, I didn't mean to hit that. If you do what USAPA wants,
2 there is tremendous harm to the West Pilots, because if you
3 dismiss the litigation today, even with prejudice, we're back
4 on the clock --

5 THE COURT: You mean without prejudice. 14:15:52

6 MR. HARPER: Without prejudice.

7 -- we're back on the clock to file another suit to
8 protect our rights or the pilots' rights within another
9 four-and-a-half months, because we've already used up about 30
10 days on the front end of the six-month statute of limitation 14:16:06
11 between what we think was the DFR and when --

12 THE COURT: And then --

13 MR. HARPER: -- we filed the lawsuit.

14 THE COURT: Sorry to inter -- let me ask you a
15 question, Mr. Harper. 14:16:16

16 MR. HARPER: Yes.

17 THE COURT: Now, in the context of what we have, and
18 I've asked you this before -- before this that this situation
19 that we have now here with Department of Justice, what remedy,
20 what remedy would I issue for your clients after the trial was 14:16:32
21 over?

22 MR. HARPER: We --

23 THE COURT: And I know what you asked for the last
24 time, and I think I may not have persuaded you that I -- that I
25 couldn't do that, but you heard what I said about it, and I 14:16:53

1 don't think I can force the Nicolau Award on -- on whatever
2 bodies are -- or whatever parties, stakeholders there are in
3 this case.

4 But so independent of that, what would be the remedy
5 that you would be asking for and that I could enforce as a
6 matter of law? 14:17:21

7 MR. HARPER: Yeah, we did hear you, because after
8 you -- we had the dialog on May 14 and we came back with our
9 final pleadings, we actually presented three potential remedies
10 to you. The one that we had initially asked for to -- we would 14:17:34
11 continue to urge, at least through the litigation, and say
12 perhaps after the evidence is laid in front of you you may feel
13 differently, based upon the conduct of USAPA and the leadership
14 during the course of this.

15 The second remedy that we suggested to you is that if 14:17:50
16 everybody agrees to arbitrate the precise issues in a quick
17 mini arbitration that would be binding, which would really
18 be -- which list is to be used by USAPA, and in its integration
19 with American we would be willing to do that quick mini binding
20 arbitration over which list, Nicolau or some other list. So we 14:18:18
21 presented that as a potential remedy; I think they rejected it.

22 And then we had the McCaskill-Bond, which is a remedy
23 which we've already litigated and I think is fully briefed,
24 that, you know, to the extent that we are entitled -- we need
25 to have a decision whether we're entitled to a seat at the 14:18:37

1 table. And then if we go to the table, then we have the right
2 to pursue in that arbitration our list.

3 THE COURT: All right. So in the context of those
4 potential remedies, if this lawsuit is still pending, what
5 power do I have to enforce them? 14:18:53

6 MR. HARPER: At what point in time? At the end of
7 this?

8 THE COURT: At the end of -- at the end of the trial.
9 What power do I have to enforce that?

10 MR. HARPER: At the end of the trial, unless it -- the 14:19:06
11 merger is not going to be consummated, you still have the
12 authority to enter a final order directing the parties to go
13 forward in the McCaskill-Bond process that would be anticipated
14 how to proceed. You still have that authority, clear up --

15 THE COURT: Okay. 14:19:19

16 MR. HARPER: -- until the time --

17 THE COURT: Okay.

18 MR. HARPER: -- that the --

19 THE COURT: I have -- I have the authority, but in the
20 context of the lawsuit can I then force the parties to 14:19:25
21 negotiate, even though this lawsuit is pending? Am I not
22 interfering with the lawsuit itself?

23 Would I -- wouldn't it be, perhaps, a needless
24 consumption of time for me to order the parties to do that even
25 if I had the authority to do so? 14:19:51

1 MR. HARPER: Well, let me -- let me step back.

2 In the context of the DFR, if we prove the DFR and if
3 you accept proof of the DFR, the case law -- and I think we
4 have briefed that -- gives you wide latitude to impose whatever
5 remedies you think are appropriate under the circumstances -- 14:20:05

6 THE COURT: Yes.

7 MR. HARPER: -- to make the parties to --

8 THE COURT: Well, let's put it in the context, though,
9 as we've got a lawsuit by the Department of Justice attempting
10 to defeat this merger. In that context, how are we going to 14:20:15
11 do -- how would we -- how would we enforce my order to let's
12 just say mediate, that's assuming that I -- I go that
13 direction. How can we do that within the context of this?

14 MR. HARPER: With all due --

15 THE COURT: Wouldn't Department of Justice, wouldn't 14:20:35
16 they bring this matter to the attention of the Court, and --
17 and wouldn't it become an issue in that -- in the lawsuit as to
18 whether or not there should be a merger?

19 MR. HARPER: No, I don't think so. I mean, I -- I
20 don't see DOJ's attitude toward stopping the merger having -- 14:20:53
21 ever coming into play here in this courtroom in the context of
22 this litigation. They want to stop it down the road in total,
23 and that's all they are looking for.

24 They really wouldn't care, I don't imagine, Judge,
25 what you do in this litigation in order to get us all ready to 14:21:10

1 go forward with the merger.

2 THE COURT: Okay. So you're -- you're going to
3 educate me here, to some extent. Is your client in any way
4 affected, other than if there is or isn't a merger like anyone
5 else would be as an employee, are you affected by that lawsuit
6 in any respect? 14:21:31

7 MR. HARPER: No, not unless there's -- the merger's
8 not consummated.

9 THE COURT: So you have -- you're just on the
10 sidelines; you have nothing to do with it -- that lawsuit
11 whatsoever. 14:21:43

12 MR. HARPER: We're at the bottom of the feeding
13 channel here.

14 THE COURT: Okay.

15 MR. HARPER: But we -- and we're in our separate
16 world. We're in front of you. And -- and we're going to --
17 this is all going to work out and it's all going to go
18 according to plan if the merger is consummated. 14:21:49

19 THE COURT: Okay. If the merger isn't consummated,
20 what do we do? We don't have anything, do we? 14:22:05

21 MR. HARPER: If the merger is not consummated, I think
22 that the folks sitting over at this table have a lot to work
23 through and to figure out what goes on at that particular point
24 in time, because if this merger is not consummated, DOJ has
25 taken the position that there ought to be stand-alone American 14:22:24

1 and a stand-alone U.S. Airways. Or there may be some other
2 plan that they would come together with that would make another
3 merger come about. But it's going to be a whole new shuffle of
4 everything --

5 THE COURT: All right. So if there's --

14:22:40

6 MR. HARPER: -- that's on the table.

7 THE COURT: -- if there's not a merger, we have -- we

8 have progressed through the facts here, because after a while

9 we -- we then had, because of the merger we had an MOU. And

10 then facts and circumstances surfaced which concerned --

14:22:53

11 troubled your client, and then that was brought in front of me,

12 okay.

13 So we don't have that MOU, so then what -- what case

14 do you have in front of me?

15 MR. HARPER: We -- we have the MOU now. The MOU is

14:23:08

16 still --

17 THE COURT: But if there's no merger.

18 MR. HARPER: If there's no merger --

19 THE COURT: If there's no merger, what case do you

20 have in front of me?

