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

10 Don ADDINGTON, *et al.*,  
11 *Plaintiffs,*  
12  
13 vs.  
14 US AIRLINE PILOTS ASSN., and  
US AIRWAYS, INC.,  
15 *Defendants.*

CONSOLIDATED CASES NO.  
2:08-CV-1633-PHX-NVW;  
2:08-CV-1728-PHX-NVW

**PLAINTIFFS' RESPONSE TO  
DEFENDANT USAPA'S MOTION FOR  
RECONSIDERATION OF ORDER  
SETTING TRIAL DATE**

16 Don ADDINGTON, *et al.*,  
17 *Plaintiffs,*  
18 vs.  
19 Steven H. BRADFORD, *et al.*,  
20 *Defendants.*

21 Plaintiffs Don ADDINGTON, John BOSTIC, Mark BURMAN, Afshin  
22 IRANPOUR, Roger VELEZ, and Steve WARGOCKI, on behalf of the West  
23 Pilot Class file *Plaintiffs' Response to Defendant USAPA's Motion For*  
24 *Reconsideration of Order Setting Trial Date.* USAPA's only purpose, only  
25 remaining strategy, is delay. USAPA hopes to delay trial so that it can put a  
26 date-of-hire collective bargaining agreement ("CBA") into effect and assert  
27 (wrongly) that the dispute is then moot. Some evidence of this strategy is found  
28 in Saturday's Arizona Republic where it is reported that USAPA has asked the

1 Company to enlist the help of a “facilitator”, the NMB, to aid in negotiations  
2 towards a single CBA. (See, Ex. A). The Court must recognize this strategy for  
3 what it is, deny the motion, and conduct the trial as scheduled.

#### 4 **MEMORANDUM OF POINTS AND AUTHORITIES**

##### 5 **I. OVERVIEW**

6 USAPA’s complaints of prejudice are belied by the facts and its  
7 arguments are misleading. The trial on liability will look at USAPA’s  
8 actions, not Plaintiffs’. If USAPA violated its duty of fair representation, no  
9 act or omission by Plaintiffs, other West Pilots or ALPA will be an excuse.  
10 USAPA’s complaint that it needs more time for discovery is particularly  
11 hollow because it has not, and cannot, identify any information that could  
12 possibly excuse its conduct and/or relieve it of liability for violations of the  
13 duty of fair representation. Moreover, USAPA has not explained, if such  
14 information might exist, why it cannot obtain it in time for trial.

15 To the extent that any material facts will actually be in dispute at the  
16 time of trial, those disputes will be resolved by evidence from one of three  
17 East Pilots sources: documents created by East Pilots, admissions made by  
18 East Pilots, and/or testimony given by East Pilots. No evidence from any  
19 other source would support USAPA’s defense. USAPA never explains  
20 otherwise.

21 In short, the evidence from both sides will largely be East Pilot actions,  
22 admissions and testimony. USAPA does not need discovery of Plaintiffs or  
23 third-parties to dispute such evidence. The logical conclusion, therefore, is  
24 that USAPA’s only use for discovery is to delay this trial for delay’s sake.

##### 25 **II. LEGAL ARGUMENT**

###### 26 **A. The System Board Has No Authority to Decide USAPA’s Liability.**

27 Plaintiffs have alleged a claim for USAPA’s breach of the duty of fair  
28 representation to the West Pilots it is supposed to represent and protect.

1 Those issues have been fully briefed and that case will be ready for trial on  
2 April 28, 2009. The case concerns USAPA's alleged wrongful conduct in  
3 forming the union, making improper promises to get elected and allowing a  
4 ripe seniority dispute to be decided by majority vote.

5 Rather than defend the specific claims Plaintiffs have alleged, USAPA  
6 continues to claim that the System Board should first decide whether USAPA  
7 caused the Company to breach its collective bargaining agreements. The  
8 Court dismissed the Company and claims against the Company. The Court  
9 has properly denied USAPA's efforts to defer, delay, or dismiss this case on  
10 those issues, and should do so again. The Company's conduct will not be a  
11 contested issue of fact or law in the case. The System Board's determination  
12 regarding any violation of the Company's duty to the West Pilot group under  
13 the West CBA is not an issue for this trial. The System Board does not have  
14 jurisdiction to enjoin USAPA from its ongoing violations of the duty of fair  
15 representation. Regardless of the outcome of the System Board's  
16 determination, the claims against USAPA for its own actions against the  
17 West Pilots will remain proper issues for the jury to decide.

