

1 LEE SEHAM, Esq. *pro hac vice*
STANLEY J. SILVERSTONE, Esq. *pro hac vice*
2 LUCAS K. MIDDLEBROOK, Esq. *pro hac vice*
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
3 445 Hamilton Avenue, Suite 1204
White Plains, NY 10601
4 Tel: 914 997-1346
Fax: 914 997-7125

5 NICHOLAS PAUL GRANATH, Esq., *pro hac vice*
6 ngranath@ssmplaw.com
SEHAM, SEHAM, MELTZ & PETERSEN LLP
7 2915 Wayzata Blvd.
Minneapolis, MN 55405
8 Tel: 612 341-9080
9 Fax 612 341-9079

10 STANLEY LUBIN, Esq., State Bar No. 003076
stan@lubinandenoch.com
11 LUBIN & ENOCH, PC
349 North 4th Avenue
12 Phoenix, AZ 85003-1505
Tel: 602 234-0008
13 Fax: 602 626 3586

14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE DISTRICT OF ARIZONA**

16 Don ADDINGTON; John BOSTIC; Mark
BURMAN; Afshin IRANPOUR; Roger
17 VELEZ; and Steve WARGOCKI,

18 Plaintiffs,

19 vs.

20 US AIRLINE PILOTS ASSOCIATION, and
21 US AIRWAYS, INC.,

22 Defendants.
23

Case No. 2:08-cv-1633-NVW

**MEMORANDUM IN SUPPORT OF
USAPA's MOTION FOR A
CONTINUANCE**

1 As grounds for, and in support of, its motion for an order granting a continuance
2 of the accelerated trial to a date to be set sometime after February 17, 2009, after the
3 parties are heard in the Case Management Conference, USAPA respectfully states as
4 follows:

5 1. In the hearing conducted in this matter on October 29, 2008, lead counsel
6 for Plaintiffs, Mr. Harper, specifically asked this Court to "... schedule this thing on an
7 *expedited* basis for a resolution on the merits ..." (Transcript, p. 137, line 5) [emphasis
8 added]. The Court then asked each party's counsel in turn, "why can't this be done in
9 60 days?" (Transcript 137, line 25). In response, Mr. Harper responded affirmatively
10 stating, "I think we can." (Transcript p 138, line 5). Mr. Harper did not then indicate
11 that Plaintiffs intended to amend their complaint in any fashion. In reliance on this, no
12 counsel for the defendants specifically objected to the expedited treatment.

14 2. In its November 21, 2008 ruling, the Court ordered, "trial ... on the claim
15 for permanent injunction and liability for damage is accelerated and will be set no later
16 than February 17, 2009." (Docket No. 84, page 2, line 14). The Court also ordered that
17 Defendant USAPA file its answer not later than December 1, 2008.

18 3. Three days before USAPA's answer was due, and over the Thanksgiving
19 weekend, on Friday November 28, Plaintiffs served and filed a First Amended
20 Complaint specifically to make multiple and detailed "class action" allegations. (Docket
21 Nos. 86, 87). The amended pleading seeks to expand the number of plaintiffs from 6
22 individuals to a "putative West Pilot Class ... [of] approximately 1800." (Docket No. 87-
23

1 2, ¶ 21). Unlike Plaintiffs' removed case (2:08-cv-1728-PHX-NVW), which also seeks
2 class status, albeit of a different nature, this action seeks monetary damages.

3 4. Counsel for USAPA received no indication from Plaintiffs prior to the
4 filing of their First Amended Complaint that Plaintiffs would seek to try a class action
5 on the Court's accelerated schedule.

6 5. Federal Rule of Civil Procedure 23 establishes both prerequisites and
7 additional onerous requirements, procedural and substantive, and case law has
8 developed additional requirements — all of which must be met before a class can be
9 certified. *See, e.g. Berger v. Compaq Computer Corp.*, 257 F.3d 475, 481 (5th Cir.
10 2001). Plaintiffs bear the burden to satisfy these series of requirements. *Zinser v.*
11 *Accufix Research Institute, Inc.*, 253 F.3d 1180 (9th Cir. 2001), *opinion amended and*
12 *superseded on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001).

14 6. Defendant USAPA's Answer denies each and every class allegation and
15 USAPA intends to vigorously oppose certification.

16 7. Plaintiffs' surprise class action amendments unquestionably expand the
17 scope of their case and complicate this action. Consequently, Defendant USAPA will
18 be substantially prejudiced without the opportunity for expanded discovery and the time
19 necessary to litigate the class action certification issue. In addition, any order denying
20 or granting certification may be appealed on an interlocutory basis under Rule 23(f).
21 An accelerated trial set not later than February 17, 2009 is therefore no longer feasible
22 or equitable and Plaintiffs have effectively waived their own request for an "expedited"
23

1 trial by seeking a class action at this late time.

2 8. Because the Court's order of November 21 setting the Rule 16 case
3 management conference anticipates a Scheduling Order as contemplated in Fed. R. Civ.
4 P. 16(b)(1)(A), which is issued only after receipt of the parties' report under Rule 26(f)
5 — an event that has not yet occurred here — the legal standard to change the November
6 21 order is at the discretion of the Court. Rule 16(d) provides a court with the authority
7 to modify any "pretrial order" separate from the "good cause" standard set forth in Rule
8 16(b)(4) that controls changes to a Scheduling Order. And Rule 40 also vests the Court
9 with great discretion to rule on motions for trial continuance. *Clinton v. Jones*, 520 U.S.
10 681, 706-707 (1997). While LRCiv 40.2(b) does not allow for a continuance "except as
11 justice requires," in the present situation the trial date has not yet been set, or not fully
12 set, and in any event justice does require that the Court continue trial beyond the
13 February 17, 2009 time-frame if the class action issue remains.
14

1 Respectfully Submitted,

2 Dated: December 1, 2008

3 By:  /s/ **Nicholas Paul Granath, Esq.**

4 Nicholas P. Granath, Esq. (*pro hac vice*)
ngranath@ssmplaw.com
5 SEHAM, SEHAM, MELTZ & PETERSEN, LLP
2915 Wayzata Blvd.
6 Minneapolis, MN 55405

7 Lee Seham, Esq. (*pro hac vice*)
Stanley J. Silverstone, Esq. (*pro hac vice*)
8 Lucas K. Middlebrook, Esq. (*pro hac vice*)
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
445 Hamilton Avenue, Suite 1204
9 White Plains, NY 10601

10 Stanley Lubin, Esq. State Bar No. 003076
stan@lubinandenoch.com
11 LUBIN & ENOCH, PC
349 North 4th Avenue
12 Phoenix, AZ 85003-1505
Tel: 602 234-0008
13 Fax: 602 626 3586

14 ATTORNEYS FOR DEFENDANT
US AIRLINE PILOTS ASSOCIATION