14:23:17

21 MR. HARPER: Candidly, probably none.

22 THE COURT: Okay. So then that's at least --

23 candidly, you're saying there's -- if there's no merger, you

24 have no case in front of me; if there is a merger, you have the

25 case that we have today, right?

14:23:28

1 MR. HARPER: And you're asking me to project out
2 through all of these uncertainties where we might be next March
3 if there is no merger.

4 THE COURT: Well, it's important, because I've got to
5 make the decision for you --

14:23:39

6 MR. HARPER: Right, but --

7 THE COURT: -- and so I asked you for guidance --

8 MR. HARPER: Yeah.

9 THE COURT: -- so if there's no merger whatsoever,
10 then your cause of action doesn't exist.

14:23:47

11 MR. HARPER: If -- if there is no merger, then the MOU
12 probably is null and void, and therefore we don't have a claim
13 under the DFR for a null and void MOU.

14 THE COURT: We have what I -- what I ordered
15 previously, right?

14:24:00

16 MR. HARPER: Correct.

17 THE COURT: And the order was that the defendants had
18 to act in good faith.

19 MR. HARPER: Right. They always will.

20 THE COURT: Okay. So then -- and then after that
21 order, circumstances occurred --

14:24:06

22 MR. HARPER: Right.

23 THE COURT: -- that involved the MOU. And -- but if
24 there's no -- and that was all in conjunction with a potential
25 merger.

14:24:20

1 So after my order, there's nothing that occurred
2 independent, that is nothing that occurred by the defendants,
3 nothing that they engaged in, that constitutes in your view an
4 unfair labor practice.

5 MR. HARPER: No, absolutely not. I mean, you're
6 talk -- you're talking about your October order --

14:24:38

7 THE COURT: Right.

8 MR. HARPER: -- is that what you're -- right? Is that
9 what you're talking about? Sure.

10 THE COURT: Which I said, Look, this is the Ninth --

14:24:44

11 MR. HARPER: Octo --

12 THE COURT: -- Circuit, but you have to act in good
13 faith. You're going forward.

14 MR. HARPER: In October --

15 THE COURT: There's nothing other than the facts that
16 were generated after that order, and they all are inextricably
17 interrelated to the merger, right?

14:24:48

18 MR. HARPER: Well, give me liberty to explain?
19 Because I think that -- you haven't seen the evidence yet.
20 Okay? In the context of MOU 1, MOU 2, MOU 1 starts middle of
21 July 12. It kind of moves into MOU 2, which is ratified in
22 February of '13.

14:25:10

23 During that time period there is a lot of conduct that
24 we think is relevant to the misconduct by USAPA at the end in
25 making the decision that it was going to enter into an MOU

14:25:32

1 without utilizing the Nicola -- Nicolau. So all of that
2 conduct is there. That was -- that is what will be presented
3 at the trial to try to convince you that there was a breach of
4 the DFR.

5 THE COURT: And I don't -- without any doubt, I don't 14:25:48
6 know the evidence as well as you do, but I -- I'm not surprised
7 to hear you say that you.

8 Let me now circle back to what I asked, which is after
9 my order, the only evidence that you would present in terms of
10 establishing that the defendants engaged in unfair labor 14:26:10
11 practice is all inextricably interrelated to the merger, so
12 that if there -- if there were no merger, then you don't have a
13 case, am I right?

14 MR. HARPER: I -- I would agree with that.

15 THE COURT: Okay. 14:26:27

16 MR. HARPER: I mean, the merger is the -- is the base
17 that gave rise to the MOU, which is the conduct we're
18 complaining about.

19 THE COURT: Okay. Thank you. All right.

20 MR. HARPER: Thank you. 14:26:37

21 THE COURT: Let me hear -- let me hear from U.S. Air.

22 And I am sure, Mr. Siegel, you're going to tell me
23 that you think the DOJ lawsuit has merit. Everybody is
24 surprising me throughout this very enjoyable experience. A lot
25 of it has to do with things or matters that have occurred 14:27:00

1 independent of everybody in the courtroom, so here we are.

2 So where -- give me the latest. I read the
3 newspapers, too. I've taken a look at what's on -- that has
4 been filed, but you tell me, what is the latest?

5 MR. SIEGEL: First of all, I will not surprise you to 14:27:20
6 tell you that U.S. Airways and American believe, as we said to
7 the press yesterday, that the Department of Justice got it
8 very, very wrong, and that we intend to prevail at an expedited
9 trial.

10 What we're working on now is the expedited schedule 14:27:37
11 for that trial. We expect to go to trial soon. It's a -- it's
12 the type of case where the Justice Department seeks an
13 injunction and there is not an extended trial process. We are
14 looking to get a trial date and get a resolution of the case by
15 no later than the end of this year. 14:27:57

16 THE COURT: Okay. So when you say "resolution," we're
17 not talk -- talking about just preliminary injunction; we're
18 talking about injunction.

19 MR. SIEGEL: Final trial --

20 THE COURT: One way or another. 14:28:07

21 MR. SIEGEL: Yes. We're looking for -- for an
22 expedited trial date this year, with a final judgment in that
23 trial no later than the end of this year.

24 Now, we have -- we have to work that out with the
25 government and with the judge, but that's what we're looking 14:28:19

1 for, and that's the experience that the antitrust litigators
2 have had in the past.

3 THE COURT: Okay. So how extensive is the -- the
4 trial going to be? Is it -- are we talking about a month-long
5 trial, or a week, or -- or two months? 14:28:34

6 MR. SIEGEL: I --

7 THE COURT: Give me a sense.

8 MR. SIEGEL: Yeah, that I -- I don't know, because I'm
9 not -- I'm not the -- the trial lawyer on the case, but I --
10 but I conferred with the trial lawyers before I came today, and 14:28:46
11 I -- so I don't know how long the trial would be scheduled.

12 What I was told was -- is that it's an exceptionally expedited
13 injunction-type hearing, and that the -- we -- the carriers are
14 asking for -- for a trial date to start very soon, and we
15 expect that -- that the trial would not last and would be 14:29:04
16 resolved by the end of the year.

17 That's all I've -- that's all I really can report
18 right now. But it is not -- it is not expected that it is an
19 extended process or a delayed process.

20 THE COURT: Was this in the offing or was this a 14:29:20
21 surprise?

22 MR. SIEGEL: This -- this was a surprise, Your Honor.
23 The Department of Justice has approved the -- as you -- as the
24 Court probably knows just from the press, there's been a major
25 consolidation in the industry, there's been approval by the 14:29:35

1 Justice Department when Delta merged with Northwest, and more
2 recently when United merged with Continental and Southwest
3 merged with AirTran. So this is a -- this is a --

4 THE COURT: Okay. But, I mean, the lawsuit itself,
5 for example, what I'm asking is -- what -- what surprised me is 14:29:53
6 is that I expected that I wasn't the only one who was
7 surprised. As they say, the judge is the last to know; in a
8 variety of different contexts we hear that.

9 But I was also surprised to hear the attorney generals
10 of a variety of states, including Arizona, were jumping on, so 14:30:16
11 that this must have -- this must not have been really a secret,
12 or --

13 MR. SIEGEL: Well, here -- here's how the process was
14 working, and it's -- it was set forth in some of our papers.
15 There's all -- the MOU, of course, that we did in the labor 14:30:28
16 field was always contingent on the closing of the transaction.
17 The closing of the transaction itself had two contingencies
18 always, and that's always been identified.

