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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 TO STRIKE  
DOCKET NOS. 106 AND 107**

1 As grounds for, and in support of, its motion to strike Docket No. 106, i.e.  
2 “Plaintiffs’ Motion To Compel USAPA To Produce” and Docket No. 107 i.e. “Rule 37  
3 Declaration of Andrew S. Jacob” together with all its exhibits and attachments, pursuant  
4 to LRCiv 7.2(m)(1), Defendant US Airline Pilots Association (“USAPA” or “movant”)  
5 respectfully states the following grounds:

6 1. This motion to strike is brought pursuant to LRCiv 7.2(m)(1) on the basis  
7 that Docket Nos. 106 and 107 constitute filings or submissions that are prohibited or  
8 unauthorized by any applicable rule and or court order, as further argued herein below.  
9

10 **FACTS**

11 2. Docket Nos. 106 and 107 together constitute a putative motion to compel  
12 discovery of attorney-client communications and work product. Specifically, they seek  
13 an “Order compelling Defendant USAPA to produce all documents and materials  
14 created before September 4, 2008, that are related to its legal representation.” (Docket  
15 No. 106, page 1, line 16). This is further clarified to mean that Plaintiffs seek to compel  
16 production of, “all documents and materials related to your representation of USAPA  
17 that were created between April 18, 2008 and September 4, 2008, that are subject to  
18 discovery pursuant to the Garner fiduciary duty exception to attorney- client privilege.  
19 (Docket No. 106, page 2, line 3).

20 3. Plaintiffs filed their motion to compel on December 12, 2008. *Prior* to  
21 that, on December 4, 2008, Plaintiffs served USAPA with their “First Request For  
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1 Production Of Documents.”<sup>1</sup> That discovery request gave USAPA 30 days to respond,  
2 which is January 5, 2009. (Docket No. 107, Exhibit A, ¶ 2A). The request was directed  
3 at *all* attorney client communications and work product documents and read as follows:

4 No. 3. All documents and correspondence to or from members of USAPA,  
5 between April 18, 2008 and the date of this Request, prepared or received by Lee  
6 Seham, Esq, or any member of his law firm, relating to USAPA, including, but  
7 not limited to internal documents, minutes and records relating directly or  
8 indirectly to each of the following topics:

9 A. Drafting of the USAPA Constitution and any amendments;

10 B. Application, adoption or enforcement of Nicolau integrated seniority list;

11 C. Drafting the seniority list proposal for submittal to US Airways, including  
12 the Conditions and Restrictions,

13 D. Legal analysis of the ruling by Judge Wake as set forth in the USAPA  
14 communications;

15 E. Advice given to the USAPA committee responsible for negotiations with  
16 the Company regarding a single CBA;

17 F. Advice given to the USAPA committee responsible for Merger  
18 discussions and negotiations;

19 G. Advice given to the USAPA committee responsible for membership  
20 issues, including the protocol for processing applications for East and West  
21 Pilots, and all applications and rejections of West Pilots;

22 H. Advice given to the USAPA committee responsible for drafting the  
23 USAPA Constitution, including any amendments, and further including all  
correspondence, memoranda, analysis or advice of counsel in preparation of  
terms and conditions of the Constitution and any Amendments;

I. Advice given to the USAPA committee responsible for creating the  
Conditions and Restrictions that is currently part of the Date of Hire  
Seniority Proposal submitted by USAPA to US Airways; and

J. Background investigation, surveillance, credit checks, or other  
investigation of any kind of any named Plaintiff in this action, or any other  
person identified as a West Pilot.

4. On December 8, 2008, the parties met in person at Plaintiffs’ attorneys’

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<sup>1</sup> However this was untimely under the Court’s order of November 21, 2008, which directed that, “The parties shall serve initial document discovery requests at least 14 days before the Case Management Conference [i.e. December 1].” (Docket No. 85, page. 2, line 5).

