

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

5 NICHOLAS J. ENOCH, Esq., State Bar No. 016473
6 stan@lubinandenoch.com
LUBIN & ENOCH, PC
7 349 North 4th Avenue
Phoenix, AZ 85003-1505
8 Tel: 602 234-0008; Fax: 602 626 3586

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 MOTION FOR
RECONSIDERATION
OF ORDER SETTING TRIAL DATE**

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 TO : PLAINTIFFS, AND ALL PARTIES, AND THEIR ATTORNEYS OF
2 RECORD.

3 **NOTICE**

4 PLEASE TAKE NOTICE that Defendant US Airline Pilots Association
5 (“USAPA”) will move this Court, without oral argument, for reconsideration of the
6 March 3, 2009 Order issued by this Court (Dkt. No. 224), and for an order continuing the
7 April 28, 2009 trial commencement date.

8 **MOTION**

9 COMES NOW Defendant USAPA to move this Court, pursuant to LRCiv 7.2(g)
10 and the on-the-record authorization, for reconsideration of the March 3, 2009, Order
11 issued by this Court (Dkt. No. 224) setting trial to begin on April 28, 2009, and seeking
12 an order continuing the trial commencement date.

13 In support of its motion USAPA states the following:

14 On March 3, 2009, the Court held a teleconference with the parties’ attorneys and
15 stated its disposition on a number of aspects of case management that culminated in an
16 Order “setting trial to a jury on the issue of liability on April 28, 2009 at 9:00 a.m.” (Dkt.
17 No. 224). At the conclusion of the March 3 teleconference, the Court stated that “if
18 anybody wants to file a motion to reconsider what I have stated as my disposition on
19 these aspects of case management, I’m not going to foreclose that. And I will fully
20 consider it.” (March 3, 2009 Tr. at p. 36, lines 10-13). Pursuant to the Court’s allowance,
21 USAPA asks this Court to reconsider its Order that trial commence on April 28, 2009.
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23

1 **I. Any Decision Rendered In This Matter *Prior to Adjudication Of The Counts***
2 **One And Two Arbitration Subverts The Primary Jurisdiction Of The System**
3 **Board.**

4 Count Three, to which USAPA is subject to trial, was expressly pled to allege that
5 Defendant violated its duty of fair representation in part **by causing the company to**
6 **violate the terms of collective bargaining agreements:**

- 7 • ¶ 112 “Because USAPA is causing Defendant US Airways to breach its
8 collective bargaining agreement with West Pilots, it has caused Plaintiffs and
9 other West Pilots the injuries alleged in Counts One and Two.” (Dkt. No. 86, p
10 22);
- 11 • ¶ 118 “By acting arbitrarily, for improper purpose and/or in bad faith, USAPA
12 caused Defendant US Airways to breach its collective bargaining agreement
13 with West Pilots.” (Dkt. No. 86, p 22);
- 14 • ¶ 119 “Because USAPA caused Defendant US Airways to breach its collective
15 bargaining agreement with West Pilots, it caused Plaintiffs and other West Pilots
16 the injuries alleged in Counts One and Two.” (Dkt. No. 86, p 22).

17 Nevertheless, this Court has held that all of the Count One and Two allegations of
18 contractual breach that underlie the Count Three DFR claim are within the exclusive
19 jurisdiction of the Transition Agreement System Board. (*See* Dkt. No. 84).

20 In addition to the overlap between the Count Three DFR claim and the Count
21 One/Two claims of contractual breach specifically pled by the Plaintiffs themselves,
22 USAPA anticipates that the System Board will address several issues that could have a
23 dispositive impact on the Plaintiffs’ Count Three DFR claim, including: 1) the alleged
existence of a good faith obligation under the Transition Agreement to negotiate toward a
single collective bargaining agreement; 2) whether any “good faith” negotiating
obligation under the Transition Agreement was owed to individual pilots; 3) the identity

1 of the parties under the Transition Agreement; 4) the intent of the parties in referencing
2 ALPA Merger Policy in the Transition Agreement; 5) whether the Transition Agreement
3 created a contractual obligation for continued adherence to ALPA Merger Policy,
4 particularly in light of the impasse that had been reached under that policy; and 6) any
5 remedy issued by the System Board would include wage claims currently being sought
6 by the named Plaintiffs.

