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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI, Plaintiffs, vs. US AIRLINE PILOTS ASSOCIATION, and US AIRWAYS, INC., Defendants.	Case No. 2:08-cv-1633-NVW **REPLY MEMORANDUM IN SUPPORT OF USAPA's MOTION FOR A CONTINUANCE**

In reply to "Plaintiffs' Response In Opposition To Defendant USAPA's Motion For Continuance By US Airline Pilots Association" dated 12/05/2008, Docket No. 102 (hereinafter "Brief"), USAPA respectfully replies to each of the arguments in the sequence and by the number presented in Plaintiffs' Brief:

I. The Eleventh Hour Conversion Of The Litigation To A Class Action Lawsuit Renders The Current Expedited Schedule Prejudicial To USAPA.

In the first of three arguments in response to USAPA's motion to continue trial, Plaintiffs say that they "always represented a West Pilot Class" (Brief p. 1), that "class action notice can be implicit" (Brief p. 1), that "the original complaint defined a class and pled a class action" (Brief p. 2), and that "USAPA waived arguing that class action requires a later trial date." (Brief p. 2). Yet this line of argument nicely ignores the fact that Plaintiffs launched *two* separate lawsuits on the same day, one in state court that properly pled class actions, or purported to do so, and one in this action that conspicuously did *not*.

The state court Complaint, now removed (Case No. cv-08-1728-PHX-NVW; Docket No. 1), attempted to properly and explicitly plead, and notice, a class-action. It cited Rule 23, it contained "Class Action Allegations" pursuant to the subparts of Rule 23, and was even titled a "Verified Complaint Class Action: Plaintiff and Defendant Classes." The original federal complaint fulfilled none of these requirements.

To claim, as Plaintiffs now do, that this action "implicitly" notified USAPA and this Court of class allegations, and that this should require maintaining a trial setting for

a non-class action case now set on an *expedited* basis, ignores the fact that no class-action was actually pled until now while at the same time Plaintiffs were litigating class claims in another related case. Certainly, no class action was actually pled in this case until now, or there would have been no need to amend. And Plaintiffs have taken no steps to amend class allegations *out* of their removed claim. On the contrary, they have vigorously pursued them. Surely it is not for USAPA to speculate from this behavior that Plaintiffs intended to drop class allegations in one suit only to add them into another. "Implicit notice" is a stretch too far under these circumstances.

In the context of the removed case's class-action, and the Plaintiffs' continuing attempts to maintain it, it flies in the face of reason to suggest that USAPA should have divined that Plaintiffs' litigation strategy would include what amounts to an on-the-eve-of-trial sea change from 6 plaintiffs to 1800. In sum, maintaining a separate action that contains class-action allegations while in this case demanding expedited treatment *before* amending to add-in class-action allegations deeply prejudices the Defendants. If USAPA is now to defend against a class action, with all the implications of that for the thousands of pilots represented at US Airways, then fairness requires more time — not a rush to judgment.

II. Rule 23 Normally Requires Class Certification Be Addressed Early And Before Trial, And Departure From The Rule In This Case Is Fundamentally Unfair To USAPA.

In its second line of argument opposing continuance, Plaintiffs argue that there is significance to the fact their First Amended Complaint ("FAC") "ensures class-wide

relief for damages." (Brief p. 6). Plaintiffs argue that, "damages began to accrue after the action was filed" (Brief p. 6), that "limitations are tolled for all West pilots" (Brief p. 6), and that the Court need not address class certification first" because, supposedly, "USAPA is not prejudiced by delay in certification" and "injunctive relief does not require class certification." (Brief p. 7). But this line of argument is no reason to deny the continuance in order to rush to judgment.