1 office to conduct the Rule 26(f) conference, as ordered by the Court. In the conference  
2 the parties conferred over Plaintiffs' demand for discovery of attorney-client  
3 communications and work product. (Declaration of Lucas K. Middlebrook, hereinafter  
4 "Decl." at ¶ 2). Counsel for USAPA made two requests of Plaintiffs in an effort to  
5 resolve the issue: i) that Plaintiffs narrow their request and, ii) that Plaintiffs provide a  
6 letter explaining the basis for an assertion that the privilege had been waived, similar to  
7 the letter Plaintiffs had earlier sent on December 3<sup>rd</sup> regarding their *Garner* argument.  
8 (Decl. ¶ 3). Plaintiffs accepted these requests and the meeting adjourned. (Decl. ¶ 4).  
9 While voicing opposition to producing documents protected by attorney client privilege  
10 at the 26(f) conference, counsel for USAPA did *not* indicate that the issue was beyond  
11 resolution between the parties, and left with the understanding that Plaintiffs would  
12 comply with the two requests. (Decl. ¶ 5).

#### 14 ARGUMENT

15 5. Plaintiffs' motion to compel, Docket Nos. 106, and supporting  
16 Declaration Docket No. 107, is premature and violates LRCiv 7.2(j), LRCiv 7.2(k),  
17 LRCiv 37.2, this Court's order of November 21, 2008 (Docket No. 85), Fed.R.Civ.P.  
18 34, Fed. R.Civ.P. 37, and the stipulation reached between Plaintiffs and USAPA and  
19 proposed by Plaintiffs in the Joint Case Management Report (Docket No. 109 ¶ 17).

20 6. LRCiv 7.2(j) applies to "discovery motions" and requires that the  
21 "moving counsel" certify "personal consultation and sincere efforts" that "failed to  
22 resolve the matter." Plaintiffs' motion, however, was filed when the parties were still  
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1 attempting to resolve the matter, specifically with USAPA's requests to Plaintiffs  
2 pending. Notwithstanding the conclusions of the Jacob Declaration, Plaintiffs had not  
3 made "sincere" efforts to resolve the matter nor was the effort futile. In this manner,  
4 Plaintiff's motion to compel violates LRCiv 7.2(j).

5 7. LRCiv 7.2(k) applies to "motions to compel" that are brought pursuant to  
6 Rule 37 and refers moving counsel to LRCiv 37.1. Plaintiffs' motion cites and purports  
7 to be brought pursuant to both Fed.R.Civ.P. 37 and LRCiv 37.1. (Docket No. 107, page  
8 1, line 16). LRCiv 37.1 applies to "motions to compel" and states in full:  
9

10 (a) When a motion for an order compelling discovery is brought pursuant to  
11 Rule 37(a)(2) of the Federal Rules of Civil Procedure, the moving party shall set  
12 forth, separately from a memorandum of law, the following in separate, distinct,  
13 numbered paragraphs:

14 (1) the question propounded, the interrogatory submitted, the designation  
15 requested or the inspection requested;

16 (2) the answer, designation or response received; and

17 (3) the reason(s) why said answer, designation or response is deficient.

18 The foregoing requirement shall not apply where there has been a complete and  
19 total failure to respond to a discovery request or set of discovery requests.

20 Nothing submitted by Plaintiffs satisfies LRCiv 37.1(a)(1) because it does not  
21 identify any Rule 34 document request but rather merely cites a letter from counsel  
22 (Docket No. 106, page 2, line 3). Whatever utility that letter served, it was not  
23 discovery propounded in compliance with any rule. Because no shorter time has been  
stipulated to or ordered, Plaintiff is not entitled to a response to its Rule 34 requests  
prior to 30 days after service. Fed.R.Civ.P. 34(b)(2)(a). For the same reason, there was  
no "response received," therefore Plaintiffs have not complied, nor could they at this

1 time, with their obligation to set forth the response, in violation of LRCiv 37.1(a)(2).  
2 For the same reason, Plaintiffs have failed to set forth how the “response is deficient”  
3 nor could they at this time, in violation of LRCiv 37.1(a)(3). Finally, Plaintiffs cannot  
4 escape the application of LRCiv 37.1 because there has been no “complete and total  
5 failure to respond to a discovery request” for the simple reason that USAPA has not yet  
6 responded, nor is it obligated to at this time.<sup>2</sup> Consequently, Plaintiffs’ motion to  
7 compel violates LRCiv 7.2(k) and 37.1

