LEE SEHAM, Esq. *pro hac vice*
STANLEY J. SILVERSTONE, Esq. *pro hac vice*
LUCAS K. MIDDLEBROOK, Esq. *pro hac vice*
NICHOLAS P. GRANATH, Esq., *pro hac vice*
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
445 Hamilton Avenue, Suite 1204
White Plains, NY 10601
Tel: 914 997-1346; Fax: 914 997-7125

STANLEY LUBIN, Esq., State Bar No. 003076
stan@lubinandenoch.com
LUBIN & ENOCH, PC
349 North 4th Avenue
Phoenix, AZ 85003-1505
Tel: 602 234-0008; Fax: 602 626 3586

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 NOTICE OF MOTION, MOTION, AND MEMORANDUM TO COMPEL RESPONSES TO CLASS CERTIFICATION REQUEST FOR DOCUMENTS**
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

NOTICE

PLEASE TAKE NOTICE that Defendant US Airline Pilots Association ("USAPA" or "Defendant" or "Movant"), by and through its attorneys, Seham, Seham, Meltz & Petersen, LLP, and Lubin & Enoch, PC, will request and move without oral argument that this Court issue an order pursuant Rule 37 to compel responses to class certification request for documents.

MOTION

COMES NOW Defendant USAPA, pursuant to Fed. R. Civ. P. 37(a)(3)(B)(iv) and LRCiv 7.2(k) and 37.1, to request this Court compel responses to select class certification document requests identified herein below that were originally propounded on December 26, 2008 in, "Defendant USAPA's First Class Action Request For Documents To Plaintiffs" and later as amended on January 19, 2009 in, "Defendant USAPA's Revised First Class Action Request For Documents To Plaintiffs."

The grounds for this motion[1] are as follows:

First, Defendants propounded to Plaintiffs on December 26, 2008, "Defendant USAPA's First Class Action Request For Documents To Plaintiffs." (*See*, Granath Decl., **Exhibit 1**). Later, in response to the Court's order requiring "limited, focused and nondilatory" class-certification discovery (Dkt. No. 155 page 3:13), on January 19, 2009, Defendant propounded to Plaintiffs an amended and sharply de-scoped, "Defendant USAPA's Revised First Class Action Request For Documents To Plaintiffs." (*See*,

[1] USAPA reserves its right to file motions to compel with respect to Plaintiffs' responses to non-class action discovery.

Granath Decl., **Exhibit 2**).

Second, next, on January 26, 2009, Plaintiffs served Defendant with, "Defendant USAPA's First Class Action Request For Documents To Plaintiffs And Answers Thereto." (*See*, Granath Decl., **Exhibit 3**).

Third, pursuant to LRCiv 7.2(j), counsel for Defendant attempted through personal consultation and sincere efforts to obtain voluntary compliance with these discovery requests but was unable to satisfactorily resolve this discovery dispute. (*See*, Granath Decl. ¶ 10, **Exhibit 4**, and **Exhibit 5** detailing both written and telephonic efforts to resolve this discovery dispute by direct consultation with Plaintiffs.)

Fourth, Defendant's original document requests totaled 16 individual requests. The Revised requests reduced this to 9. This motion has been further narrowed to a selection of just 3. This narrowed selection reflects the most important of the document requests not yet voluntarily complied with, as well as the Movant's intent to avoid unduly burdening this Court.

Fifth, in the format required by LRCiv 37.1, Defendant herein below states that the following numbered requests are "evasive or incomplete" responses, for the reasons herein given, and therefore "must be treated as failures to respond" within the meaning of Rule 37(a)(4) and subdivision (a):

Request For Documents No. 4

1) Request:
"That form the basis for any damages you claim on behalf of the class."

2) Response:
"See plaintiff's response to class Interrogatory No. 15. Information regarding dues

in Plaintiff's possession was previously disclosed. USAPA is in possession of all relevant information regarding dues."

3) Deficiency:

Incomplete or evasive response because:

First, Plaintiffs have made no claim that responsive documents do not exist or are not in their possession, custody or control.

Second, Plaintiffs have made no specific, timely objections to responding to this particular request therefore they have waived any objections not made. *See*, *e.g.*, *Shomide v. ILC Dover, Inc.*, 521 F. Supp. 2d 324, 330 (D. Del. 2007); *Essex Ins. Co. v. Neely*, 236 F.R.D. 287 (N.D. W. Va. 2006) (while Rule 34 does not contain the same specificity and waiver provisions as Rule 33, the Advisory Committee note to Rule 34 states that the procedure for Rule 34 is essentially the same for Rule 33).

