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9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE DISTRICT OF ARIZONA**

11 Don ADDINGTON; John BOSTIC; Mark
BURMAN; Afshin IRANPOUR; Roger
12 VELEZ; and Steve WARGOCKI,

13 Plaintiffs,

14 vs.

15 US AIRLINE PILOTS ASSOCIATION,
US AIRWAYS, INC.,
16 Defendants,

Case No. 2:08-cv-1633-PHX-NVW
(Consolidated)

DEFENDANT USAPA'S
REPLY BRIEF
IN SUPPORT OF ITS
MOTION FOR EXTENSION OF TIME
(first request)

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

19 Plaintiffs,

20 vs.

21 Steven H. BRADFORD, Paul J. DIORIO,
Robert., A. FREAR, Mark. W. KING,
22 Douglas L. MOWERY, and John A.
STEPHAN,
23

Defendants.

Case No. 2:08-cv-1728-PHX-NVW

1 In reply to Plaintiffs' Response brief (Dkt. No. 142; "Resp.") to USAPA's motion
2 to extend the time to serve and file its response to Plaintiffs' motion for class certification
3 (Dkt. No. 120), USAPA respectfully replies as follows:

4 First, Plaintiffs confirm the facts asserted in USAPA's motion, which are that
5 Plaintiffs have refused to allow class action discovery contrary to the Court's instruction
6 and contrary to representations Plaintiffs made to the Court. Consequently, while
7 USAPA complied with the Court's direction to serve written discovery, and attempted to
8 confer with Plaintiffs to schedule timely depositions of class representatives,¹ the
9 Plaintiffs have willfully acted to refuse discovery. For a certainty now, USAPA will have
10 neither answers to written discovery (interrogatories and document requests) or have
11 conducted depositions by January 16, the current deadline — and this is because of
12 Plaintiffs' contumacious actions.

14 Second, the legal authorities that Plaintiffs rely upon predate the 2003
15 amendments to Rule 23. Under the amendments, discovery is presumed allowed, not
16 presumed denied. The fact-intensive nature of the class certification analysis requires
17 granting broad latitude to defendants in testing the suitability of class treatment regardless
18 of the nature of the class. *See*, Class Actions, 2007 Thomson/West, 12/207, § 3:7;
19 Manual For Complex Litigation § 21.142 (4th Ed. 2004).

21 Third, Plaintiffs' argument that no extension is necessary because no discovery is
22 necessary requires this Court to make a defacto determination that it should not do at this

23 _____

¹ Which to date remains unscheduled, awaiting confirmation from Plaintiffs.

1 time: i.e. to determine that Plaintiffs have properly pled a Rule 23(b)(2) injunction class,
2 and in addition that no discovery of the proposed class is necessary. Plaintiffs are not
3 entitled to that presumption and to grant that would prejudice USAPA. Indeed, it is
4 reversible error for a court to, as Plaintiffs now suggest, require an opponent of class
5 certification to disprove that class certification is appropriate. *See In re American*
6 *Medical Systems, Inc.*, 75 F.3d 1069, 1086 (6th Cir. 1996). As this Court has already
7 observed, Plaintiffs *have* sought damages in their motion for class certification. (Dkt. No.
8 130, p. 2 –“In their subsequent motion for class certification (doc. # 120), Plaintiffs have
9 confirmed that they seek damages on behalf of the putative class”). As the Court earlier
10 recognized, where damages are sought, discovery is necessary. (Transcript of December
11 15, 2008 hearing, at 13:17 - “If you move ... to certify a damage class whether it's under
12 the umbrella of the (b)(2) class or otherwise, then I think Mr. Seham is right, that he's
13 entitled appropriate discovery on that, and that amount of discovery seems like it's going
14 to be extensive and inconsistent with the schedule that we talked about and I tentatively
15 set the last time.”).

17 Fourth, moreover, Plaintiffs’ claim that USAPA has made no showing of a need
18 for discovery is wrong on several counts. First, it requires the Court to presume as ‘self
19 evident’ that Plaintiffs have satisfied Rule 23, but as a matter of law the Court must not
20 presume what is Plaintiffs’ burden. Second, Plaintiffs’ motion for certification is
21 virtually unsupported by any evidence whatsoever, leaving USAPA and the Court to
22 speculate on how Plaintiffs could meet their burden. Third, Plaintiffs’ claim simply
23 ignores those areas of discovery that USAPA has indicated in its brief (Docket No. 133,

1 p. 5, lines 10-17) were sought. Fourth, USAPA's written discovery (*see Attachment A,*
2 hereto) are further indication of the discovery that USAPA seeks and is necessary to
3 ensure compliance with Rule 23.

4 Fifth, Plaintiffs ignore the need for discovery and attribute USAPA's motion for
5 extension to the motive of delay. But *due process* is not unjustified delay, and due
6 process is fundamental to USAPA's motion for extension of time. Without due process,
7 USAPA will have been deprived of any discovery whatsoever. It is no answer, as
8 Plaintiffs would have it, to claim that USAPA has not shown any defect or issue under
9 Rule 23 – because in order to do that, discovery will assist and may even be necessary.
10 Furthermore, USAPA has yet to make its argument on the merits of the certification
11 motion (USAPA waives no issue under Rule 23 and on the contrary anticipates
12 demonstrating that certification should be denied on several Rule 23 grounds).

14 Therefore, to deny an extension of time and thereby deprive USAPA of any class
15 certification discovery risks thrusting USAPA into a dilemma of being forced to trial on a
16 fundamentally unfair class or of taking an interlocutory appeal (likely to engender a
17 longer delay than Plaintiffs would deny USAPA now) in order to avoid the prejudice at
18 trial. The judicial economy of this case and fundamental due process will instead be
19 served by taking the time necessary to test the class that Plaintiffs have chosen to
20 propose.

21
22 For these reasons, USAPA respectfully requests the Court grant its motion (Dkt.
23 131) to extend time.

1
2 Respectfully Submitted,

3 Dated: January 8, 2009

By:

/s/ Nicholas Paul Granath, Esq.

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1 **CERTIFICATE OF SERVICE**

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

- 4 • Reply Memorandum in Support of USAPA’s Motion for Extension of Time;
5 • Certificate of Service

6 were electronically filed with the Clerk of Court using the CM/ECF system, which will
7 send notification of such filing to the following:

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Who are admitted counsel for Defendant US Airways, Inc. in this matter.

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.

1 On January 8, 2008, by:

2 /s/ **Lucas K. Middlebrook**

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