7
8 In an effort to have these underlying contractual issues resolved in the appropriate
9 forum prior to a federal trial, USAPA invited the Plaintiffs to present their Count One
10 claim before the System Board on January 8, 2009, concurrently with USAPA's
11 presentation of its substantially similar TA-9 grievance. In addition, USAPA offered to
12 schedule a hearing before the System Board on January 9 for the Plaintiffs to present both
13 their Count One and Count Two claims. Plaintiffs, without explanation, declined both of
14 these hearing dates with the direct consequence that the Count One and Two claims are
15 now scheduled to be heard on May 27, 2009.

16 The current situation presents two serious due process issues. Proceeding with a
17 federal court trial in April prior to the System Board's resolution of the underlying
18 contractual issues constitutes a transgression of the Courts into the exclusive jurisdiction
19 of the Board. This transgression violates USAPA's due process to have the relevant
20 contractual issues determined in the appropriate forum. The Court's proposed
21
22
23

1 scheduling requires USAPA to prepare for two major trials simultaneously, which vastly
2 compounds the due process issues discussed in further detail below.¹

3 **II. Defendant Is Deeply Prejudiced By The April 28th Trial Date By The Course**
4 **And Conduct Of This Case To Date.**

5 Under the procedural history unique to this case, a trial date of April 28, 2009
6 deeply prejudices USAPA:²

7 At the December 15, 2008 hearing in this matter, after the Plaintiffs made the
8 eleventh hour decision to convert their case to a class action, the Court rejected Plaintiffs'
9 efforts to backload the determination of class certification and determined that USAPA
10 had a due process right to engage in class-specific discovery and obtain prior resolution
11 of the class issue. (Dec. 15 Tr. at 5-6). In reliance on the Court's determination, USAPA
12 devoted its resources to conducting class action discovery and to formulating a response
13 in opposition to Plaintiffs' motion for class certification.

14 Throughout this time period, however, Plaintiffs failed to cooperate in the discovery
15 process, initially resisting any discovery whatsoever, and necessitating expenditure of
16 USAPA's resources to seek the Court's intervention. Even after the Court directed
17 certification discovery and extended the briefing period on the class issue, the Plaintiffs
18

19
20 _____
21 ¹ USAPA also hereby incorporates into this submission the Defendant's Request for
22 Leave to File Summary Judgment Motions (Dkt. No. 215) – the submission of which was
23 authorized by the Court -- wherein it submitted uncontested case law and uncontroverted
evidence that the Court lacks jurisdiction over Count III because that claim is not ripe and
because Count III states no legally cognizable claim, *inter alia*, no court has *ever* found a
DFR violation based on a date of hire integration.

² This Court itself recognized that the "lay of the land changed pretty dramatically here."
(Feb. 20 Tr. at p. 43, line 8).

1 elected to continue to frustrate USAPA’s attempts to conduct thorough class action
2 discovery. Plaintiffs withheld relevant documents necessitating motions to compel, and
3 did not cooperate in the scheduling of depositions of the agents of a third-party
4 corporation that finances the litigation and substantially controls its conduct through a
5 “control group.” After a Court order for production of the corporation’s fee agreement
6 with Plaintiffs, counsel – which had been fiercely resisting its production – suddenly
7 asserted that no such agreement existed. In short, no person or entity has any contractual
8 obligation to finance the Plaintiffs’ litigation. Eventually, USAPA was forced to
9 subpoena several individuals (none of whom have yet been deposed).

11 Thus, in reliance on the Court’s prior determinations, USAPA’s discovery to date
12 has been focused primarily on the class certification and, indeed, Plaintiffs have taken the
13 position to date that USAPA was not allowed to question subpoenaed witnesses on any
14 issues beyond that of class certification.

15 Aside from the focus on the class issue – concerning which there is still no final
16 order – USAPA’s litigation resources have been principally dedicated to responding to
17 the Plaintiffs’ vexatious motions, including: 1) Plaintiffs’ efforts to penetrate USAPA’s
18 attorney-client privilege, which the Court characterized as “blindly fishing,” (Dkt. No.
19 185 at 3); 2) Plaintiffs’ regressive effort to deprive USAPA of the jury trial that they had
20 requested in their own original and amended complaints; and 3) Plaintiffs’ efforts to graft
21 on dues and agency fee-related claims to its class certification motion, which has
22 substantially complicated briefing with respect to the class issue. Indeed, as the Court set
23

1 the briefing schedules on these issues it acknowledged that it was imposing exacting
2 demands on counsel. (Dec. 15, 2008 Tr. at p. 57, lines 5-7).