Third, there can be no dispute that the requested documents are well within the scope of discovery pursuant to Rule 26(b)(1): the request directly seeks documents relating to "any damages" claimed. Plaintiffs' First Amended Complaint expressly pleads "damages" as a remedy against USAPA on Count III (Dckt. No. 86, ¶ 25(f)), and seeks a remedy of "money damages" against USAPA (Dckt. No. 86, ¶ 120), and seeks "injunctive relief *in addition to money damages*" (Dckt. No. 86, 123) [emphasis supplied]. And, while Plaintiffs have subsequently claimed in briefs that they seek only equitable remedies, still it is beyond dispute that Plaintiffs have never amended their Complaint to strip it of the aforesaid money damage claims, nor have Plaintiffs offered to stipulate the same. Moreover, even if they had, it is undisputed that Plaintiffs now claim

that they seek – though without amending their pleadings – payment of money in the form of "disgorgement." But such monies could only be paid from general funds, and for this reason and others, in actual fact Plaintiffs still seek damages and do so for all 1,800 individual members of their putative class.

Fourth, neither the response to Interrogatory No. 15, nor any response to date to any other discovery demand, has previously supplied documents responsive to this particular request. Indeed, the answer given by Plaintiffs to Interrogatory No. 15 merely referred to Plaintiffs' motion for class certification, but no responsive documents were supplied with Plaintiffs motion.

Fifth, USAPA is not in possession of the responsive documents *to this request* and it impermissibly shifts Plaintiffs' burden onto Defendant to prove Plaintiffs' claim and prove their injury by requiring Defendant to calculate Plaintiffs' damages from documents that Defendant selects and supplies. *See*, *e.g.*, *Sabouri v. Ohio Bureau of Employment Services*, 2000 WL 1620915 (S.D. Ohio 2000) (fact that documents are available from another source, even a public one, is not, by itself, a valid basis for refusing to produce documents that are within the possession, custody, or control of the responding party).

Sixth, even entertaining Plaintiff's un-pled theory of disgorgement of union dues/agency fees as a substitute for damages, because Plaintiffs seek money for up to 1,800 individual class members, and because it is beyond dispute that there are *multiple categories* of dues and fees payers, and in the regular course of business there is no segregation of dues or fees by individual, Defendant could not possibly identify what

documents Plaintiffs intend to satisfy this request that Plaintiffs have so far refused to produce and not yet identified. Moreover, each named Plaintiff in their respective deposition testimony has confirmed that calculation of the dues/fees damage claim would involve an individualized assessment of each pilot's situation, for example, whether a pilot is in military service, on disability, or apprenticeships, or several other categories. (Addington 72:18, 73:23; Bostic 80:9, 80:17, 82:7; Burman 81:15, 85:1, 85:6; Iranpour 107:7, 107:14, 107:21,108:3; Wargocki 127:3, 127:8, 127:15; Velez 86:5, 86:13, , 86:18. 86:23).[2] Plaintiffs therefore must supply responsive documents in their possession for each class member who claims damages under any theory or admit they have none.

Request For Documents No. 6

1) Request:
"Any retainer, contract or recorded understanding that describes or relates to the attorneys' fees and costs for the class action or any agreement relating to the payment of attorneys' fees and costs for the class action?"

2) Response:
"Documents responsive to this request have already been produced."

3) Deficiency:

Incomplete or evasive response because:

First, the response to date has been incomplete because what has been supplied are five retainer letters for five of the six named-plaintiffs, *but what has not been supplied* are the documents that reflect an agreement between Plaintiffs and/or Plaintiffs' retained counsel and third parties, particularly Leonidas LLC, that pertain directly to the financing of this litigation.

[2] See Granath Decl. **Exhibit No. 6** for all extracts of deposition transcripts.

There is no question that there is a retainer or contract between Leonidas and Plaintiffs' retained attorneys that directly pertains to this litigation and to the financing of a class action against USAPA (nor is there any claim or objection to the contrary). In the first instance, the produced retainer letters between named-Plaintiffs and their counsel *expressly refer* to "Leonidas LLC" and that it has "paid all legal fees to date relating to your [Plaintiffs'] representation in this matter." (*See*, Granath Decl., **Exhibit 7**). In the second instance, all named Plaintiffs have testified under oath that it was Leonidas that originally retained counsel of record in this matter (Addington 38:2, "the Leonidas group already had them retained"; Bostic 50:20 "Leonidas was already connected with them [Shugart]"; Burman 49:13; Iranpour 75:21-76:5; Wargocki 61:19-62:10; Velez 39:13), and that Leonidas is *solely* responsible for the financial obligations of this litigation. (Addington 41:12; Bostic 55:4; Burman 53:4; Iranpour 73:19; Wargocki 79:18-81:7; Velez 51:6 "through the Leonidas group").

