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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, US AIRWAYS, INC., Defendants,	Case No. 2:08-cv-1633-PHX-NVW (Consolidated) **DEFENDANT USAPA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR EXTENSION OF TIME (first request)**
Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI, Plaintiffs, vs. Steven H. BRADFORD, Paul J. DIORIO, Robert., A. FREAR, Mark. W. KING, Douglas L. MOWERY, and John A. STEPHAN, Defendants.	Case No. 2:08-cv-1728-PHX-NVW

Before the Court is USAPA's motion to extend the time to serve and file its response to Plaintiffs' motion for class certification. (Docket No. 120). The motion seeks to move the current deadline of January 16, 2009 (see order at Docket No. 116) to February 27, 2009, or alternatively at the completion of depositions of all named-plaintiffs and service of responses to written discovery that are directed to class certification; Plaintiffs' reply is due in the time allotted by the Local Rules.

In support of its motion, USAPA states as follows:

First, events subsequent to the scheduling conference held on December 15th and the Court's order setting deadlines (Docket No. 116) demonstrate for a certainty that USAPA would not have the benefit of *any* discovery including depositions of proposed class representatives under the current deadline of January 16th. These events are:

- USAPA served its written class certification discovery requests on December 26, 2008 (Docket No. 119). However, because the Court did not order a shorter time to respond than is provided in Fed.R.Civ.P. 34, discovery answers are due in the normal course on or about January 26, i.e. after the January 16 current deadline. As discussed below, Plaintiffs will not voluntarily take the necessary responsive action prior to the current January 16 deadline.
- Plaintiffs indicated subsequent to service of USAPA's written class action discovery that they will object to producing any discovery whatsoever pertaining to class certification. (Decl., Exhibit C, page 3 "... we will be objecting to class discovery ..."); (Decl., Exhibit C, page 5).
- USAPA requested dates to depose named plaintiffs (i.e., proposed class representatives) prior to January 16. (Decl, Exhibit C, page 3). Despite Plaintiffs' representation to this Court that they would make the class representatives available for discovery prior to the January 16th class certification motion response deadline[1], they have refused to schedule depositions of the proposed class representatives before the January 16

[1] *See* Decl., Exhibit B, 39:13-15.

deadline, and have further indicated that they cannot make any of the plaintiffs available until the week of January 26, 2009. (Decl., Exhibit C, page 4). As a result, depositions will not be completed until late January or early February. (Decl., Exhibit C, pages 5, 6).

Second, the Court has already indicated and directed that USAPA would be allowed discovery on the issue of class certification. (Decl., Exhibit B, 41:10 "So I think, Mr. Seham, I'm not going to foreclose, I'm not going to prejudge what discovery you need ..." and 41:18 "Let's set the defendant's response for January 16 and the reply for January 23rd, recognizing that if it turns out the defendants really do have legitimate needs for more discovery then you can get to them on that schedule, that I will give that account when you bring it before me.").

Third, the Plaintiffs have rejected the Court's tacit invitation to streamline its class action – and thereby promote their purported interest in an accelerated trial schedule – by refusing to limit their proposed class remedies to injunctive relief. Instead, the Plaintiffs have chosen to complicate what was already an eleventh hour conversion of this case to a class action by seeking monetary remedies for an alleged class of 1700 pilots despite allegations – contained in both their original and amended complaints – that "there are too many factors affecting any calculation of their likely damages to make such calculation practical." (FAC, Docket No. 86, ¶ 122). Defendant is entitled to an opportunity to discovery relating to Plaintiffs' new demand that Defendant be ordered to "correct injuries caused" by the non-implementation of the Nicolau List. (Docket No. 120 at 2:16).

Fourth, Plaintiffs have also chosen to vastly complicate the proposed class action

by effectively introducing a new cause of action related to contractually-mandated dues payments, a cause of action which was not pled in either the original or amended complaints.[2] Aside from the manifest jurisdictional issues presented by the alleged minor dispute, this new cause of action introduces enormous class-related complications as a result of the variegated categories into which West pilots fall in relation to the dues issue, including West pilots who are in one of eight categories which can in turn be subdivided into "good" or "bad" standing: 1) Member, 2) Applicant, 3) Apprentice, 4) Objector, 5) Challenger, 6) Non-Member, 7) Inactive Member, 8) Management. (Decl. ¶ 6).