19 One was that the bankruptcy Judge Lane had to -- had
20 to approve confirmation of American's restructuring plan. That 14:30:47
21 was actually scheduled for a hearing today in New York, and
22 that step has to occur, 'cause this merger is part of their
23 restructuring plan; bankruptcy judge has to approve it. So
24 that was step 1. And then step 2 always identified was
25 regulatory antitrust approval of the transaction. 14:31:08

1 So when we entered into the MOU last December and it
2 was ratified in January, it was called a conditional labor --
3 collective bargaining agreement. And the -- and the condition
4 was the closing of the deal, and the closing of the deal was
5 based on those two events.

14:31:26

6 And the way we had envisioned it was today, August
7 15th, would have been the bankruptcy court hearing on
8 confirmation -- that hearing did take place and the matter, as
9 I understand, is under submission -- and the regulatory
10 approval.

14:31:41

11 So what's really happened here is that we've -- we've
12 had these contingencies in place. We knew that the approval
13 had to be granted on the antitrust issues. We thought it would
14 be granted by the Justice Department by the end of the third
15 quarter of this year, and that's what we indicated to this
16 Court. So the unexpected piece was the Justice Department did
17 not grant approval and decided to file the lawsuit it filed.
18 But the --

14:31:58

19 THE COURT: That was just spontaneously, or --

20 MR. SIEGEL: No, they've had a seven-month -- they say
21 because -- it's a seven-month investigation, the -- the Justice
22 Department, and then it was joined by the attorney generals of
23 various states, and it's been an investigation open and a
24 normal part of the process. It's not atypical. But it's been
25 part of the process. It's been under review. I was told it's

14:32:13

14:32:31

1 a seven -- it's been under review for about seven months in
2 terms of the Justice Department process.

3 What was unex --

4 THE COURT: Was there -- when the Department of
5 Justice does a review under -- on some occasions, say, for
6 example, for a redistricting, they don't really -- they don't
7 interface with -- with the state of Arizona or other states.

14:32:45

8 Is this -- is this a situation where they were -- they
9 were interfacing with -- with U.S. Air and -- and American?

10 MR. SIEGEL: They asked for -- I think I know the
11 answer, but because I wasn't involved I don't want to say
12 anything inaccurate. But as I understand it, that their review
13 includes asking for that information from the carriers.

14:33:11

14 And in the course of the review it's fairly typical at
15 times for the -- for the attorney general of interested states
16 to just join in the -- in the review process, and so that's
17 what occurred. So --

14:33:30

18 THE COURT: I see.

19 MR. SIEGEL: So over that seven month --

20 THE COURT: That's where the states got involved.

14:33:38

21 MR. SIEGEL: Yeah. And over that seven-month period,
22 again, as I understand the process, the -- the normal course is
23 they ask for information regarding the transaction from the
24 carriers, and they do that as part of the review. And at times
25 they take statements from people during the course of the

14:33:56

1 review as well.

2 But it's not -- that doesn't -- that doesn't then mean
3 that there's -- that there's trouble ahead. That's just part
4 of the process that -- that they engage in as they get ready
5 to -- to make a decision. 14:34:10

6 THE COURT: So you're hoping to get a decision, or get
7 this resolved in front of a judge by the end of the year, and
8 hopefully by a decision from the judge by the end of the year,
9 which is optimistic, I would expect, but then you have the
10 appeal process. 14:34:29

11 MR. SIEGEL: I've been informed --

12 THE COURT: You're going to ask for an expedited
13 appeal.

14 MR. SIEGEL: What I've been informed, again, in that
15 area that it's not completely in my expertise, but what I've 14:34:35
16 been informed in the -- in a -- in an antitrust injunction
17 action by the government is that once the -- if -- if the
18 district judge denies the injunction sought by the government,
19 that absent a stay of that decision by the district judge, the
20 transaction is permitted to close. 14:34:52

21 THE COURT: Well, it would be either a stay by the
22 district judge or by the court of appeals, correct?

23 MR. SIEGEL: That's correct, but -- but the -- the
24 ability to move forward -- correct, Your Honor. But the
25 abil -- absent such a stay, the ability to move forward to 14:35:05

1 close the transaction would occur immediately upon the end of
2 the trial.

3 THE COURT: Yeah. And -- that's interesting. That
4 is --

5 MR. SIEGEL: If the --

14:35:21

6 THE COURT: That is -- that is essentially, then, if
7 the -- if the stay is denied by the court of appeals, in
8 contrast to other cases that I'm familiar with, that basically
9 is the death knell for the Department of Justice's case, which
10 is unusual. That means that they basically decided that this
11 merger's going to go forward because they're not going to undo
12 a merger.

14:35:40

13 MR. SIEGEL: That's right. That's -- as I understand
14 the procedure is that that -- that's the protection for the
15 parties who are attempting to enter into a transaction is
16 that --

14:35:52

17 THE COURT: So you have to win the -- the stay.

18 MR. SIEGEL: You have to win the stay or the
19 transaction can go forward.

20 So from our perspective, Your Honor, what -- what has
21 occurred here is that we always had -- we always had a
22 contingency in this deal, which was approval by the bankruptcy
23 judge and by the regulatory. And that contingency attached to
24 the MOU and to the transaction. We've always had that.

14:35:59

25 You asked -- this Court asked me at a prior hearing

14:36:19

1 when did we anticipate obtaining that approval, and -- and the
2 answer has been that we anticipated obtaining it by the end of
3 the third quarter, because that is how the experts on the
4 antitrust thought the Justice Department process would go.

5 What has happened now is essentially we have a delay 14:36:36
6 in what we think will be an approval process. We think we have
7 to get the approval from -- from the district court as opposed
8 to the agency that --

9 THE COURT: Has the -- I'm sorry to --

10 MR. SIEGEL: No. 14:36:49

11 THE COURT: -- interrupt, but your -- you've answered
12 my question.

13 Has -- has any of this been implemented, or is it
14 all -- is everybody just standing on the sidelines waiting for
15 this to occur, or in anticipation of the approval? 14:37:02

16 In particular, let's -- in terms of -- of the pilots
17 and their lawsuit and seniority and all of that, has anything
18 changed that has -- that -- one way or another, or
19 implementation of the MOU, any of that?

20 MR. SIEGEL: Yeah, I think there's been a lot of 14:37:28
21 activity on a lot of levels, Your Honor. I mean, first of all,
22 in anticipation of the deal closing there's been a lot of
23 activity but in the -- on the corporate level, a lot of people
24 making a lot of plans for integration of the management of the
25 two companies, and identifying who would -- who would hold what 14:37:40

1 positions, and, frankly, even making plans as to where people
2 would live, and so forth. So there's been a very active
3 step -- steps taken by a number of people who -- who thought
4 this merger would close by the end of third quarter.

5 In terms of the -- of the pilot process, the -- the 14:38:00
6 plan was, under the MOU, shortly after the M -- after the deal
7 closes, under the MOU the party's required to initiate the
8 McCaskill-Bond seniority integration process, which is
9 described in paragraph 10 of the MOU.

10 In anticipation of that, we've received a request from 14:38:22
11 USAPA's lawyers to provide -- we, the carriers, to provide data
12 and information that they would use in the course of their
13 negotiation or their arbitration over seniority integration.
14 They've started that process.