Second, documents responsive to this request are well within the scope of discovery pursuant to Rule 26(b)(1): Plaintiffs seek to certify a class action; this request seeks documents that describe how that class action has been, is, and will be financed and the financial resources of the class representatives and their class counsel. Rule 23(a)(4) makes the adequacy of the class representatives relevant to certification while Rule 23(g)(1)(A)(iv) makes the "resources that counsel will commit to representing the class" relevant. Consequently, fee arrangements between plaintiffs and their attorneys in class actions are discoverable. *See*, *e.g.*, *Epstein v. American Reserve Corp.*, 1985 WL 2598, at *3 (N.D. Ill. 1985); *Klein v. Henry S. Miller Residential Services, Inc.*, 82 F.R.D. 6, 8-9,

1980-1 Trade Cas. (CCH) P 63087, 27 Fed. R. Serv. 2d 398 (N.D. Tex. 1978). This is in accord with long-standing holdings that class action defendants are entitled to discover the putative representative's ability to finance the costs of prosecuting a class action, even if someone else is advancing the costs. *See*, *e.g.*, *In Ray re ML-Lee Acquisition Fund II, L.P. and ML-Lee Acquisition Fund (Retirement Accounts) II, L.P. Securities Litigation*, 149 F.R.D. 506, 509, Fed. Sec. L. Rep. (CCH) P 976544 (D. Del. 1993) ("before allowing a plaintiff to represent a class, the court must be convinced that plaintiffs are willing and financially able to shoulder the burdens of class representation. Thus, the financial status of a proposed representative plaintiff is relevant to the determination of whether that plaintiff is capable of adequately representing the class"); *Elster v. Alexander*, 75 F.R.D. 503, 505 (N.D. Ga. 1976) (instructing class representative to respond to interrogatories concerning his "financial ability to vigorously prosecute the interests of the class). Moreover, where a class seeks to rely on the funding of a non-profit corporation, such as Leonidas LLC purports to be, that funding becomes relevant and discoverable. *See*, *Hugo Martin Recinos-Recinos v. Express Forestry, Inc.*, 233 F.R.D. 472, 480 (E.D. La. 2006) (class relies on a "non-profit organization" for adequate representation).

Third, there is a special relevance to this request. Plaintiffs have to date withheld from disclosure what individuals or what organizations beyond the named six Plaintiffs are their clients in this matter who are controlling this litigation. (*See*, Granath Decl. Exhibit 4, page 2: "Who are the unnamed clients (i.e. the 4 of the 10 indicated by Mr. Jacob in the 26(f) conference)? Who are the actual class representatives controlling this

litigation?").

As a threshold matter, the identity of clients is not normally protected by attorney client privilege. *Rahman v. Smith & Wollensky*, 2007 U.S. Dist. LEXIS 37642, *34 (S.D.N.Y. 2007) ("absent special circumstances," the identity of an attorney's client is not privileged") *citing*, *In re Grand Jury Subpoena Served Upon Doe, 781 F.2d 238, 247 (2d Cir. 1986)*; *accord Lefcourt v. United States, 125 F.3d 79, 86 (2d Cir. 1997)*.

And here there is no question that named Plaintiffs have all uniformly testified under oath that in addition to financing the class action, Leonidas LLC and certain individuals are part of a "control group" that sets and controls legal strategy in his case. (Addington 46:10-47:7, 53:3, law firm directed by "group effort" that includes "Leonidas Board members"; Bostic 52:8, "control group" consists of Leonidas; Burman 40:22 Leonidas decided to commence this litigation; 49:13, Leonidas selected the law firm; Iranpour 39:16 the "control group" including Leonidas decided whether to participate in the TA No. 9 arbitration; 78:5 the "control group" including Leonidas determines legal strategy; Wargocki 82:12 "control group" including Leonidas control legal strategy; Velez 55:15 legal strategy determined by Leonidas and individuals other than named plaintiffs).

Documents showing any agreements, retainers or contracts with Plaintiffs' counsel necessarily encompasses any retainer with Leonidas LLC, or its officers, or any other individuals who are undisclosed clients but not named Plaintiffs. Such agreements are relevant to participation, funding and control of this lawsuit, and therefore are relevant to

the adequacy of the named-Plaintiffs to act as class representatives.[3]

Fourth, Plaintiffs have made no specific, timely objections to responding to this particular request; therefore they have waived any objections not made. *See*, *e.g.*, *Shomide v. ILC Dover, Inc*., 521 F. Supp. 2d 324, 330 (D. Del. 2007); *Essex Ins. Co. v. Neely*, 236 F.R.D. 287 (N.D. W. Va. 2006) (while Rule 34 does not contain the same specificity and waiver provisions as Rule 33, the Advisory Committee note to Rule 34 states that the procedure for Rule 34 is essentially the same for Rule 33).