First, Plaintiffs' argument that their class allegations toll the running of statutes of limitations presents a rationale for their amendment, and to some extent for the timing of it, *but not for avoiding the continuance* necessitated by pursuit of class status. Time for discovery of the certification question is the norm under the Rule, and certainly leap-frogging discovery, certification and even an entire trial is extraordinary. Courts frequently have ruled that "discovery relating to the issue of whether a class action is appropriate needs to be undertaken before deciding whether to allow the action to proceed on a class basis." 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure*, § 1785.3 (3d ed. 2006); *See, e.g., In re Am. Med. Sys.*, 75 F.3d 1069, 1086 (6th Cir. 1996) (certification improper where defendant was not permitted, among other things, to "conduct any discovery on any of the plaintiffs"). In most cases it would be an "abuse of discretion to foreclose adequate discovery by defendants into class certification issues." *McLaughlin On Class Actions: Law and Practice*, Fourth Ed., Thomson & West (2007), § 3.7, p. 3-27, *citing Kamm v.*

California City of Development Co., 509 F.2d 205, 210 (9th Cir. 1975) (denial of discovery into issue of existence of class 'would be an abuse of discretion').

Second, Plaintiffs' claim that "USAPA is not prejudiced by delay in certification" is flat wrong in fact and as a matter of law. As Plaintiffs acknowledge (Brief p. 7), the "general rule is that class certification should be addressed before deciding the final merits." Basic notions of fair play underlie this, and Plaintiffs understate the "general rule" which presumes class allegations are followed by discovery then by certification, then by a determination of the merits. This is apparent from the Rule, the comments to the Rule, and a long line of cases, both before and after the 2003 amendments to the Rule on timing. The modern Rule on timing is straightforward and clear:

> Time To Issue. [Certification Order] At an **early practicable time** after a person sue or is sued as a class representative, the court must determine by order whether to certify the action as a class. Rule 23(c)(1)(A) [emphasis added]

And the Comments to the Timing rule make it very clear that the certification order should occur in the normal course after certification-discovery but before trial:

> Time maybe needed to gather information necessary to make the certification decision. Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, **discovery in aid of the certification decision often includes information acquired to identify the nature of the issues that actually will be presented at trial.** In this sense it is appropriate to conduct controlled discovery into the merits, limited to those aspects relevant to making the certification decision on an informed basis. Active judicial supervision may be required to achieve the most effective balance that expedites an informed certification determination without forcing an artificial and ultimately

> wasteful decision between 'certification discovery' and 'merits discovery.' **A critical need is to determine how the case will be tried**. **An increasing number of courts require a party requesting class certification to present a "trial plan" that describes the issues likely to be presented at trial and test whether they are susceptible of class-wide proof**. Advisory Comm. Notes to 2003 Amendments to Fed. R. Civ. P. 23(c) [emphasis added][1]
>
> Case law and learned commentary are in accord.
>
> [I[t is rarely appropriate for a district court to certify a class after a decision has been rendered on the merits. The reason for this is simple. When a named plaintiff seeks a ruling on the merits and then later seeks class certification, all potential class members are placed in a "win-win" situation: if the ruling goes against the named plaintiff, then others can "opt out" of the class and not be bound by that adverse decision, and if the ruling is favorable, then others can "opt in" to the class knowing that the defendant's liability has already been established. Such "one-way intervention" is to be avoided because it **is inherently unfair to defendants**. [emphasis added]

Owens v. Hellmuth & Johnson, PLLC, 550 F. Supp. 2d 1060, 1070 (D. Minn. 2008). *See Also, e.g.*, Manual For Complex Litigation (4th) § 21.133 ("The 'early practicable time' is when the court has sufficient information to decide whether the action meets certification criteria of Rules 23(a) and (b) ... appropriate timing will vary with the circumstances of each case, although an early resolution is generally desirable"); *Horn v. Associated Wholesale Grocers, Inc.,* 555 F.2d 270, 273 (10th Cir. 1977) (disapproving certification post-trial); *Paxton v. Union National Bank*, 688 F.2d 552, 558 (8th Cir. 1982) ("It is rarely appropriate for a court to delay the certification decision until after a trial on the merits [cites omitted] ... a deliberate deferral of the class determination until full trial on the merits is fraught with serious problems of

[1] Plaintiffs have not yet proposed their Rule 23 Trial Plan or moved to certify the class.