8  
9 8. The Court’s Order of November 21, 2008, stated in regards to “formal  
10 discovery” that “... the court expects discovery to commence prior to the scheduling  
11 conference. The parties shall serve initial document discovery requests at least 14 days  
12 before the Case Management Conference.” (Docket No. 85, page 2, line 4). Nothing in  
13 the Order allowed or required a shorter time to respond than given in Fed.R.Civ.P. 34  
14 (or any other rule). Because Plaintiffs’ motion to compel seeks to compel a time to  
15 respond shorter than Rule 34, the motion violates this Court’s order of November 21  
16 and Fed.R.Civ.P. 34(b)(2)(A).

17 9. Plaintiffs’ motion violates Fed. R.Civ.P. 37(a)(1) and 37(a)(3)(B)(iv). For  
18 the reasons stated above herein (¶ 7), Plaintiffs have brought their motion without  
19 conferring in good faith. A mere demand sent in a letter is not sufficient under the rule.  
20 *See, e.g. Payless Shoesource Worldwide, Inc., v. Target Corp.*, 237 F.R.D. 666, 670-71  
21 (D. Kan. 2006) (certificate should describe efforts to resolve the dispute, which means  
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23 <sup>2</sup> To cooperate and to fulfill Rule 26 obligations, counsel discussed the issue of

1 more than faxing or mailing a letter). And Plaintiffs have not addressed, nor could they  
2 explain, why they brought a motion to compel within days of representing to counsel for  
3 USAPA that they would offer to narrow their requests and provide a letter in an effort to  
4 resolve the dispute short of a motion. Moreover, “generally, a motion to compel may  
5 *only be filed after* a discovery request has been properly served and the opposing party  
6 has failed to respond.” Federal Civil Rules Handbook, 2009, Baicker-McKee Janssen  
7 Corr, Thomson West, p 887; *See Also, Molski v. Franklin*, 222 F.R.D. 433, 435 (S.D.  
8 Cal. 2004); *U.S. v. Katter*, 191 F.R.D. 33, 35 (D.N.H. 1999) (a motion to compel  
9 production pursuant to Rule 34 must comply with Rule 37(a)). Here, it is beyond  
10 dispute that Plaintiffs have filed their motion to compel before the opposing party failed  
11 to respond.

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13 10. Finally, Plaintiffs’ motion to compel should be struck because it violates  
14 the very written stipulation Plaintiffs agreed to with USAPA and have already proposed  
15 to the Court to make part of the Case Management Order. On the same day, within  
16 hours of Plaintiffs filing their motion to compel, Plaintiffs filed their Joint Proposed Case  
17 Management Report. Paragraph 17 is entitled “Discovery Disputes” and in part (a)  
18 provides in relevant part:

19  
20 The parties shall not file written motions to compel discovery without leave of  
21 court. Except during a deposition, if a discovery dispute arises and cannot be  
22 resolved despite sincere efforts to resolve the matter through personal consultation  
(in person or by telephone), the parties shall jointly file (1) a brief written  
summary of the dispute, not to exceed one page, with explanation of the position  
taken by each party and (2) a joint written certification that the counsel or the

23 Plaintiffs’ demand for privilege documents at the Rule 26(f) conference.

1 parties have attempted to resolve the matter through personal consultation and  
2 sincere effort as required by LRCiv 7.2(j) and have reached an impasse.

3 Plaintiffs saw this language as early as the 26(f) conference on Monday, and agreed to,  
4 and filed it as part of the proposed Joint Case Management Report (Docket No. 109).  
5 However, Plaintiffs simply ignored their Stipulation and failed to comply with it by not  
6 seeking leave of court to file the motion and by failing to make or even attempt the joint  
7 filing requirement. Plaintiffs have thus unnecessarily burdened USAPA and this Court  
8 with a frivolous filing.

9 **REMEDY**

10 11. As for a remedy, USAPA requests that this Court strike Docket Nos. 106  
11 and 107. In the alternative, this Court should set a date for USAPA to file a written  
12 response to Plaintiffs' motion to compel and to file a motion for a protective order, and  
13 to be heard.  
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