3 As a result of the allocation of Defendant's obligation to allocate its resources to the
4 class issues, which the Court determined had first priority, and the Plaintiffs' vexatious
5 motions, USAPA, to date, has taken only one deposition going to the merits of this
6 dispute.

7 In view of these developments, the Court itself stated during the February 20, 2009
8 teleconference, that it did not anticipate a trial any earlier than June or July and, in view
9 of this development, advised that it was receptive to the Plaintiffs' and Defendant's joint
10 request for consideration of dispositive motions. In reliance on the schedule indicated by
11 the Court, USAPA devoted resources to fulfilling that request. As USAPA advised the
12 Court, this focus on dispositive motions was particularly warranted in view of the
13 Plaintiffs' uniform deposition testimony supporting USAPA's claim that, as a matter of
14 constitutional law, there is no live case or controversy supporting the Court's subject
15 matter jurisdiction in this case.

17 Additionally, the Court further directed that USAPA devote its time and resources
18 to addressing Plaintiffs' new class remedy, never even pled, regarding disgorgement of
19 dues and fees, by asking USAPA to file a Rule 12(c) motion challenging the legal
20 viability of such a remedy. The necessity of USAPA expending its resources on this
21 issue arises not just from the Plaintiffs' disregard of the basic pleading requirements, but
22 also its blatant non-compliance with the Court's directive that Plaintiffs' counsel let
23 USAPA know "what cards he's holding" so that USAPA would not have to "waste your

1 clients' money or my time with the motion” (Feb. Tr. 28:23). Plaintiffs’ counsel has
2 steadfastly refused to comply with the Court’s instruction by either supplying their
3 ‘cards’ or withdrawing the ill-alleged remedy.

4 Since the February 20th teleconference, USAPA has had no opportunity to engage in
5 meaningful discovery on the merits and has relied heavily on the Court’s statement that
6 its “goal is to have a trial on this probably in July, maybe in June.” (Tr. 27:5).

7 Because they did not face the obligation to defend against a class motion, the
8 Plaintiffs have accrued a *substantial advantage* in terms of trial preparation, by the end of
9 the week of March 16, they will have completed ten depositions on the merits.

10 Moreover, while USAPA has cooperated in providing witnesses for deposition, it is
11 expected that many of those individuals whom USAPA seeks to depose will require
12 service of subpoena because they have no relation, allegiance or affinity with named-
13 Plaintiffs, Plaintiffs’ counsel, or Plaintiffs’ bankrollers, Leonidas LLC. Likewise, in
14 certain circumstances, document demands may accompany deposition notices. And as a
15 practical concern, even if certain deponents will be produced by Plaintiffs’ counsel
16 without the need for subpoena, pilots’ schedules cannot be changed overnight and
17 scheduling conflicts are sure to arise within the next seven weeks. Consequently, it does
18 not appear logistically possible to complete the necessary discovery to adequately defend
19 against the Plaintiffs’ claims in seven weeks, given that during this seven-week period,
20 the large majority of discovery must be completed and disputes resolved, potential expert
21 witnesses must be disclosed and deposed, pre-trial motions and deadlines must be filed
22 and met, and jury instructions must be crafted.
23

1 An additional complication, as this Court has previously recognized, is that “it can
2 become an enormous challenge to craft jury instructions because you have to figure out
3 the right answer to all legal questions up front.” (Dec. 15 Tr. at p. 22, lines 11-13). The
4 Court also expressed its belief that given the “unsettled areas of law” that this matter
5 presents, the crafting of jury instructions becomes even more arduous because the Court
6 must determine “ahead of time what all the substantive rules are and instruct the jury in a
7 way that a non-lawyer group of folks will not be confused by.” (*Id.* at lines 20-22).
8 Given the new extremely truncated timeline before trial, this “enormous challenge” now
9 must be accelerated in a manner that is antithetical to due process consideration, and this
10 alone results in inevitable prejudice.
11

12 Moreover, the granting of a class action combined with this truncated trial schedule
13 risks imposing on USAPA irresistible pressure for a ‘blackmail settlement’ that is itself
14 prejudicial and entirely avoidable. *Matter of Phone-Poulenc Rorer Inc.*, 51 F.3d 1293,
15 1303 (7th Cir. 1995) (quoting 1973 publication of Judge Friendly). *See also, In re Visa*
16 *Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 148 (2d Cir. 2001) (noting the
17 “brutally coercive effect of [class] certification”); *In re General Motors Corp. Pick-Up*
18 *Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 784 (3d Cir. 1995) (“class
19 actions create the opportunity for a kind of legalized blackmail”).
20