15 We also, Your Honor, have had discussions about who 14:38:43
16 would be a party in that process, and that led to -- I know
17 Mr. Harper amended his complaint so that we could try to get
18 clarification of the federal law regarding the party status of
19 the West Pilots, and all this was being done in preparation for
20 what we thought was the initiation in the next few weeks of -- 14:39:02
21 of sitting down to work out the protocol agreement for that
22 integration process. That protocol agreement is called for in
23 paragraph 10 of the MOU.

24 So there's been a -- all that preliminary activity has
25 occurred, and -- and we -- and we had this one open issue of 14:39:20

1 who -- whether the West Pilots were or were not a recognized
2 party under McCaskill-Bond. But all of that has occurred,
3 and --

4 THE COURT: On that issue, you did have that issue,
5 and --

14:39:35

6 MR. SIEGEL: Yes.

7 THE COURT: -- that was an issue we discussed.

8 So where are you on that issue, or where did you come
9 to before the lawsuit?

10 MR. SIEGEL: Well, we didn't -- we didn't have a
11 resolution of that issue before the lawsuit. When -- when we
12 did the MOU back in December, the issue was left unresolved --

14:39:44

13 THE COURT: Right.

14 MR. SIEGEL: -- because there was a --

15 THE COURT: But I meant the DOJ lawsuit. Did you come
16 any closer to deciding?

14:39:57

17 MR. SIEGEL: On the -- on the McCaskill-Bond issue?

18 THE COURT: Yes.

19 MR. SIEGEL: No, it's a dif -- it's a -- USAPA has
20 argued that the West Pilots are not a party and the West Pilots
21 and U.S. Airways have argued that they are a separate party.
22 Mr. Harper has amended his complaint to seek a declaratory
23 judgment on that action -- on that issue, and we filed an
24 intervention complaint on that issue as well.

14:40:09

25 So frankly, what -- one of the things that we were

14:40:27

1 hoping to accomplish here was to have a -- this Court's ruling
2 on interpretation of that federal statute, because we needed to
3 know that so we can start with the right parties from the very
4 beginning.

5 THE COURT: Essentially, from the -- from the last 14:40:43
6 time you were here and what you gave me in writing, your client
7 has taken a position, and so has American, of neutrality,
8 essentially, on this issue, and stepped back and said: Get
9 this resolved. These are -- there are legal issues. You --
10 you raise some. Both the parties raise some and you raised a 14:41:02
11 unique one about --

12 MR. SIEGEL: Right.

13 THE COURT: -- McCaskill-Bond.

14 So -- so okay. So you've given me an idea of where we
15 are, and whether or not there has been any progress in moving 14:41:15
16 forward as was -- was the plan under the merger.

17 Now I'm going to ask you for a moment to tell me,
18 what -- what position would you take if I went forward with
19 this in September? What would your client's position be in
20 this litigation? 14:41:42

21 MR. SIEGEL: Well, first of all, we favor you going
22 forward, because we -- we think that -- that it's on the
23 calendar and it would be very beneficial to have --

24 THE COURT: And -- and it would be beneficial even if
25 there was no merger. 14:41:54

1 MR. SIEGEL: It would be beneficial so we would be
2 pre -- we would have re -- we would have resolved or taken
3 steps toward resolving the -- this long-standing multiyear
4 battle over seniority list, so that when we do close, and we
5 think we will close, and we will -- but when we do close we are 14:42:12
6 required under the MOU to then start this process.

7 THE COURT: If I -- if, let's say, there wasn't a
8 merger, would there be any benefit to my -- my deciding this
9 issue in terms of precedent of some sort?

10 I mean, you're talking about sort of an issue, as I 14:42:29
11 recall, of first impression, and so independent of -- of that,
12 would there -- is there any benefit whatsoever?

13 MR. SIEGEL: As I -- I don't know how compelling this
14 is, but -- but there -- but McCaskill-Bond's a new law, and --
15 and the issue presented to -- to Your Honor with regard to 14:42:51
16 the -- to the correct parties in the McCaskill-Bond process, it
17 would be very beneficial to the airline industry, and I think
18 to the labor unions, to under -- to have a ruling on the issue
19 that -- that this Court has been briefed on.

20 However, I -- to be honest, the -- the McCaskill-Bond 14:43:09
21 process here would not take place if there's no merger, because
22 the McCaskill-Bond process applies to a merger.

23 If I just might, Your Honor, what we're concerned
24 about is stopping the mo -- the momentum. Our -- our view is
25 that Your Honor, this Court, the parties, have done a great 14:43:24

1 deal in the past years over a difficult dispute to try to get
2 it to a moment where there's a trial scheduled and there's a
3 potential resolution of a pretty bitter fight over seniority.
4 And we wanted -- we, the carrier, are neutral on the DFR issue,
5 but we wanted to have a -- a situation where when we closed the
6 deal, this dispute is no longer subject to ongoing extensive
7 litigation but, rather, we have direction about how to
8 implement the MOU on a timely basis, including the
9 McCaskill-Bond process.

14:43:43

10 And so what we are hoping is that rather than take
11 this whole process off track right now, because -- because of
12 the DOJ lawsuit, rather, recognize that we always had a
13 contingency. It's just been term -- but the resolution of it
14 is going to be pushed out by three or four months, in our view.

14:44:01

15 And we don't see any harm in keeping the trial dates,
16 because these par -- the two parties seem to think that they
17 need to have some evidentiary proceedings before this Court.
18 And so if we need two days of hearing to get that evidence in
19 before this Court and it's on everybody's calendar, why not
20 submit -- why not complete that process?

14:44:18

14:44:35

21 And then we, the carrier, can keep the Court apprised
22 as to the progress of the DOJ litigation, and we can file
23 status reports with the Court, and -- and the Court could
24 decide after hearing the evidence on the -- on the September
25 24th and 25th, the Court could decide whether it's appropriate

14:44:50

1 to stay further proceedings or stay a decision until we can
2 report that the merger's going forward.

3 If we take everything off calendar, it's like starting
4 all over again, and then if -- if we report back to you, Your
5 Honor, that the merger's going to close and the Justice
6 Department's losing, then we have to start all over, but we
7 don't have a mechanism for -- for a fair resolution of this
8 really very difficult seniority dispute and it would delay the
9 timing.

14:45:06

14:45:19

10 THE COURT: Other than -- than your position on the
11 legal issue, which will be briefed, are you -- are you involved
12 in any way regarding the facts that will be presented?

13 In other words, are you or your client, are you going
14 to present evidence on behalf of your client, are you going to
15 rebut evidence that you know is going to be presented by either
16 side, or -- and/or do you expect that your client in some
17 manner or means is going to be called as a witness, or are
18 there exhibits that are going to be proffered from your client?

14:45:46

19 MR. SIEGEL: Your Honor, at -- at this time, based on
20 what we know now, we were not planning to present witnesses or
21 present evidence as a -- as a party litigant, as opposed to
22 filing briefs and -- and arguing issues that we felt would
23 assist the Court.

14:46:05

24 I don't know whether the other -- the two parties were
25 going to attempt to call company officials to testify or not.

14:46:26

1 I believe perhaps they're considering that, but I don't know
2 that for a fact. And if they were called, then I think their
3 testimony would come in through questions from the lawyers who
4 called them.

