

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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NO. 09-16564

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DON ADDINGTON, JOHN BOSTIC; MARK BURMAN AFSHIN IRANPOUR,  
ROGER VELEZ, and STEVE WARGOCKI, representing themselves and as  
representatives of the class, and all others similarly situated in the class,

Plaintiffs-Appellees,

v.

US AIRLINE PILOTS ASSOCIATION,

Defendant-Appellant,

and

US AIRWAYS, INC.,

Defendant.

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Appeal From Permanent Injunction Order By The United States District Court For  
The District Of Arizona,  
No. C08-1633 & C08-1728 (consolidated) NVW  
Honorable Neil V. Wake, United States District Judge

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**DEFENDANT-APPELLANT'S  
MOTION TO STRIKE LETTER BY APPELLEES  
(Fed. R. App. P. 27; 9th Cir. R. 27-1)**

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## **I. MOTION TO STRIKE.**

Comes now Defendant-Appellant, the US Airline Pilots Association (“USAPA” or “Appellant”), pursuant to Fed. R. App. P. 27 and 9th Cir. R. 27-1 to move this Court to strike forthwith Plaintiff-Appellees’ (“Plaintiffs”) letter filed on December 2, 2009 (Dkt. 7148730) purporting to set forth citation to supplemental authorities under Rule 28(j).<sup>1</sup>

## **II. FACTS.**

Plaintiffs did not oppose USAPA’s motion to expedite this matter. (Dkt. 7008365, p. 9). This Court ordered this matter expedited (Dkt. 7014854) and set oral argument for December 8, 2009 (Dkt. 7109791).

Plaintiffs did not seek an extension of time to file their response brief. Rather, on October 26, 2009, Plaintiffs filed a full, 13,986 word response brief with citations to dozens of cases, statutes, rules and treatises.

Six calendar days before oral argument, Plaintiffs filed a letter (Dkt. 7148730) with this Court with five case citations that they had omitted from their Response brief despite the fact that none of the cases were announced or published after Plaintiffs filed their main brief. Because Plaintiffs’ filing fails to comply with Fed. R. App. P. 28(j) and 9th Cir. R. 28-6, and constitutes an unfair and prejudicial

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<sup>1</sup> This motion is without prejudice to Appellant to respond to the citations in the letter pursuant to Fed. R. App. P. 28(j) in lieu of a grant of this motion to strike.

attempt to supply an unauthorized sur-reply brief, USAPA brings this motion to strike it.

### **III. GROUNDS.**

Plaintiff-Appellees' letter filing should be struck on four grounds (together and independently):

First, the filing **abuses the purpose of Rule 28(j)** because all citations did not come "after the party's brief ... [was] filed" and the filing was calculated to, or has the effect of, constituting an unauthorized sur-reply brief.

Second, the filing is **not timely** under 9th Cir. R. 28-6 and the *Circuit Advisory Committee Note To Rule 28-6*.

Third, the filing **fails to state the reasons for the supplemental citations** by failing to refer to any page in Appellees' Response brief.

Fourth, the filing **lacks pertinent and significant** authorities.

### **IV. ARGUMENT.**

#### **i) Abuse of Rule 28(j).**

Rule 28(j) is intended to allow parties to assist a reviewing Court with authorities that are significant and which "come to the party's attention *after* the party's brief has been filed" and which the party "*promptly*" brings to the Court's attention. The intent of the Rule is to allow consideration of cases that constitute

new developments, that is after briefs were filed or after oral argument heard. Wright, A. Miller, E. Cooper & E. Gressman, *Fed. Prac. & Proc. Juris.*, Vol. 16AA, § 3974.6 (4th ed.), (2009) (*citing* Committee Notes to the 1979 amendment adding Rule 28(j)).

The usual rule that contentions and issues not raised and argued in a party's principal brief are ordinarily deemed abandoned applies with equal force to Rule 28(j) letters, and they are thus not an appropriate vehicle for asserting new contentions. *United States v. Gonzalez-Torres*, 309 F.3d 594, 599 n. 1 (9th Cir. 2002), *cert. denied*, 538 U.S. 969 (2003) (granting motion to strike Rule 28(j) letter that raised arguments that had not been made in the briefs or before the district court). *See also*, *United States v. Kimler*, 335 F.3d 1132, 1138 n. 6 (10th Cir. 2003), *cert. denied*, 540 U.S. 1083 (2003) (refusing consideration of “authority that was readily available at the time of briefing”); *United States v. Jones*, 308 F.3d 425, 427 n. 1 (4th Cir. 2002) (no consideration of “authority that was readily available at the time of briefing”). And commentators, too, have noted the obvious dangers in sending a letter citing authorities that were in existence at the time of briefing but that counsel simply failed to include in their brief. Wright, A. Miller, E. Cooper & E. Gressman, *Fed. Prac. & Proc. Juris.*, Vol. 16AA, § 3974.6 (4th ed.), *Wright & Miller* (2009) (*citing* Aldisert, *Winning on Appeal: Better Briefs &*

*Oral Argument*, 2d ed. 2003, p.331 (“Submitting cases at the last minute that should have been in the brief is a sign of sloppy lawyering.”)).

