Marty Harper (#003416)
mharper@stklaw.com
Kelly J. Flood (#019772)
kflood@stklaw.com
Andrew S. Jacob (#22516)
ajacob@stklaw.com
SHUGHART THOMSON & KILROY, P.C.
Security Title Plaza
3636 N. Central Ave., Suite 1200
Phoenix, AZ 85012
Phone: (602) 650-2000
Fax: (602) 264-7033
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DON ADDINGTON, *et al.*, Plaintiffs, vs. US AIRLINE PILOTS ASSOCIATION, and US AIRWAYS, INC., Defendants.	CASE NO. 2:08-CV-1633-PHX-NVW **PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT USAPA'S MOTION FOR CONTINUANCE BY US AIRLINE PILOTS ASSOCIATION.**

Plaintiffs object to Defendant US Airline Pilots Association motion for continuance (doc. 91). Contrary to USAPA's argument, the *First Amended Complaint* (FAC) makes no significant change to the substance of this litigation and, more importantly, does not require formal class certification before the Court can address the claim for permanent injunction and liability for Plaintiffs' damages. In addition, the Court can address these issues without a jury because the action was originally brought to obtain equitable relief. This Response is supported by the Memorandum of Points and Authorities that follows.

Memorandum of Points and Authorities

I. Plaintiffs always represented a West Pilot class.

A. Class action notice can be implicit.

Professor Newberg's treatise on class actions explains that, "Class allegations should put the defendant on notice that relief is sought on behalf of a class and,

basically, what the nature of that class is." 2 *Newberg on Class Actions*, § 6.13, p.609 (4th ed. 2002). "No formal rules govern class definition." *Id.* at § 6:14, p.620. Hence, in a case cited favorably by *Newberg*, class relief was upheld under the following circumstances:

> It was apparent from the beginning that Bing intended his suit to be a class action. The **action was brought by Bing on behalf of himself and "all others similarly situated."** He complained that Roadway's no-transfer rule discriminated against himself and "all others similarly situated, and his complaint alleged that the union's regulations and policy were discriminatory toward Negroes and prevented "Negroes from having equal employment. . . ." For relief he asked the court to enjoin the union from "discriminating against petitioner and others similarly situated," to award him damages and all other relief that was just or required.

Bing v. Roadway Exp., Inc., 485 F.2d 441, 446 (5th Cir. 1973). (emphasis added, citation omitted). The *Bing* court concluded that language such a this "must have notified Roadway and the union that Bing sought class relief." *Id.*

Other courts have recognized that allegations can give implicit notice of a class claim. *See*, *e.g.*, *Langley v. Coughlin*, 715 F.Supp. 522, 554, n.31 (S.D.N.Y. 1989) ("Although the original complaint did not contain class action allegations, it did allege all of the basic facts material to the class claims and, by its request for injunctive relief, gave adequate notice that class-wide relief might well be merited."); *Hawthorne v. Gulfshores, Inc.* 115 F.R.D. 474, 477 (S.D.Miss.,1986) (recognizing that "[t]he existence, if any, of general statements in the individual complaint indicating the possibility that a class claim might be raised" and "indications in the record that the plaintiff intended to proceed with the cause as a class action" support finding "notice to the Defendant that the Plaintiff's individual cause was really intended to be a class action").

B. The original complaint defined a class and pled a class action.

Although in the original *Verified Complaint* Plaintiffs neither cited to Rule 23 nor expressly asked for class action treatment, they provided ample notice that they

sought to vindicate the seniority rights of the West Pilots. Plaintiffs defined "West Pilots" as a class, by noting that the term was used "to refer, as individuals and as a group … to the pilots on the seniority list incorporated into the West CBA." *Ver. Compl.*, ¶ 2(e) (Sept. 4, 2008) (doc. 1). Plaintiffs unambiguously indicated that they were seeking relief for the benefit of this class. *See id.* at p.20 (praying for an order that "Defendant US Airways shall not furlough any West Pilot before it has furloughed all East Pilots junior to them on the Nicolau List"). They alleged class-wide standing, stating that "[b]ecause West … Pilots have standing as parties to the Nicolau Arbitration they may, as individuals or as groups … [e]nforce obligations established by the Nicolau Award against … East Pilots." *Id.* at ¶ 54(b). Finally, they used language analogous to that used in *Bing* to allege class-wide injury, alleging: that "[o]ne or more **Plaintiffs and other similarly situated West Pilots** will continue to accrue injuries until USAPA and Defendant US Airways implement a single CBA that applies the Nicolau List," *id.* at ¶ 72 (emphasis added); and that "USAPA … has caused **Plaintiffs and other West Pilots** the injuries alleged in Counts One and Two, *id.* at ¶¶ 102 & 109 (emphasis added).