5 But we're neutral on the DFR position, we have a 14:46:43
6 position on the McCaskill-Bond issue, which we briefed the
7 Court on, and we're not -- we're not trying to be a litigant as
8 such in the -- in that -- in the traditional manner.

9 THE COURT: Professorial.

10 MR. SIEGEL: I -- yes, that's a -- that's a good word. 14:47:06

11 THE COURT: Okay. Thank you.

12 MR. SIEGEL: All right. Thank you.

13 THE COURT: Let me ask each counsel, let me start with
14 the plaintiffs first, Mr. Harper, in terms -- you already know
15 what evidence you're going to offer. You already are prepared 14:47:13
16 to, let's say, outline for me today what your evidence would
17 be, and have you shared that with Mr. Szymanski and Ms. Martin?

18 MR. HARPER: Yes, let me -- let me, obviously, address
19 that, since you asked, but to give you a backdrop, we've had,
20 in the past 10 days, maybe two telephonic conversations in 14:47:34
21 anticipation of this hearing, without the DOJ overlay, to -- to
22 talk about what a trial might look like, what we have to do to
23 get there yet, and so we've had some discussions. And I can
24 run through those with you if you want to --

25 THE COURT: Yeah, I'd like -- for example, are you 14:47:54

1 presenting live witnesses, as opposed to dead witnesses,
2 and/or --

3 MR. HARPER: I guess those that can't answer questions
4 could be dead, too.

5 THE COURT: Are you asking -- yeah, that's right. At 14:48:08
6 least there will be no objections.

7 MR. HARPER: Right.

8 THE COURT: Are you going to present deposition
9 testimony, or is that -- is that what it is going to be?

10 MR. HARPER: Yeah, let -- let me -- let me just -- 14:48:19

11 THE COURT: Or am I --

12 MR. HARPER: Let me just --

13 THE COURT: More than anything else am I making
14 credibility decisions?

15 MR. HARPER: Yeah, you will be. 14:48:26

16 THE COURT: Okay.

17 MR. HARPER: I mean, we're going to have, actually,
18 some people up there that will provide testimony.

19 THE COURT: Can you outline what -- who the witnesses
20 are? How much time they're going to take? 14:48:32

21 We've got two days scheduled --

22 MR. HARPER: Right.

23 THE COURT: -- for this, so is -- how much time are --
24 is your case going to take?

25 MR. HARPER: Yeah, let me -- let me try to talk to 14:48:41

1 that, because that's been on the agenda for the last two calls.
2 So here's where we are, sort of, subject to somebody saying I'm
3 misrecalling.

4 If we have two days of hearing in front of you, and we
5 understand we will probably get five and a half hours a day, or 14:49:03
6 something like that, so we're talking maybe about 11 --

7 THE COURT: Because it's a preliminary injunction
8 hearing, we may go a little bit longer because we won't have a
9 jury.

10 MR. HARPER: And we -- we were told by your staff that 14:49:14
11 we may go into the evening a little bit later. So if we have
12 about 11 hours of total testimony, or total time before you, we
13 had talked yesterday about perhaps the opening arguments taking
14 about 90 minutes total. That would be --

15 THE COURT: Each of you. 14:49:34

16 MR. HARPER: Each of us, and we included --

17 THE COURT: Forty-five minutes a party.

18 MR. HARPER: Yeah, we included America West -- or
19 U.S. Airways in that. We -- we talked about abiding by
20 whatever you would want by way of closing. Perhaps you'd want 14:49:44
21 closing in written documents and not oral argument, which would
22 save some time in front of you.

23 With that then being the case, we would be left with
24 about nine or nine-and-a-half hours, and what -- the proposal
25 that was made by myself to Mr. Szymanski and -- and his team is 14:49:59

1 that we would divide that approximately evenly, so that we
2 would take about four hours or so to put our case on, and our
3 cross-examination, and they would do likewise.

4 Now, in fairness to Mr. Szymanski, he can't commit to
5 that because he doesn't know -- yet -- what our case is going 14:50:19
6 to be, and we have to work through that because we're now in
7 the -- in the beginning of discovery. We have depositions scheduled
8 for the end of this month early into September; we have written
9 discovery that has been exchanged between the parties; we've
10 agreed, as you saw in the scheduling order, proposed scheduling 14:50:35
11 order, expedited resolution. Okay?

12 Now, our case, I've tried to tell them, is I'm going
13 to show that you did not have a legitimate union purpose for
14 doing what you did by not including the Nicolau in the MOU.
15 They have in the past given us half a -- about a dozen 14:50:55
16 legitimate union purposes. We've addressed them before. We
17 will address them again and try to convince you that none of
18 those in the past were legit. They're not legit now. The new
19 legit that they come up with is that he just had no
20 alternative. They couldn't get the MOU through if they put the 14:51:13
21 Nic in as part of the ratification, so they decided not to do
22 it. We don't think that that's a legitimate union purpose and
23 we will try to convince you that -- like that.

24 Now, they have an affirmative defense they have raised
25 with respect to the West Pilot vote indicating that a majority 14:51:29

1 of them voted in favor of the MOU and, therefore, they waived
2 any claim they have to a DFR. If they have -- if they're going
3 to go forward with that affirmative defense, then I need to
4 address that. So I need to spend some time beating back their
5 affirmative defense if they come forward. So I've got no
6 legitimate union purpose. Some of it's --

14:51:50

7 THE COURT: And I --

8 MR. HARPER: -- going to be live and some of it will
9 be deposition testimony.

14:51:59

10 THE COURT: All right. And I understand from our
11 conversations previously before in hearings before the Court
12 what your position would be on their affirmative defense.

13 Does that require presentation of evidence, however?

14 MR. HARPER: Well, it depends. Let me give you an
15 example. If you would decide the class certification based
16 upon the briefs that are already submitted, I think that that
17 would probably gut their affirmative defense. They've --
18 you're using on a one side of the coin right now. I suspect if
19 you reject it, you might reject it on that side of the claim
20 also, and I may not have to do more than to bring in one pilot
21 who says: Look, I was told I could vote for this at no risk.

14:52:17

14:52:32

22 So, I mean, if you make that early ruling on the class
23 certification, I think it clears it up and pre -- and opens up
24 more time for both of us.

25 THE COURT: Okay.

14:52:48

1 MR. HARPER: Now, experts, you might want -- be
2 interested in that. You might ask him what they have in mind
3 by way of an expert.

4 We have one pilot. We're going to come in here, we're
5 going to have one pilot who's going to update for us briefly if 14:53:01
6 we can't stipulate to the Nicolau Award, what it would look
7 like today if you would consider telling somebody to use it.

8 So we're going to make -- we have one pilot who will
9 come in and tell you what he did to update it. Lay foundation
10 if they can't stipulate to it. Reading your local order, it 14:53:18
11 seemed to us that perhaps that pilot might be a quasi-expert,
12 so we're going to identify him as such tomorrow. He'll be
13 deposed at the end of the month by USAPA, and then we'll see if
14 we can't stipulate to something. So that's going to be our
15 expert. 14:53:36

16 They have a week from Friday, the 23rd, to determine,
17 declare their experts. I don't know if they have one. I think
18 they may be thinking about one, so you might ask them what they
19 intend to do by way of expert.