18 **B. USAPA has suffered no prejudice.**

- 19 1. USAPA has not explained, and cannot explain, how any  
20 remaining discovery will help its defense.

21 USAPA claims that it has been "deeply prejudiced" by the "course and  
22 conduct of this case to date." Plaintiffs filed this action on September 4, 2008,  
23 seeking injunctive relief. The Court denied injunctive relief but put both  
24 parties on notice that the resolution of the case would be accelerated. As the  
25 Court has noted in its rulings, the facts about USAPA's conduct are largely  
26 undisputed. Although USAPA complains about Plaintiffs' lack of cooperation  
27 (which is unfounded), it has completely failed to demonstrate how any alleged  
28 lack of cooperation prejudiced its ability to prepare for trial.

1 Plaintiffs submitted to many hours of deposition interrogation from Mr.  
2 Seham, on class qualification issues as well as the merits. Although proper  
3 objections were preserved for questions that were outside the scope of  
4 discovery for class certification purposes, Mr. Seham took the opportunity to  
5 examine Plaintiffs as to the merits. Moreover, contrary to USAPA's  
6 mischaracterization of events, Plaintiffs cooperated with USAPA's discovery  
7 requests. On very short notice, when USAPA sought to depose several West  
8 Pilots (who are not named parties), Plaintiffs arranged for these individuals  
9 to assemble in Phoenix and San Diego for depositions during the week of  
10 February 9, 2009. After Plaintiffs made these arrangements, USAPA's  
11 counsel cancelled. Plaintiffs arranged depositions of several of these West  
12 Pilots a second time for the week of March 9 and that schedule was not  
13 accepted by USAPA. Instead, USAPA issued subpoenas for these same  
14 witnesses, for different dates, without consulting with Plaintiffs' counsel or  
15 regarding the availability of the pilots due to scheduling commitments.  
16 USAPA did so despite Plaintiffs' offer to accept service and make these  
17 witnesses available in Phoenix for the convenience of USAPA's counsel. If  
18 USAPA honestly expected to obtain vital information from such discovery it  
19 would have taken advantage of Plaintiffs' efforts to make these pilots  
20 available.

21 USAPA did not take advantage of its opportunity to conduct these  
22 depositions because it is more interested in delaying the trial than in its  
23 discovery. USAPA has no actual need for these depositions and cannot  
24 demonstrate prejudice if it were unable to complete these depositions  
25 because, even if there were disputed facts, the resolution of those facts will  
26 come only from testimony or documents authored by East pilots or USAPA  
27 officers.

1 In an apparent effort to justify its claim of prejudice, immediately after  
2 the Court's preliminary pretrial conference on Friday, March 6, 2009,  
3 USAPA's counsel Mr. Granath fired off an e-mail to Don Stevens demanding  
4 that Plaintiff produce nine pilots for depositions, starting the following  
5 Monday, March 9, 2009. Of these nine, of course, three had already been  
6 subpoenaed by Mr. Brengle and Plaintiffs had confirmed the availability of  
7 those three witnesses. Perhaps USAPA was hoping that these nine witnesses  
8 would not be available, but Plaintiffs have confirmed today the depositions of  
9 five of the six other witnesses requested by USAPA, and Mr. Brengle will  
10 take those depositions on March 11, 12, and 13, 2009. USAPA has no further  
11 valid excuse or complaint about its ability to prepare for trial on April 28,  
12 2009.

13 The remaining witness, Kevin Horner, is on medical leave, at home,  
14 recovering from a serious medical condition that required surgery. This  
15 information was given to USAPA when USAPA first requested his deposition.  
16 USAPA then subpoenaed Mr. Horner for deposition. Mr. Brengle agreed that  
17 they would defer Mr. Horner's deposition, and that it would not be necessary  
18 for Plaintiffs to provide medical confirmation. Then, Mr. Granath's email on  
19 March 6, 2009, demanded again that Kevin Horner be deposed. When  
20 Plaintiffs pointed out that Mr. Brengle had previously agreed to postpone  
21 that deposition because Mr. Horner is recovering from serious surgery, Mr.  
22 Granath offered to take the deposition of Mr. Horner at his home so he would  
23 not have to travel. Only after Plaintiffs promised not to call Mr. Horner at  
24 trial or submit any information from him did USAPA finally agree to cancel  
25 Mr. Horner's deposition. This is just a mean spirited waste of time.