judicial economy, and of fairness to both sides."); *Navaro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1334 (1st Cir. 1991) ("egregious omission" for court not to move quickly on issue of class certification); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1273 (11th Cir. 2000) ("Rule 23 contemplates that the class certification decision will be made prior to the close of discovery"); *Philip Morris Inc. v. National Asbestos Workers Medical Fund*, 214 F.3d 132, 135 (2d Cir 2000) (a district court's plan to defer class certification until after trial disapproved: "It is difficult to imagine cases in which it is appropriate to defer class certification until after decision on the merits"); *Kerkhof v. MCI World Com, Inc.*, 282 F.3d 44, 55 (1st Cir. 2002) (post-judgment certification should usually be discouraged); *Robinson v. Texas Auto. Dealers Ass'n*, 387 F.3d 416, 420 (5th Cir. 2004), *cert. denied*, 544 U.S. 949 (2005) (on certification court must confront how case will be tried and must avoid a "figure-it-out-as-we-go-along approach"); *Arnold v. Arizona Dept. of Public Safety*, 233 F.R.D. 537 (D. Ariz. 2005) ("[T]he more relaxed standard provides the parties and the court with the time necessary to gather information relevant to the certification decision. In addition, the court may need to determine how the case will be tried, consider pretrial motions, and explore the designation of counsel before deciding whether to certify a class."); *Heerwagen v. Clear Channel Communications*, 435 F.3d 219, 232 (2d Cir. 2006).

Plaintiffs attempt to avoid the Timing rule by arguing that, "USAPA will not get any real benefit here from a determination of class certification" (Brief. P. 7) because, they claim, the "class size is known." But the test is not the "benefit" to defendant, it is

whether Plaintiffs can satisfy their burden under Rule 23; moreover, Plaintiffs are not entitled to assume facts that is their burden to prove.

Plaintiffs claim that their class size is 1800 but that is by no means an assertion this Court should accept for certification simply because Plaintiffs said so. While this Court must make specific findings certifying a class (Rule 23(b)(3); *Cf. Molski v. Gleich*, 318 F.3d 937, 946 (9th Cir. 2003) ("district court's decision must be supported by sufficient findings")) — here, there are questions. For example, does the putative class include those West Pilots who would *not* be furloughed under USAPA's proposed seniority language? What about those who would be protected from another merger? Are there competing factions among West Pilots favoring different positions on seniority? Who are the six named-plaintiffs to represent the claimed 1800?[2] And nothing about class size, commonality, or typicality can be assumed. "There is no question that a court should never assume the existence of a class." *McLaughlin On Class Actions: Law and Practice*, Fourth Ed., Thomson & West (2007), § 3.11, p. 3-70, *citing Denny v. Jenkens & Gilchrist*, 230 F.R.D. 317, R.I.C.O. Bus. Disp. Guide (CCH) P 10837 (S.D.N.Y. 2005), *aff'd in part, vacated in part on other grounds, remanded*, 443 F.3d 253, R.I.C.O. Bus. Disp Guide (CCH) P 11050 (2d Cir. 2006). And without making a showing that their class is ascertainable, Plaintiffs have not met their burden and are entitled to nothing at this stage except to attempt to meet their burden. *See, e.g.*, *Szabo v. Bridgeport Mach., Inc.*, 249 F.3d 672, 675-78 (7th Cir. 2001) (rejecting district

court's decision to accept allegations in the complaint "as true for purposes of the class motion").

Plaintiffs also attempt to avoid the Timing rule by asserting that USAPA "would be amply protected by issue preclusion if it were to prevail on the merits before certification." The point is not well taken. USAPA will be protected by certification prior to trial and then prevailing at trial on the merits. Moreover, the conversion of this case to a class action changes the nature of discovery, defenses and scope of damages. This is no reason to jump the Timing rule in Rule 23 and rush to judgment as Plaintiffs hope this Court will. It is unfair to USAPA to allow Plaintiffs to have their cake and eat it too: either an expedited trial without class action litigation, or a continued one with class allegations.