20 THE COURT: Expert -- 14:53:50

21 MR. HARPER: And then we have the opportunity to put
22 a --

23 THE COURT: Under --

24 MR. HARPER: -- rebuttal on.

25 THE COURT: Under the applicable rule of evidence, 14:53:55

1 and, of course, this is before a court, but the Court is acting
2 as a jury, why would I need an expert? Why would an expert be
3 valuable --

4 MR. HARPER: I have no idea.

5 THE COURT: -- or relevant --

14:54:06

6 MR. HARPER: I mean --

7 THE COURT: -- or why do I need expertise?

8 MR. HARPER: I think you need our pilot to update,
9 because we -- we are going to, for the record, ask you to
10 consider imposing --

14:54:18

11 THE COURT: Well --

12 MR. HARPER: -- the Nic.

13 THE COURT: Oh. So what you're really talking about
14 is not an expert who's going to give an opinion, are you?
15 You're talking about an expert who is essentially nothing more
16 than a summary witness?

14:54:24

17 MR. HARPER: Yeah. It started out that way, but then
18 as we had some discussions, it sounded to us like they thought
19 that we may -- that person may be an expert, so we were just
20 going to --

14:54:39

21 THE COURT: Okay. So put a --

22 MR. HARPER: You can -- you can take him any way you
23 want, whether he's just a summary --

24 THE COURT: Is he -- is the pilot going to offer an
25 opinion on something that's relevant? Certainly not an opinion

14:54:47

1 on the ultimate issues and legal issues.

2 MR. HARPER: No. No, not at all. No.

3 THE COURT: So as a summary witness, then.

4 MR. HARPER: Yes. But I've heard that they may think
5 they need somebody to tell you what a legitimate union purpose
6 is, or something like that, so I don't know. 14:55:00

7 But in any event, we think if we try real hard and
8 keep on this schedule, we can get it all done on September 24
9 and September 25, about. If we really, really work to -- to
10 work with you and your staff to lay it in so that we get it
11 done. 14:55:20

12 If there's a little tail to it, I think it remains to
13 be seen yet, and I think it will mostly be USAPA thinking that
14 they might need more time to do something.

15 THE COURT: Are there issues about the admissibility
16 of evidence? One that appears to be important to me that may
17 save time, or not, is whether or not an expert witness is
18 necessary. Other than that, are there other issues concerning
19 admissibility of evidence? 14:55:33

20 MR. HARPER: We've had in the first conversation, or
21 maybe the conversation before that, I can't remember, we've had
22 about three or four. The general thought was any of the
23 documents that come from USAPA probably will be agreed to as
24 authentic, and therefore can be in evidence that way. There
25 may be some relevant -- relevancy objections and stuff like 14:56:15

1 that.

2 THE COURT: How about --

3 MR. HARPER: On our side we don't have very -- pardon
4 me?

5 THE COURT: Yeah. I'm just trying to figure out if I 14:56:23
6 can streamline it to two days, are we talking about other than
7 hearsay, are we talking about hearsay objections, or -- or are
8 you so far from completion --

9 MR. HARPER: No.

10 THE COURT: -- it seems you're beyond the embryonic 14:56:40
11 stages of discovery, but are you unable to decide that?

12 MR. HARPER: No, we -- we've identified a limited
13 number of pilots who we're going to call for certain purposes
14 if we have to. Let me give you an example.

15 If they still go on their affirmative defense and say 14:56:53
16 all the pilots waived, we have a couple of pilots who say under
17 their bylaws and their constitution they weren't entitled to
18 vote, so they can't waive. They should stipulate to that.
19 Stuff like that we should be able to work out either at the
20 time of the joint pretrial in early September or before we go 14:57:08
21 to trial, I would think, but most of the stuff like that should
22 be resolved.

23 THE COURT: Okay.

24 MR. HARPER: I doubt if we're going to have, as I'm
25 just sitting here, I don't intend to ask anybody anything that 14:57:20

1 they don't know firsthand about. So I don't think there will
2 be any hearsay on my part, objections or -- objections to any
3 of the testimony that I want to present. I doubt if there will
4 be any on Pat's side, either. I mean, he's pretty good at --

5 THE COURT: All right.

14:57:34

6 MR. HARPER: -- honing it down.

7 THE COURT: Thank you.

8 MR. HARPER: Now, there are a couple things that
9 you -- you might think about here that will help streamline it.

10 In the complaint we have a common fund request for
11 attorneys' fees or damages based upon the common fund doctrine.
12 I think it's count 3 in the complaint. My understanding of
13 what you ordered us to do on September 24 and 25 was to hone in
14 on the preliminary-permanent injunction issues, and that's what
15 we'd be trying in front of you. From my way of thinking, the
16 common fund point is not ripe yet until you decide whether we
17 have proved a breach.

14:57:44

14:58:05

18 So I told the other side I don't think common fund
19 ought to be part of the two-day trial. We haven't reached an
20 agreement on that, but if you could give us some guidance on
21 whether you think it's even proper to be thinking about that on
22 September 24-25, and if you say, No, don't bring it up yet,
23 we'll get to it later if we can prove a breach, then that would
24 reduce the trial.

14:58:21

25 THE COURT: I haven't heard from Mr. Szymanski, but

14:58:38

1 that seems to make abundant sense to me --

2 MR. HARPER: I thought so.

3 THE COURT: -- that it's not ready -- we're not ready
4 for that.

5 MR. HARPER: And the other thing you might do early 14:58:48
6 that would help us is pay attention to the class certification.

7 If you think you can certify based upon the current briefs and
8 if you say the class is certified, that may -- I'm going to get

9 some push back, I know, when USAPA gets up there -- that may

10 limit, maybe it should limit the scope of some of the 14:59:07

11 deposition testimony of the 14 or 17 pilots that they have

12 noticed the deposition of, and that would clear that issue up

13 so as we roll into this we know that we have a certified class.

14 That's something I think you could consider doing now in

15 advance of the trial. 14:59:26

16 And then the -- the other thing that might help us all

17 as we move forward here, just because of the things that

18 Mr. Siegel has talked about the request, perhaps you could look

19 at the briefing on McCaskill-Bond. I don't think there are

20 going to be any facts at any time that are going to go to that, 14:59:44

21 and you may just look at those and decide the McCaskill-Bond

22 issue as a matter of law based upon the briefs that you have in

23 front of you.

24 THE COURT: Okay. Thank you.

25 Mr. Szymanski. 14:59:56

1 MR. SZYMANSKI: Well, Your Honor, I want to start with
2 just very briefly a couple of comments that were made not about
3 the trial going forward, but about where we are right now.

4 First of all, I think it's clear that if there's no
5 merger there's no case. And that's the important effect of
6 what the Department of Justice lawsuit means for this case.

15:00:17

7 Second, Judge Lane -- again, I wasn't there. As
8 Mr. Siegel says, I don't want to misrepresent things, but I
9 understand that Judge Lane has concerns about the Department of
10 Justice case -- has asked for briefs to be due on the 23rd of
11 August, and has set a hearing on the 29th of August to talk
12 with the parties about that in the bankruptcy case.