26 The remaining pilots USAPA wants to depose are West Pilots who were  
27 formerly ALPA representatives on various committees. None of these pilots  
28 have any involvement with events relating to USAPA's liability in this case.

1 USAPA has no legal basis to blame ALPA for its violations of the duty of fair  
2 representation, or to use ALPA's conduct as an excuse. None of these  
3 depositions can reasonably yield evidence that would be even remotely  
4 relevant, much less admissible.

5 Nonetheless, Plaintiffs have made arrangements over this past weekend,  
6 to produce all of these witnesses (other than Mr. Horner) for depositions.  
7 Because Plaintiffs stipulate they will not call Mr. Horner at trial, USAPA has  
8 no further complaint.

9 2. Mr. Brengle is **not** lead counsel.

10 As a last point, USAPA claim that it is prejudiced because its resources  
11 are allocated to other matters rings particularly hollow. As the Court knows,  
12 Mr. Seham continues to direct USAPA's defense, despite his announcement  
13 in open court last December that he was withdrawing as "lead counsel"  
14 because he might be called as a witness. Despite that avowal, Mr. Brengle  
15 did not apply to be admitted pro hac vice until January 14, 2009. Moreover,  
16 Mr. Seham personally conducted all the depositions of the named Plaintiffs.  
17 Mr. Brengle has attended depositions of USAPA witnesses in Charlotte and  
18 has taken depositions from two class members. Everything else, such as  
19 motion practice and discovery disputes, have been handled by the Seham law  
20 firm team.

21 Indeed, when on March 3, 2009, the Court was scheduling a follow up  
22 telephonic conference, Mr. Granath was concerned with Mr. Seham's  
23 availability, not Mr. Brengle's. As the following excerpts from the transcript  
24 demonstrate, the Court directly confirmed with Mr. Granath that Mr. Seham  
25 was lead counsel and scheduled the telephonic conference on Friday rather  
26 than Thursday so that Mr. Seham could participate.

27 MR. GRANATH: I do object, Your Honor. I'd prefer that we set  
28 it Friday. I don't recall if you said Friday was off base but I  
believe Mr. Seham has a flight on Thursday. So I'm reluctant  
to say 4:00 on Thursday.

1 (RT 29:12-15 (Mar. 3, 2009).)

2 THE COURT: Now, Mr. Seham, I agree, Mr. Seham's lead  
3 counsel, correct?

4 MR. GRANATH: That's correct, Your Honor.

5 (Id. at 30:22-24.)

6 MR. GRANATH: I don't know what his flight schedule is  
7 Thursday. He's preparing witnesses for depositions the  
8 plaintiffs are going to take tomorrow. And it's my  
9 understanding is he's flying back at some point on Thursday.  
10 My problem is I don't want to commit him right now and have  
11 to go back and inform the Court that's not going to work. As  
12 far as I know right now, I understand that Friday would be a  
13 day that he could do that. If it's not satisfactory with the  
14 Court, then I have to contact Mr. Seham today and confirm a  
15 time on Thursday.

16 THE COURT: Let's do this. I want Mr. Seham to participate in  
17 that discussion.

18 (Id. at 31:1-12.)

19 Yet two days after this discussion, USAPA requested a trial continuance  
20 based upon Mr. Brengle now being lead trial counsel with some kind of trial  
21 conflict. Mr. Brengle's trial conflict may go away, but USAPA should not be  
22 able to use Mr. Brengle's trial calendar as an excuse to continue this trial.  
23 Mr. Seham is and has been USAPA's lead counsel from the very first moment  
24 he was consulted by East Pilots in June of 2007. USAPA should not be  
25 permitted to use Mr. Brengle's limited participation in the case to date as an  
26 excuse to continue the trial.

27 3. USAPA's motive is to delay for delay's sake.

28 USAPA's real motive to demand further delay is delay itself. While  
USAPA seeks to delay this litigation, it is working hard to finalize  
negotiation and approval of a date-of-hire single collective bargaining  
agreement with the Company. Recent announcements from USAPA and its  
officers tell the entire story.