Fifth, as a matter of law, USAPA is entitled to discovery into class certification. It is well established that a defendant has the right to obtain discovery from plaintiffs into issues relating to class certification. Indeed, the purpose of the December 1, 2003 amendment to Federal Rule of Civil Procedure 23 (c)(1)(A), relaxing to "an early practicable time" the period at which the Court should determine class certification, is to clarify that "a certain amount of discovery may be appropriate [before certification is decided] to illuminate issues bearing on certification, including the nature of the issues that will be tried." (2003 report of the judicial conference, committee on rules of practice and procedure (commentary on amended rule 23 (c)(1)(A)). Accordingly, in most cases it has been held that it would be an abuse of discretion to foreclose adequate discovery by defendants into class certification issues. *Kamm v. California City Development Co.*, 509 F.2d 205, 210 (9th Cir. 1975) (denial of discovery into issue of class "would be an abuse

[2] Plaintiffs have made no attempt to seek leave of this Court to amend their first amended complaint to add this new cause of action.

of discretion"); *Parker v. Time Warner Entertainment Company, L.P.*, 331 F.3d 13, 21-22 (2d Cir. 2003) (reversing denial of certification because denial precluded any discovery into the size of the putative class); *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1037 (5th Cir. 1981) (District Court has "special responsibility to withhold its decision on class certification until an adequate record has been developed"); *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 of any of the plaintiffs").

Sixth, Plaintiffs' certification motion necessitates discovery in at least these additional areas of inquiry before USAPA makes its response: the nature, scope and effect of the non-equitable remedies that Plaintiffs seek (e.g. Plaintiffs seek a single remedy effecting dues and fees payment for 1700 pilots but there are eight separate categories of membership status maintained by USAPA; Decl. ¶ 6); the qualifications and adequacy of the named-plaintiffs to represent the class; the typicality and commonality of seniority of the proposed class; the qualifications and resources of class counsel; and the trial plan for the class.

Seventh, if USAPA were required to respond prior to being afforded discovery, it must oppose certification on this basis alone regardless of other grounds to oppose and if denied may seek interlocutory appeal under Fed.R.Civ.P. 23(f). This will entail delay and burden on the parties and on the Court that could now be avoided by an extension.

Eighth, counsel for USAPA sought a voluntary extension to avoid this motion, but Plaintiffs unreasonably rejected a stipulation (Decl., Exhibit A, page 2) and did so

contrary to representation made in open court by Mr. Harper. (Decl., Exhibit B, 39:13: "But if they want to go through the discovery with our class reps, we will make them available between now and January16 or January 9 as best we can."); (Decl. Exhibit B, 40:2: "If they want to take the depositions of the class reps, then let's sit down and come up with a schedule, get it done in a timely fashion in a way also that doesn't delay the discovery on the other parts of the case going towards the February 17 --").

Ninth, the proposed deadline is reasonable and fair. A deadline of February 27 or at the completion of class-discovery is still a faster than typical schedule for complex litigation, but avoids prejudice to USAPA or burdening the Court with unnecessary proceedings. This is more than fair considering:

- Plaintiffs' last-minute amended Complaint seeks class allegations;
- Plaintiffs' motion continues to seek money damages despite the inconsistent allegations found in their pleadings;
- Plaintiffs have effectively introduced a new damages-driven cause of action;
- Plaintiffs will not make the class-representatives available for depositions until the end of January yet under Rule 30(e)(1) deponents have a full 30 days to review the transcript;
- The requirements imposed by Rule 23(c) on the Court to certify a class are not trivial. *See*, *Besinga v. U.S.*, 923 133, 135 (9th Cir. 1991) (urging a "bright line rule requiring trial courts to certify a class in a written order which clearly sets out the class's compliance with Rule 23"); *Molski v. Gleich*, 318 F.3d 937, 946 (9th Cir. 2003) ("the district court's decision must be supported by sufficient findings to be afforded 'the traditional deference given to such a determination'"); *Robinson v. Texas Auto. Dealers Ass'n*, 387 F.3d 416, 420 (5th Cir. 2005), *cert. denied*, 544 U.S. 949 (2005) ("To make a determination on class certification, a district court must conduct an intense factual investigation."); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356 (4th Cir. 2004) (reversing certification because "by accepting the plaintiffs' allegations for purposes of certifying a class in this

> case, the district court failed to comply adequately with the procedural requirements of Rule 23 ... for conducting a 'rigorous analysis of [class] matters, and for making 'findings' that the requirements of Rule 23 have been satisfied (internal citations omitted)"); *cf.* Manual For Complex Litigation (Fourth) § 21.14 at 255 (2004).

For the above reasons, USAPA respectfully requests the Court grant its motion and order the remedy in the separately submitted proposed order.

Respectfully Submitted,

Dated: January 5, 2009 By:

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