15:00:44

13 THE COURT: When you say "concerns," you're indicating
14 that he has, or --

15 It's a he?

15:01:04

16 MR. SZYMANSKI: Yes. Judge Lane, yes.

17 THE COURT: He has impliedly stated that he's
18 concerned about whether or not there's merit?

19 MR. SZYMANSKI: No, he -- he's concerned about whether
20 or not he should be proceeding to approve the plan of
21 reorganization, given the pending Department of Justice
22 lawsuit. That's -- and he -- and he stated at the beginning of
23 the hearing that he in fact considered postponing the hearing
24 today but decided not to do that because of how soon before the
25 hearing the Department of Justice case was filed. It would

15:01:20

15:01:40

1 have been disruptive to people who were already planning to be
2 before him today.

3 But it's clear that he has concerns about going
4 forward, based on the fact that the Department of Justice has
5 filed the lawsuit. And that's what he's asked for briefs on,
6 and that's what he scheduled the hearing on. So that's what I
7 understand the situation to be before the bankruptcy court.

15:01:56

8 As Mr. Siegel said, the plan of reorganization itself,
9 in order to go forward with the merger, requires the approval
10 of the bankruptcy court and all of the necessary governmental
11 approvals. And not only there's -- is there a lawsuit by the
12 Department of Justice, the fact that they have sued means, of
13 course, that they have not issued that approval. So those
14 necessary approvals by the bankruptcy court and by the
15 Department of Justice are both up in the air.

15:02:22

15:02:42

16 As far as activities that have happened concerning the
17 potential merger, there have been a lot of preparations and
18 discussions on both sides, but there have been no actual
19 activities. No -- no pilot's been reassigned. No seniority
20 system has been changed. People have not assumed positions in
21 the various corporations. There are no transactions between
22 them in terms of members of the board of directors or so forth.
23 They have all acted within their own corporation to approve --
24 to be sure the merger, the shareholders, the members of the
25 board of directors and so forth, have all done those things,

15:03:03

15:03:27

1 but not in a way that begins to mix the two corporations. That
2 hasn't happened and won't happen until the merger is approved
3 one way or another.

4 Frankly, Your Honor, if this Court were to issue some
5 decision in this case and the merger didn't go forward, it 15:03:47
6 would be purely advisory. I wouldn't think that it would have
7 precedential value. In fact, I think it would be subject to
8 being vacated because of that situation. I don't think there's
9 any benefit whatsoever --

10 THE COURT: I'm sorry, vacated on -- on what basis? 15:04:01

11 MR. SZYMANSKI: Because -- because there was no actual
12 merger, and therefore it was a -- a purely advisory decision.
13 It did not actually decide any rights between the parties
14 because the merger didn't go forward. That's what I'm saying.

15 We are enga -- when -- when this Court issued its 15:04:18
16 decision back in -- in July, the Court was under the
17 impression -- and frankly, we all were. And let me just say
18 one thing that I think we all agree on here: We're all
19 extremely disappointed with this development.

20 THE COURT: So am I. 15:04:40

21 MR. SZYMANSKI: I -- I imagine. But we have a number
22 of different people who have been making plans --

23 THE COURT: For all of our -- for legal reasons only.

24 MR. SZYMANSKI: Okay.

25 THE COURT: Okay. Go ahead. 15:04:51

1 MR. SZYMANSKI: But we have a number of pilots, both
2 former America West Pilots and former U.S. Airways pilots, who
3 were looking forward to getting retrospective pay and beginning
4 to earn on a regular basis at a different rate with different
5 benefits, and that all at a minimum has been postponed probably 15:05:06
6 for three or four months. We hope that that's all it is.

7 In the meantime, when this Court set the dates of the
8 24th and 25th of September, I'm sure the Court understood --
9 and, of course, we all understood -- that that was an extremely
10 challenging schedule. And we have been working maybe even 15:05:28
11 night and day, certainly on weekends, to try to meet that
12 schedule.

13 And to say that this has been a -- a fire drill, I
14 mean, we've -- we've shortened the time for responding to
15 discovery requests. We've set up an abbreviated schedule for 15:05:45
16 responding to objections within three business days of
17 receiving a request instead of waiting for the normal 30 days,
18 and -- and so on and so forth. And we have been doing that,
19 and we've had our normal disagreements, but everybody has been
20 cooperating on doing that. 15:06:06

21 But I have to tell you this is making it difficult,
22 especially for us, to prepare our defense in this case, and
23 with respect to the issue about expert witnesses --

24 THE COURT: Well, let me stop you.

25 What is making it difficult to prepare your defense, 15:06:24

1 if in fact -- I thought your client was not really involved in
2 the -- in the DOJ lawsuit, so you've just been moving forward.

3 MR. SZYMANSKI: The defense in this case, Your Honor.
4 The -- the abbreviated trial schedule.

5 THE COURT: I see. So what you're saying is it has
6 nothing to do with the DOJ lawsuit. 15:06:45

7 MR. SZYMANSKI: No.

8 THE COURT: Okay.

9 MR. SZYMANSKI: What I am saying is that my
10 understanding was that the Court set the abbreviated trial
11 schedule because the Court was under the impression, as we all
12 were, that this deal was going to close and the merger was
13 going to occur by the end of the third quarter. 15:06:56

14 At this point it's obvious that it's not going to
15 occur by then, and in fact the best estimates are that we're
16 talking about sometime in December. 15:07:15

17 It seems to me --

18 THE COURT: So are you asking, or would you be asking,
19 anyway, and now it makes more sense to ask for it, for if I do
20 hold the hearing, you need additional time, is that what you're
21 asking for, to get prepared? 15:07:31

22 MR. SZYMANSKI: Your Honor, it seems to me that there
23 are two reasons for not holding the hearing on the 24th and
24 25th of September. The first one is is that at that point you
25 will know probably not much more than you know now about what's 15:07:46

1 happening with the Department of Justice case and with the
2 bankruptcy court's case.

3 Number two, as I say, we are on an extremely
4 abbreviated schedule. There are a number of things -- I mean,
5 on September 6th, for example, we have to have the normal 15:08:07
6 pretrial order; we have to have findings of fact and
7 conclusions of the law. We're -- we're doing depositions that
8 week, we're doing depositions the week before, we've got
9 multiple people doing multiple things at different times, and
10 it's really stretching the resources to get things done the way 15:08:24
11 they should be done for a federal court trial on that kind of a
12 schedule.

13 It would seem to me that if you're not going to
14 dismiss this without prejudice that at a minimum what we ought
15 to have here is something like a 30- or 60-day stay of what's 15:08:42
16 happening and come back with a -- before the Court at that
17 particular point, pick up where we left off, and at that point
18 the Court can decide, we'll have information about what's
19 happening in the bankruptcy court. We'll have, I suppose, a
20 trial schedule at that point from the Department of Justice. 15:09:04
21 Is it going to be December, is it going to be January, or
22 whatever it's going to be.

23 THE COURT: How far are you towards completion of the
24 discovery?

25 MR. SZYMANSKI: Your Honor, we've exchanged document 15:09:17

1 requests and interrogatory requests. We have some disputes
2 that we have talked about. Nothing has been produ -- well,
3 except for a couple of minor documents, nothing's been produced
4 at this point, and there have been no depositions taken.