21 Plaintiffs own actions belie their claims of urgency. These actions include their
22 delay in seeking injunctive relief, delayed conversion of the case to a class action, last-
23 minute additions of dues-based claims, vexatious motions related to attorney-client
privilege and the right to a jury trial, and their refusal to proceed before the System Board

1 on January 8 and 9, 2009. USAPA also wants this matter resolved, but not in a matter
2 that violates its due process rights or the primary jurisdiction of the System Board over
3 all contractual issue.³ The trial date, as scheduled, would violate USAPA's due process
4 rights by jeopardizing its ability to properly prepare its defense in the face of such high
5 stakes, class action litigation.⁴

6 WHEREFORE, defendant USAPA respectfully requests continuance of the trial
7 date now set at least until such time as the System Board has rendered its decision in the
8 Count One and Count Two issues that have been submitted to its exclusive jurisdiction.

9 Respectfully Submitted,

10 Dated: March 5, 2009

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

12 Nicholas P. Granath, Esq. (*pro hac vice*)
13 ngranath@ssmplaw.com
14 SEHAM, SEHAM, MELTZ & PETERSEN, LLP
2915 Wayzata Blvd.
Minneapolis, MN 55405

15 Lee Seham, Esq. (*pro hac vice*)
16 Stanley J. Silverstone, Esq. (*pro hac vice*)
17 Lucas K. Middlebrook, Esq. (*pro hac vice*)
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
445 Hamilton Avenue, Suite 1204
White Plains, NY 10601

18 Stanley Lubin, Esq. State Bar No. 003076
19 stan@lubinandenoch.com
20 LUBIN & ENOCH, PC
349 North 4th Avenue
Phoenix, AZ 85003-1505

21 _____
22 ³ While it is recognized that US Airways has a stake in this case, it is USAPA that is
subject to trial; prejudice to USAPA is a reason to continue the trial schedule.

23 ⁴ Additionally, trial counsel James K. Brengle who was introduced to the Court at the
December 15 hearing, has a previously scheduled trial that conflicts with the Court's
current trial schedule in this matter. (*See* Declaration of James K. Brengle).

1 **CERTIFICATE OF SERVICE**

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

- 4 • Defendant USAPA’s Motion for Reconsideration of Order Setting Trial Date;
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:

8 Marty Harper
9 mharper@stklaw.com

Kelly J. Flood
10 kflood@stklaw.com

Andrew S. Jacob
11 ajacob@stklaw.com

12 Shughart Thompson & Kilroy, P.C.
13 Security Title Plaza, Suite 1200
14 Phoenix, AZ 85012
15 Tel. 602 650-2000
16 Fax. 602 264-7033

17 Who are admitted counsel for the Plaintiffs in this matter, and,

18 Robert A. Siegel
19 rsiegel@omm.com

Rachel S. Janger
20 rjanger@omm.com

21 O’Melveny & Meyers LLP
22 400 S. Hope St.
23 Ste 177
Los Angeles, CA 90071-2899, and,

Sarah A. Asta
Sarah.Asta@USAirways.com

Karen Gillen
Karen.gillen@USAirways.com

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 March 5, 2009, by:

2 /s/ Lucas K. Middlebrook

3 Nicholas Paul Granath (*pro hac vice*)
4 ngranath@ssmplaw.com
5 SEHAM, SEHAM, MELTZ & PETERSEN, LLP
6 2915 Wayzata Blvd.
7 Minneapolis, MN 55405
8 Tel. 612 341-9080
9 Fax. 612 341-9079

10 Lee Seham, Esq. (*pro hac vice*)
11 ssmpls@aol.com
12 Lucas K. Middlebrook, Esq. (*pro hac vice*)
13 lmiddlebrook@ssmplaw.com
14 Stanley J. Silverstone, Esq. (*pro hac vice*)
15 ssilverstone@ssmplaw.com
16 SEHAM, SEHAM, MELTZ & PETERSEN, LLP
17 445 Hamilton Avenue, Suite 1204
18 White Plains, NY 10601
19 Tel: (914) 997-1346
20 Fax: (914) 997-7125

21 LOCAL COUNSEL:

22 Stanley Lubin, Esq., Lic. 003076
23 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: US Airline Pilots Association (“USAPA”)