1 First, in a recent campaign email supporting election of Doug Mowrey  
2 for USAPA President, Jim Portale explains to USAPA membership that  
3 USAPA and the Company are close to finalizing negotiations.

4 [T]he following have ALREADY been negotiated:

5 Pay raise to the tune of 20%

6 10 extra vacation days (TOS) per year

7 12 (or 13) days off (12 in a 30 day month and 13 in a 31 day  
8 month)

9 5+15 VM Day

10 1/1.5 Duty Rig

11 1/3.25 Trip Rig

12 A 5+15 hr credit for a 24 hr RON

13 For reserves, 10 non movable days vs 4

14 POTA pays time and a half

15 A dynamic bid system that provides far better control over  
16 which days off you need

17 Jim Portale, "Endorsements for USAPA Officer Positions" (Email Feb. 25,  
18 2009) (Exhibit B).

19 Next, to resolve the last remaining points of disagreement over the terms  
20 of a new collective bargaining agreement, "USAPA and US Airways  
21 management [are] jointly seek[ing] a facilitator utilizing the services of the  
22 National Mediation Board to assist the parties in reaching an agreement."  
23 USAPA Press Release (Feb 26, 2009) (Exhibit C).

24 Finally, Mr. Portale admits that his candidate "Doug Mowery wants a  
25 **quick contract to secure our constitutional right to a DOH seniority and the**  
26 **complete elimination of the NIC threat hanging over our heads.**" Jim Portale  
27 (Email Feb. 25, 2009) (emphasis added).

28 Quite clearly, therefore, the real "prejudice" to USAPA by holding the  
April 28 trial date is that it does not provide sufficient time for USAPA to try  
to get a "quick contract" that would "complete[ly] eliminate the NIC threat."  
Should trial be delayed, USAPA would simply have more time to get its



1 “quick contract” in place, and then argue that Plaintiffs’ DFR claims are  
2 moot. By denying USAPA’s motion and keeping the April 28 trial date, the  
3 Court can (and should) put a stop to USAPA’s efforts to avoid having this  
4 case decided on the merits.

5 This case must be decided before any collective bargaining agreement is  
6 finalized. The Company is entitled to negotiate an agreement knowing what  
7 seniority list will be implemented. Time here is, indeed, of the essence. This  
8 is an injunction case and all affected parties are entitled to a prompt  
9 resolution.

10 USAPA vigorously challenged class certification and demanded  
11 burdensome and irrelevant discovery, regardless that “[a] successful  
12 injunction by the named Plaintiffs culminating in an order requiring USAPA  
13 to negotiate toward the implementation of the Nicolau list would have the  
14 same impact with or without class certification.” (USAPA, *Resp. Class Cert.*,  
15 16:21-23 (Feb 17, 2009) (doc. 195).)

16 USAPA insisted on a jury trial, no doubt hoping for further delay. It did  
17 so regardless that unions generally want DFR cases tried to the court. *See,*  
18 *e.g., Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558  
19 (1990).

20 Now, USAPA wants to use additional trumped up excuses to delay the  
21 trial directly. The fact is, Mr. Seham is lead counsel and he is ably assisted  
22 by Mr. Granath, Mr. Middlebrook and Mr. Silverstone. Mr. Brengle’s trial  
23 conflict, though real, does not deprive USAPA of the right to be represented  
24 by their counsel of choice and should not be grounds for a trial continuance.  
25 The Court should find, therefore, that there is insufficient prejudice (if any at  
26 all) to continue the trial.

1 **III. CONCLUSION**

2 The trial will address a narrow claim for injunctive relief. Plaintiffs are  
3 ready for trial. USAPA can be ready. Additional delay will unjustly provide  
4 USAPA the opportunity to accomplish with its majority power what it  
5 apparently believes it cannot achieve in court. The Court, therefore, should  
6 deny USAPA's motion for reconsideration in all respects.

7 Dated this 9th day of March, 2009.

8 **Polsinelli Shughart, P.C.**

9 */s/ Don Stevens*

10 By: \_\_\_\_\_

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18 **CERTIFICATE OF SERVICE**

19 I hereby certify that on March 9, 2009, I electronically transmitted the  
20 foregoing document to the U.S. District Court Clerk's Office by using the  
21 CM/ECF System for filing and transmittal of a Notice of Electronic Filing.

22 *s/ Don Stevens*