5 THE COURT: But you have depositions scheduled. 15:09:37

6 MR. SZYMANSKI: We have depositions scheduled for the
7 last week in August and the first week in September.

8 THE COURT: Um-hum. Okay.

9 What's this about an expert witness?

10 MR. SZYMANSKI: Your Honor, there are a couple of 15:09:49
11 different areas in which we have been considering an expert
12 witness. One is with respect to the McCaskill-Bond process,
13 the seniority integration process. There are a number of
14 issues that are involved in that process that likely are
15 involved in this case. Again, I -- I don't know exactly what 15:10:07
16 the plaintiffs' case may be, but there are questions about that
17 process, and --

18 THE COURT: Now, let me ask you, what would the
19 witness testify to? Would the witness be testifying to the
20 process, or would the witness be testifying to opinion 15:10:25
21 testimony of any sort? That's what an expert witness does. Or
22 is this a --

23 MR. SZYMANSKI: Probably --

24 THE COURT -- separate witness?

25 MR. SZYMANSKI: Your Honor, I'm going to have to tell 15:10:40

1 you, I'm not even sure I can tell you with certainty what we
2 expect the expert wit -- we're a week before when we have to
3 declare our expert witness and I have not engaged expert
4 witnesses. I've been -- I've talked to three or four of them
5 who, for different reasons, many because they can't make the
6 schedule to have their expert report done on the 23rd of
7 August, which is set, to even consider doing this, so I don't
8 have an expert at this point. I've been looking for one for
9 the past two weeks.

15:10:59

10 THE COURT: And --

15:11:16

11 MR. SZYMANSKI: So I can't -- I really can't tell you
12 what it is.

13 THE COURT: Well, you're looking for an expert, but
14 you're looking for an expert to testify to what?

15 MR. SZYMANSKI: The McCaskill-Bond process.

15:11:28

16 THE COURT: Okay, so tell me what the expert would
17 testify to.

18 MR. SZYMANSKI: Your Honor, I -- what the process is;
19 how the process goes forward; what parties do in the process.
20 We haven't actually --

15:11:42

21 THE COURT: Isn't that --

22 MR. SZYMANSKI: -- come to that point.

23 THE COURT: -- something that you would tell me in
24 opening statement?

25 The reason why I'm asking, Mr. Szymanski, is that I'm

15:11:48

1 hoping to save some time. And you're looking for an expert,
2 and I -- and I presume you're doing everything you can, as
3 aggressively and as fiercely as an advocate you can, in order
4 to meet the requirement that you proffer who your expert is and
5 what he or she would testify to. But that's why I'm asking you 15:12:07
6 here now.

7 If in fact there's no need for an expert and I would
8 grant the plaintiffs' motion not to allow it, then let's --
9 let's talk about that now.

10 MR. SZYMANSKI: Your Honor, I'm not prepared to talk 15:12:24
11 about it at this point any more than I already have. We've --
12 we've discussed. We've talked about finding a person. We've
13 tried to find a person. We don't have it yet. We don't have a
14 set of --

15 THE COURT: So you don't -- 15:12:35

16 MR. SZYMANSKI: -- rudimentary set of issues yet.

17 THE COURT: What you're telling me is is you don't
18 even know yet whether or not you'll be calling an expert.

19 MR. SZYMANSKI: That's correct.

20 THE COURT: Okay. 'Cause you just haven't talked to 15:12:45
21 somebody to determine what they would say about the process?

22 MR. SZYMANSKI: I haven't even found somebody who's
23 willing to meet the time schedule yet, Your Honor.

24 THE COURT: Mr. Harper, you're raising your hand.

25 MR. HARPER: I am. 15:12:57

1 THE COURT: You have an answer to my question?

2 MR. HARPER: No, I don't. I just -- when he started
3 he says he was thinking about an expert in several areas. He's
4 only mentioned one. I just don't know if there's another area.

5 THE COURT: And are there other areas?

15:13:07

6 MR. SZYMANSKI: There are potentially other areas,
7 Your Honor. There are areas about people who have expertise
8 about union collective bargaining negotiations.

9 THE COURT: About what, now?

10 MR. SZYMANSKI: Union collective bargaining
11 negotiations and the --

15:13:19

12 THE COURT: Give me --

13 MR. SZYMANSKI: -- functions of unions.

14 THE COURT: All right. You've been -- you've been
15 in -- in this area of practice for a long time, so what would
16 this witness testify to as an expert? What opinion would he --
17 he or she proffer that would be relevant to the issues before
18 this Court and also something that required an expert?

15:13:28

19 MR. SZYMANSKI: Your Honor, the kinds of things that
20 unions typically take into account in making decisions in the
21 course of collective bargaining negotiations. The kinds of --

15:13:50

22 THE COURT: Well, let me --

23 MR. SZYMANSKI: -- competing --

24 THE COURT: Okay. All right. Anything else? Any
25 other? You said a number of different potential experts.

15:14:02

1 MR. SZYMANSKI: Those are the two -- those are the two
2 main areas, Your Honor.

3 THE COURT: All right. Without unequivocally
4 presaging a ruling, I can tell you based upon your proffer I
5 wouldn't allow those experts to testify to what you have
6 proffered, so that may save you some time. 15:14:18

7 Under the rules, under Rule 702, the expertise of the
8 individual has to be something that would be helpful to the
9 Court where expertise is required. It sounds to me like more
10 than anything else, that's the type of thing that I would be 15:14:39
11 interested in hearing from you in opening statement or closing
12 argument, and perhaps there would be witnesses that would
13 testify to what really happened at the time that is related to
14 the proffer that you have given to me as to what these people
15 would say. So that should save you some time. 15:15:02

16 Now, I'm going to take this matter under advisement
17 and I will save you time, meaning that I will give you a
18 decision as soon as possible, which should be within 24 hours,
19 as to whether or not we're going to go forward; whether or not
20 I'm going to dismiss the case without prejudice; whether or not 15:15:21
21 I'm going to stay the matter.

22 All right. Mr. Harper?

23 MR. HARPER: Would you mind, Your Honor, if I could
24 make one response to a point that he made?

25 THE COURT: As long as it's -- 15:15:33

1 MR. HARPER: It would be very --

2 THE COURT: -- very short.

3 MR. HARPER: -- very, very brief.

4 THE COURT: If you're going to repeat something that
5 I've already said --

15:15:39

6 MR. HARPER: Very, very brief.

7 He's having difficulty preparing his defense. Judge,
8 the issue is: What was the legitimate union purpose for doing
9 what they did? They know it, they have to articulate it, and I
10 have to beat it back.

15:15:57

11 He has no defense. He should be up there first
12 explaining to you what the legitimate union purpose was as a
13 plaintiff, and I should be trying to beat it back.

14 He's not preparing a defense. He has to prepare his
15 story.

15:16:13

16 THE COURT: Thank you. We are adjourned.

17 (Proceedings concluded at 3:15 p.m.)

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2 C E R T I F I C A T E
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6

7 I, GARY MOLL, do hereby certify that I am duly
8 appointed and qualified to act as Official Court Reporter for
9 the United States District Court for the District of Arizona.

10 I FURTHER CERTIFY that the foregoing pages constitute
11 a full, true, and accurate transcript of all of that portion of
12 the proceedings contained herein, had in the above-entitled
13 cause on the date specified therein, and that said transcript
14 was prepared under my direction and control.

15
16
17 DATED at Phoenix, Arizona, this 16th day of August,
18 2013.

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21 s/Gary Moll
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