Plaintiffs also sought a preliminary injunction that would have benefitted all other similarly situated West Pilots. This is unambiguously demonstrated by Plaintiffs' prayer for relief, which asked "the Court to grant their application for an ORDER that the Company shall not furlough Plaintiffs **or any other pilot who was on active service at the time of the merger** before it has furloughed all US Airways pilots who were on furlough at that time." *Applic. Prelim. Injunction*, 17:1-4 (doc. 12).

At a minimum, Plaintiffs' original *Verified Complaint* and *Application for Preliminary Injunction* gave USAPA and the Court notice that Plaintiffs intended to seek class-wide relief. Consequently, the Court proceeded with that understanding. For example, the Court characterized Plaintiffs' claim as

"challeng[ing] the furloughing of West Pilots in advance of furloughing New-Hire East Pilots." RT 7:6-8 (Oct. 29, 2008). The Court also noted that "it appears that as a practical matter, you [Plaintiffs] are first seeking relief, prospective and retroactive, against West Pilots being furloughed." *Id.* at 20:18-20. Finally, the Court adopted the class definition used in the original *Verified Complaint* where it stated, "[W]hen I say 'West Pilot' I mean a West Pilot who was flying when the merger agreement was done in 2005." *Id.* at 21:3-4.

USAPA also demonstrated its understanding that Plaintiffs were seeking class action treatment. For example, USAPA expressly recognized the large number of West Pilots that shared Plaintiffs' claims to protect their seniority rights. It did so where Mr. Seham recognized the problems inherent in each pilot bringing an individual claim while stipulating stated that would allow a neutral arbitrator to hear Counts I and II. Mr. Seham stated:

> But for every pilot, for theoretically to have 1800 proceedings when each pilot says I want my own bite at the apple, that's extremely problematic. We are willing to say that these plaintiffs have access to that process.

Id. at 361-5:.

Finally, the Company understood that the relief at issue would benefit the entire class of West Pilots. For example, Mr. Siegel assumed that if Plaintiffs obtained their injunctive relief, the Company would have to retrain far more than six pilots to comply with the Court's order. He estimated, if the Court were to grant the relief requested by Plaintiffs, that it would cost "as much as $30 million in the first year to accomplish an entire training process to switch the pilots over in the manner that a court order might allow us to do." *Id.* at 144:1-3. Surely, it would only cost the Company $30 million if the entire class of West Pilots was to benefit from the order.

Quite simply, therefore, USAPA has no credible basis to refer to the FAC as having "surprise class action amendments." *See USAPA Memo.* at ¶ 7 (doc. 92). It begs the question, how could counsel sign a pleading wherein he wrote that he "received no indication from Plaintiffs prior to the filing of their First Amended Complaint that Plaintiffs would seek to try a class action on the Court's accelerated schedule." *Id.* at ¶ 4.

C. USAPA waived arguing that class action requires a later trial date.

Because there was no "surprise," USAPA cannot now seriously argue that anything has expanded the scope of this case and complicated this action. *Id.* at ¶ 7. Absent any surprise, USAPA waived arguing unfair prejudice. Plaintiffs has done nothing more that expressly clarified what was implicitly clear in the original pleading—that they sought relief on behalf of the West Pilots.

If USAPA is unable to prepare for trial in February if Plaintiffs are asserting a class wide claim, it ought to have said so at the October 29 hearing. Alternatively, USAPA could have raised this issue and sought a Rule 23(d)(1)(D) order to "eliminate allegations about representation of absent persons," pursuant to when the Court scheduled trial for February 2009. Fed. R. Civ. P. 23(d)(1)(D); *see also John v. National Sec. Fire and Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007) ("Where it is facially apparent from the pleadings that there is no ascertainable class, a district court may dismiss the class allegation on the pleadings.");*Nguyen v. St. Paul Travelers Ins. Co.*, 2008 WL 4534395, 7 (E.D.La., Oct. 6, 2008) (same).

USAPA did neither. Instead, when asked if he could be ready for trial in 60 days, Mr. Seham responded:

> I'm hopeful, for example, on the issue of consideration of interest, of minority interest, that that can be evaluated based on our constitution and our proposal and if that issue is narrowed in those terms, then yes, I could seethe discovery being pretty limited and the hearing could be held in January.

RT 164:22-165:2.