Plaintiffs’ letter cites only cases available to them by simple research prior to the filing of their brief, that is, it cites no new cases. Indeed, one of Plaintiffs’ citations, *Teamsters Local Union No. 42 v. NLRB*, 825 F.2d 608 (1st Cir. 1987), was already cited in the *joint* proposed jury instructions (3ER434) and had been cited by the District Court as well (1ER17) long before Plaintiffs’ response brief was due.

The Ninth Circuit has refused to consider supplemental citations submitted under the cloak of Rule 28(j) where it appears that the Rule is being abused. *See generally, Trans-Sterling, Inc. v. Bible*, 804 F.2d 525, 528 (9th Cir. 1986); *Stuart v. United States*, 813 F.2d 243, 250 (9th Cir. 1987); *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*, 969 F.2d 764, 773 (9th Cir. 1992); *United States v. LaPierre*, 998 F.2d 1460, 1466 n 5 (9th Cir. 1993); *United States v. Fowlie*, 24 F.3d 1059, 1068 n 7 (9th Cir. 1994); *United States v. Gonzalez-Torres*, 309 F.3d 594, 599 n. 1 (9th Cir. 2002), *cert. denied*, 538 U.S. 969 (2003) (motion to strike Rule 28(j) letter granted). And, this Court has refused to consider citations already made to a district court, as was done here. *Brady v. Gebbie*, 859 F.2d 1543, 1557 n. 13 (9th Cir. 1988).

Because Appellees' letter cites no new developments, but simply offers old citations in response to USAPA's arguments, Appellees' letter is nothing more than an unauthorized sur-reply brief. As such it abuses Rule 28(j) and should be struck.<sup>2</sup>

## **2) Not Timely.**

It is undisputed that Appellees filed their letter six calendar days before oral argument in this matter, scheduled for next Tuesday, December 8.<sup>3</sup> Yet in this Circuit, in the "interests of promoting full consideration by the court and fairness to all sides," the parties "should file all FRAP 28(j) letters as soon as possible ... at least 7 days in advance of any scheduled oral argument." *Circuit Advisory Committee Note To Rule 28-6*. Appellees did not do that. Appellees offer no reason for their dilatory filing. And none appears, because four of the five citations they make are to cases that preceded the filing of their response brief not by months but by years. And the one recent case they do cite, *Lindsay v. Association of Professional Flight Attendants*, 581 F.3d 47, 61 (2d Cir. Sept. 21, 2009) was published nearly a full month *before* Appellees filed their Response brief.

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<sup>2</sup> Similarly, the District Court found that counsel for Plaintiffs had earlier submitted an unauthorized sur-reply brief to it, too, and on motion, struck it. (Docket No. 566).

<sup>3</sup> Excluding the day of oral argument. *See*, Fed. R. App. P. 26(a)(1).

**3) Reasons Not Stated.**

Rule 28(j) requires that a supplemental letter “must state the reasons for the supplemental citations” and that this is to be accomplished by “referring either to the page of the brief or to the point argued orally.” Plaintiffs have done neither. What Plaintiffs have done is cite to *USAPA’s* briefs. But Plaintiffs are not supplementing *USAPA’s* brief, rather, presumably, their own. This is contrary to a common sense reading of the Rule and defies its utility to the reviewing Court. And, tellingly, citing to a brief *not* supplemented and beginning each paragraph with “Contrary to *USAPA’s*” argument is in the nature of a sur-reply.

**4) No Significant Authorities.**

Rule 28(j) is abused if parties use it as a vehicle to re-argue or simply exceed the limitations on their main brief. Rather, the Rule allows supplemental citation of only “pertinent and significant” authorities. As explained in *USAPA’s* response letter, the authorities cited by Plaintiffs fall short of this standard. Thus, Plaintiffs’ motion is not authorized under the Rule by their failure to cite anything of significance.

**V. REMEDY.**

For the foregoing reasons, Defendant-Appellant requests that this Court grant its motion to strike Plaintiff-Appellees' letter filing (Dec. 2, Dkt. 7148730), and award of the costs of this motion.

Date: December 4, 2009

Respectfully submitted,

*s/ Nicholas Paul Granath, Esq.*

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**CERTIFICATE OF SERVICE**

**Docket No. 09-16564**

When All Case Participants are Registered for the  
Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on: December 4, 2009

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

**s/ Nicholas Paul Granath, Esq.**