

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 DATED 9 DEC. 09  
(Fed. R. App. P. 27; 9th Cir. R. 27-1)**

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

Defendant-Appellant, US Airline Pilots Association (“USAPA”) submits this motion, pursuant to Fed. R. App. P. 27 and 9th Cir. R. 27-1, for an order striking forthwith Plaintiff-Appellees’ (“Plaintiffs”) letter filed on December 9, 2009 (Dkt. 7156512), which purports to set forth citation to supplemental authorities under Rule 28(j) but does not.<sup>1</sup>

## **II. FACTS.**

Oral argument was held in this appeal on December 8, 2009. On December 9, 2009, Plaintiffs filed a letter purportedly pursuant to Fed. R. App. P. 28(j) and Ninth Circuit Rule 28-6 in order to “submit authority to clarify a point raised yesterday at oral argument.” (Dkt. 7156512, at 1).

However, Plaintiffs’ letter does not cite any authorities that came to Plaintiffs’ attention after oral argument, which is the purpose of Rule 28(j). Instead, Plaintiffs’ letter simply cites a case *discussed in oral argument* in order to give a new answer to a question Judge Tashima asked about it. As such, it is a blatantly improper attempt to continue oral argument after argument was concluded. 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 attempt to continue oral argument, USAPA brings this motion to strike it.

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

This is Plaintiffs' second filing under Rule 28(j), and *both* have been improper uses of the rule. Plaintiffs' first Rule 28(j) letter was filed on December 2, 2009, six days before oral argument. (Dkt. 7148730). In that letter, Plaintiffs cited five cases 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. USAPA moved to strike that letter as an unfair and prejudicial attempt to file an unauthorized sur-reply brief. (Dkt. 7151959).

### **III. GROUNDS.**

Plaintiff-Appellees' letter filing should be struck because the filing **abuses the purpose of Rule 28(j)**, which permits a party to provide citations for "pertinent and significant authorities [that] come to a party's attention after the party's brief has been filed – or after oral argument but before decision." Plaintiffs' December 9 letter cites **no** authorities that came to their attention "after oral argument but before decision," and the filing was calculated to, or has the effect of, constituting an unauthorized continuation of oral argument.

### **IV. ARGUMENT.**

#### **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 or after oral argument. The intent of the Rule is to

allow consideration of cases that constitute new developments, that is, after a brief has been filed or after oral argument has been held. 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)).

Plaintiffs' letter cites **no** authorities that came to their attention after oral argument. They only cite one case, *Ramey v. District 141*, 378 F.3d 269 (2d Cir. 2004), but that was raised in oral argument, and this they do to make a point that counsel could have made during oral argument but failed to at the time. If this practice were permitted, the parties could continue to submit argument to the Court under the guise of "clarification," as Plaintiffs have done here, until the issuance of a decision.

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).

Because Plaintiffs' letter cites **no** new authorities, but simply attempts to improperly continue oral argument, the letter abuses Rule 28(j) and should be struck.

**V. REMEDY.**

For the foregoing reasons, Defendant-Appellant USAPA requests that this Court grant its motion to strike Plaintiff-Appellees' letter filing (Dec. 9, Dkt. 7156512), and award the costs of this motion to USAPA.

Date: December 10, 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  
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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 10, 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.**