Having notice that Plaintiffs sought class action treatment and having failed to object to a February trial date on that basis, USAPA waived its opportunity to assert that it cannot prepare for a trial by February 17, 2009.

II. The FAC ensures class-wide relief for damages.

A. Damages began to accrue after the action was filed.

Had the Court granted Plaintiffs' *Application for a Preliminary Injunction* (doc. 12) before October 1, 2008, substantial damages would have been averted. Because the Court did not do so, West Pilots have been improperly furloughed and have suffered economic injury. "The economic consequences of a lapse in employment—loss of pay, status, and other benefits—can be remedied for the most part with damages and a permanent injunction in the near future." *Order*, 23:22-24 (Nov. 20, 2008) (doc. 84). Absent class action treatment, the six-month limitations on the valid claims by each of the other West Pilots might run out while the parties litigate injunctive relief in this case. If that happened, USAPA would surely assert a limitations defense against any West Pilot.

B. Limitations are tolled for all West Pilots.

Plaintiffs' Amendment to ensure that there would be class action treatment effectively tolled running the limitations on such claims. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974)("[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action."); *In re Dynamic Random Access Memory (Dram) Antitrust Litigation*, 516 F.Supp.2d 1072, 1101 (N.D.Cal. 2007) ("The class tolling doctrine holds that the commencement of a class action stops the running of statutes of limitations as to all claims that might be asserted by all members of the class."). Plaintiffs, therefore, filed their FAC on November 28, 2008, added class treatment allegations, but

otherwise left the original pleading unaltered. *See* Doc. 87-2 (showing changes in FAC).

C. The Court need not address class certification first.

1. USAPA is not prejudiced by delay in class certification.

The amendments in the FAC do not change anything between now and February 17, 2008. Although the general rule is that class certification should be addressed before deciding the final merits, the Court has discretion to delay any determination of class certification where it would be more efficient to do so. For example, it is well-established that a court can address summary judgment before class certification. *See Wright v. Schock*, 742 F.2d 541, 543-44 (9th Cir. 1984); *Curtin v. United Airlines, Inc.*, 275 F.3d 88, 92 (C.A.D.C. 2001).

USAPA will not get any real benefit here from a determination of class certification. "[O]ne of the justifications for this rule [for expedited class certification] is to provide defendants with notice of the number of parties and the potential damages against which they must defend." *Siskind v. Sperry Retirement Program, Unisys*, 47 F.3d 498, 503 (2d Cir.1995); *see also Reed v. State Farm Mut. Auto. Ins. Co.*, 2008 WL 1777487, 3 (D.Colo. April 16, 2008) (same). The class size here is known (USAPA recognized that it is 1800 pilots). Class certification will not make that any clearer. With or without class certification, the potential for damages will depend on the extent of ongoing and future West Pilot furloughs, not class size.

Ordinarily, class certification prior to a decision on the merits gives an advantage to the defendant by supporting its use of res judicata. *See Katz v. Carte Blanche Corp.*, 496 F.2d 747, 758 -759 (3d Cir. 1974). In this instance, USAPA would be amply protected by issue preclusion if it were to prevail on the merits before class certification.

2. Injunctive relief does not require class certification.

Under the circumstances of this case, the Court can provide injunctive relief for the entire West Pilot class before deciding class certification. The only relevant restriction on injunctive relief is that it cannot be any broader than is necessary to fully protect Plaintiffs. *See Zepeda v. INS*, 753 F.2d 719, 272 (9th Cir. 1983). Although "injunctive relief should be narrowly tailored to remedy the specific harms shown by the plaintiffs," *id.* at 728, n.1, the remedy can have as broad an effect as is necessary to provide the needed relief to those plaintiffs. *See id.* (explaining that the necessary remedy for a single plaintiff to be free of having to ride on segregated buses is to desegregate busses for all persons—whether or not they are plaintiffs).

In this case, Plaintiffs would only be partly protected by an order that they cannot be furloughed ahead of any East Pilot who is junior to them on the Nicolau seniority list. That order would protect Plaintiffs from furloughs but would not protect their interest in promotions and other seniority benefits that result from having the full complement of more junior West Pilots working. The only way to protect that interest is to enjoin the furloughing of any West Pilot ahead of East Pilots. more junior on the Nicolau list.

In short, Plaintiffs will be entitled to the same injunctive relief whether or not the class is certified.