Third, Plaintiffs argue that continuance should be denied because "injunctive relief does not require class certification ... [and] Plaintiffs will be entitled to the same injunctive relief whether or not the class is certified." (Brief p. 8). But the fact that the six named-plaintiffs seek injunctive relief while the putative class would too is not material to why Plaintiffs should have this Court turn the Timing rule on its head by subjecting USAPA to trial before certification. Plaintiffs' hopes for, and speculation about, injunctive relief, infused or confused by dismissed Counts I and II now subject to arbitration, are hardly relevant to whether the Court continues trial to allow for proper Rule 23 litigation on the class action allegations that Plaintiffs now insist on bringing.

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[2] It was uncovered at the Parties' Rule 26(f) meeting, that Plaintiffs' Counsel apparently

III. USAPA Has A Seventh Amendment Right To A Jury Trial On All Common Fact Issues Before Any Remedy Is Considered.

Plaintiffs' third argument opposing continuance is less than clear, given that Plaintiffs have in their original Complaint and in their FAC claimed money damages and demanded a jury trial yet now, without amending to drop their damages or jury demand, claim that damages are a "secondary element" and no jury trial is needed until yet another trial to the Court has already concluded. This line of argument misstates the Plaintiffs' pleadings and misapplies the law.

As a threshold matter, given the type of injunctive relief sought by Plaintiffs, this case must be deemed limited to damages only as a matter of law. Plaintiffs seek to dictate the *substance* of collective bargaining between USAPA and US Airways, but the Supreme Court has held that governmental oversight of collective bargaining is limited to "governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *H.K. Porter Co., Inc. v. National Labor Relations Board*, 397 U.S. 99, 108 (1970). This principle has been recognized in the DFR context. *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 74 (1991) ("The Government has generally regulated only the process of collective bargaining, but relied on private negotiation between the parties to establish their own charter for the ordering of industrial relations.") (internal citations omitted).

It was the Plaintiffs' *state* complaint, now removed, that expressly disclaimed money damages, not the current action; that has and does seek "money damages"

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has four other "clients" in this matter that are not named and not disclosed.

(Docket No. 86, ¶ 120) and "*damages to compensate Plaintiffs for the value of lost wages and benefits*." (*Id.* p. 23 ¶ C) (emphasis supplied). And there is no issue but that USAPA has timely and properly invoked *its* right to trial by jury, as Plaintiffs acknowledge. (Brief. P. 9). Now, USAPA is entitled to a jury trial on all common fact issues before any remedy is imposed.

"Where legal and equitable claims are joined in the same complaint, and where there are common issues of fact, the normal practice is to try both claims to a jury." *Brownlee v. Yellow Freight System*, 921 F.2d 745, 749 (8th Cir. 1990) *citin*g, *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479 (1962).

The Supreme Court has long indicated that a district court cannot properly deny a litigant a trial on legal issues by characterizing those issues as merely "incidental to," or insignificant in comparison to equitable issues. *Curtis v. Loether*, 415 U.S. 189, 196 n.11 (1974). But once a court determines that a case involves legal issues, the litigants have a right to a jury trial on those issues, regardless of how insignificant they may appear in relation to equitable issues. *See*, *Thermo-Stitch Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486, 491 (5th Cir. 1961), *cited with approval in Dairy Queen, Inc.*, 369 U.S. at 473 n.8.

Here, Plaintiffs now mischaracterize their own Complaint by asserting that money damages are incidental. The fact is that Plaintiffs seek monetary damages and always did; that raised a legal issue; and USAPA preserved its Seventh Amendment

right to jury trial. Plaintiffs' misguided attempt to deny USAPA of its Seventh Amendment Constitutional rights must be heavily scrutinized.

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry, 494 U.S. 558, 564 (1990) (citations omitted).

That Plaintiffs now seek to subject USAPA to money damages increased exponentially by class action allegations is hardly cause for a rush to judgment, but rather for a continuance that is in accord with the Rules and basic fairness.

Respectfully Submitted,

Dated: December 12, 2008

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CERTIFICATE OF SERVICE

This is to certify that on the date indicated herein below a true and accurate copy of the foregoing pleading, *to wit*,

- Reply Memorandum in Support of USAPA's Motion for Continuance;
- Certificate of Service

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And further that paper hard copies were provided to The Honorable Neil V. Wake, District Court Judge, 401 W. Washington Street, SPC 52, Phoenix, AZ 85003.

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