Request For Documents No. 7

1) Request:
"Any communications between the representatives and the class"

2) Response:
"Objection: This request seeks to invade the attorney-client and/or work product doctrine's, and is otherwise overly broad and unduly burdensome. In response to USAPA's First Requests For Production, Plaintiffs undertook good-faith efforts to collect and compile such communications. Plaintiffs have different computer hardware/software/ application/ server/ host types. (E.g. Mac vs PC, various iterations of Outlook, and various Internet and e-mail service providers. Plaintiffs have attempted to collect and assemble their communications, and estimate the total number of communications to be at least 36,000 due to the exponential nature of e-mail when there are multiple senders/recipients. After investigation and good-faith efforts, plaintiffs and their counsel have determined that this request is overly broad and unduly burdensome and no documents or logs will be produced."

3) Deficiency:

Incomplete or evasive response because:

First, this request does *not* seek communications *between attorneys and clients*. Rather it seeks communications between putative class representatives and members of

[3] Relevant also to the extent of pending discovery issues and the limits of any claimed attorney-client privilege.

the putative class.

None of the prerequisites to assert the privilege are here claimed, or could be. In order to invoke the attorney-client privilege, Plaintiffs must establish the following elements: 1) the asserted holder of the privilege is or sought to become a client; 2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with the communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of serving primarily either (i) an opinion on law or (ii) legal service or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been claimed and not waived by the client. *U.S. v. Impastato, 2007 U.S. Dist. LEXIS 63454 at *5, 2007 WL 2463310, at * 2 (E.D. La. Aug. 23, 2007) (citing U.S. v. Kelly, 569 F.2d 928, 938 (5th Cir. 1978))*.

Therefore the objection based on the privilege is not valid. For the same reason it does not arguably invade the work-product doctrine. And, even if privilege or work-product were available, they have been effectively waived by the production to date of "such communications" (*e.g.*, *In re Grand Jury Proceedings Subpoena to Testify to: Wine*, 841 F.2d 230, 234 (8th Cir. 1988). Also, the admitted refusal to supply a privilege log may result in waiver as well. (*See*, *DL v. District of Columbia*, __ F. Supp. 2d __ (D.D.C. 2008) (the obligation to describe the nature of the privileges met through a privilege log); *Weiss v. National Westminster Bank*, PLC, 242 F.R.D. 33 (E.D.N.Y. 2007) (failure to include sufficient information on the privilege log can result in waiver).

Second, the burden and broadness objections are not valid.

In the first instance, the Requests expressly give the Plaintiffs the option of producing in hard copy or in electronic format, i.e., on disk for example. According to the Plaintiffs, the information is all in the form of ESI so there is no need to handle or reproduce reams of paper.

In the second instance, the named Plaintiffs have already testified that they have identified, collected and turned over to their attorneys' responsive documents that are not yet produced. (Velez 61-63; 63:1 "The 1,800 [pages of emails] is what I provided to STK [Plaintiffs' attorneys]. Of those 1,800, many of the emails are just, you know, communications between various members of the Plaintiffs, Control Group, and the board"; Addington 50:7 "we have produced that"; Burman 63:15; Wargocki 91:14).

Third, there is no question that more responsive documents other than those already produced exist because the objection admits it: "In response to USAPA's First Requests For Production, Plaintiffs undertook good-faith efforts to collect and compile such communications."

Fourth, there is no question that this request is within the scope of discovery, as the making of the incomplete responses has already effectively conceded.

WHEREFORE, Defendant USAPA respectfully requests that its motion to compel responses pursuant to Rule 37 be GRANTED.

Respectfully Submitted,

Dated: February 16, 2009

By: **/s/ *Nicholas Paul Granath, Esq.***

Nicholas P. Granath, Esq. (*pro hac vice*)
ngranath@ssmplaw.com
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
2915 Wayzata Blvd.
Minneapolis, MN 55405
Tel 612 341-9080; Fax: 612 341-9079

Lee Seham, Esq. (*pro hac vice*)
lseham@ssmplaw.com
Stanley J. Silverstone, Esq. (*pro hac vice*)
ssilverstone@ssmplaw.com
Lucas K. Middlebrook, Esq. (*pro hac vice*)
lmiddlebrook@ssmplaw.com
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
445 Hamilton Avenue, Suite 1204
White Plains, NY 10601
Tel: (914) 997-1346; Fax: (914) 997-7125

Stanley Lubin, Esq. State Bar No. 003076
stan@lubinandenoch.com
LUBIN & ENOCH, PC
349 North 4th Avenue
Phoenix, AZ 85003-1505
Tel: 602 234-0008; Fax: 602 626 3586

ATTORNEYS FOR DEFENDANT USAPA