III. There's no Seventh Amendment right to enjoin breach of DFR.

Although both parties have requested a jury trial, neither has a Seventh Amendment right to have a jury decide whether to order implementation of the Nicolau seniority list. "[I]n determining whether the Seventh Amendment guarantees a jury," the primary focus is on the character of the relief, rather than on "finding a precisely analogous common-law cause of action." *Spinelli v. Gaughan*, 12 F.3d 853, 855-56 (9th Cir. 1993). Where both money damages and injunctive relief are sought, the general rule is that a jury must determine all facts common to

both claims. *Brownlee v. Yellow Freight System, Inc.*, 921 F.2d 745, 749 (8th Cir. 1990). Where an "unfair representation claim … seeks purely equitable remedies," however, "there is no right to a jury trial." 22A *Fed. Proc., L. Ed.* § 52:2273. As was noted in another matter, "because Plaintiffs' original complaint involved only claims that were equitable in nature, [both Plaintiffs and Defendants] were not entitled to a jury trial." *Leary v. Daeschner*, 349 F.3d 888, 910 (6th Cir. 2003).

A claim for a monetary award does not necessarily invoke Seventh Amendment rights. Rather, where "[a] monetary award … is found to be 'incidental to or intertwined with injunctive relief,'" there is no right to a jury. *Stewart v. KHD Deutz of America Corp.*, 75 F.3d 1522, 1526 (11th Cir. 1996) (*quoting Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 571 (1990)). One such example is where the monetary award is for damages that arose "after the action [for equitable relief] is initiated." *Ramey v. District 141, Intl. Assn. of Machinists and Aerospace Workers*, 473 F.Supp.2d 365, 373 (E.D.N.Y. 2007).

Ramey explained as follows:

> Ultimately, the damages sought here merely make the injunction fully effective. The injunction remedied the deprivation caused by defendant's breach from the moment it issued and continuing into the future. Damages are required only because the injunction could not compensate for injuries that incurred before its issuance which are now required to make the remedy complete. Under these circumstances, the damages sought should be considered incidental to the injunctive relief, and the matter should be tried to the Court.

Id.

In *Ramey*, "it [wa]s clear both from the language of the complaint and the parties' conduct … that injunctive relief was plaintiffs' primary goal." *Id.* Just as is the case here, damages were needed to supplement the injunction because "layoffs and furloughs … [became] at issue" after the action was commenced. *Id.*

> All that mattered, or at least what mattered most to plaintiffs, was restoration of their seniority status. Mr. Nelson's argument, essentially that the changing factual landscape required plaintiffs to modify the focus of the relief sought, particularly because the majority of plaintiffs are no longer employed by U.S. Airways and therefore did not benefit

> from the injunctive relief awarded, cannot convert this action as it was originally brought from one seeking equitable relief, with incidental damages, to an action at law requiring a jury trial on the remaining issues.

Id.

The situation here is closely analogous to that addressed in *Ramey*. Plaintiffs primarily sought an injunction requiring implementation of the Nicolau seniority list. They are entitled to that relief without regard to whether Defendants should also be subject to damages. Damages did not became concrete until there were actual furloughs after the case was filed. In contrast, the claim for equitable relief was ripe before the first furlough. Hence, damages are a secondary element of the claim.

The right to injunctive relief here, therefore, exists independently from the right to damages. Under the logic applied in *Ramey*, the factual issues relevant to obtaining injunctive relief can be decided by the Court. USAPA will have a Seventh Amendment right to a jury at the point that we reach factual issues that are relevant to determining whether its violations of the duty of fair representation caused injury to the West Pilots. Only at that point would we need a jury.

IV. Conclusion

The Court provided Plaintiffs an opportunity to present their claims on an expedited basis because of the harm that would occur if prompt judicial relief was not granted. Having created the very condition which has caused actual harm to Plaintiffs, USAPA should not be permitted to delay the proceedings further. The express clarification of class action treatment added to the FAC should not delay the litigation because USAPA had adequate notice of class action treatment before the amendment and because class certification is not necessary before the Court hear evidence on Plaintiffs' request for a permanent injunction. Plaintiffs, therefore, respectfully request that the Court deny USAPA's motion for a continuance. In the

alternative, if the Court feels compelled to grant the continuance, then Plaintiffs urge to set a prompt hearing on providing interim injunctive relief that would protect the West Pilots from furloughs while allowing the Company a reasonable means to re-furlough East Pilots who were on furlough at the time of the merger.

Dated this 5th day of December, 2008.

SHUGHART THOMSON & KILROY, P.C.

/s/ Andrew S. Jacob

By: _____

Marty Harper
Kelly Flood
Andrew S. Jacob
Security Title Plaza
3636 N. Central Ave., Suite 1200
Phoenix, AZ 85012
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2008, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing.

s/ *Andrew S. Jacob*