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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,

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-1633-PHX-NVW
(Consolidated)

**DEFENDANT USAPA'S
MEMORANDUM IN OPPOSITION
TO PLAINTIFFS' MOTION
FOR PROTECTIVE ORDER**

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

1 Defendant, US Airline Pilots Association, by its undersigned counsel, submits this
2 memorandum in opposition to Plaintiffs' "Motion for Protective Order Directing
3 Defendant's Counsel to Respect ER 4.2 and Abstain from Ex Parte Contact with
4 Members of the West Pilot Class" (Docket No. 274), filed on March 23, 2009.

5 Approximately two hours after the filing of plaintiffs' motion, the Court issued an
6 order for USAPA to respond by 5:00 p.m. the next day (Dkt. No. 276). The Court took
7 this expedited action despite the fact that Plaintiffs did not follow the proper discovery
8 dispute procedure, and despite the fact that the Plaintiffs' motion is not supported by any
9 declaration made under penalty of perjury.¹

10
11 Plaintiffs' motion should be stricken for failure to comply with the Court's
12 standing discovery dispute order, or, in the alternative, the motion should be denied
13 because (i) there is no attorney-client relationship between class counsel and class
14 members; (ii) the unsworn factual allegations made by plaintiffs' counsel and Mr. Phipps
15 are untrue; and (iii) the relief sought is grossly overbroad in that it would prevent
16 USAPA, and its counsel, from carrying out their duty to represent all US Airways pilots.

17 **I. Plaintiffs Failed to Comply with the Discovery Dispute Order**

18 Plaintiffs' motion should be stricken by reason of their end-run around the Court's
19 standing discovery dispute order of February 19 (Dkt. No. 203). That Order was issued
20 while there were *pending* discovery motions filed by USAPA (Dkt. Nos. 187 and 191)

22 ¹ In our view, USAPA's Order to Show Cause for a Stay of Proceedings Pending
23 USAPA's Appeal to the Ninth Circuit (Dkt. No. 260), filed on March 17, 2009, has the
superior claim to expedited treatment based on its inherent urgency and, in contrast with
the instant motion, defendant's compliance with all applicable filing rules.

1 that otherwise complied with the Federal Rules of Civil Procedure as well as this Court's
2 Local Rules.

3 Earlier, Plaintiffs had brought another discovery motion to compel production of
4 attorney-client privileged documents (Dkt. No. 106), which this Court entertained despite
5 Defendant's motion to strike (Dkt. No. 111) for failure to comply with the conferral rule
6 in Fed. R. Civ. P. 37 and LRCiv 7.2. Though eventually denying that motion to compel
7 on the merits (Dkt. No. 185), the Court did so without at that time requiring the process
8 detailed in the Court's standing discovery dispute order (Dkt. No. 203) that was later
9 issued while Defendant's motions were pending.
10

11 Now, Plaintiffs have brought another discovery motion without complying with
12 the Court's discovery order: the motion failed to allow time to confer and on its face it
13 does not even purport to allow a response from Defendant, nor does it, as required by the
14 discovery dispute order, which requires the joint submission of a one-page summary of
15 the dispute.² Yet the Court has required USAPA to respond in an expedited timeframe of
16 less than 24 hours when, under LRCiv 7.1, USAPA would have had ten days.

17 In order to maintain consistency, USAPA submits that the Court should strike
18 plaintiffs' motion and require the plaintiffs to adhere to the same process that USAPA has
19 been held to.
20

21 ² Plaintiffs' counsel sent an e-mail to USAPA counsel on March 23rd at 1:26 p.m. to
22 advise that plaintiffs would file their motion at 2:00 p.m. USAPA counsel wrote back at
23 2:22 p.m. to inform plaintiffs' counsel that his "account of the phone call in your email is
not accurate: the purpose of the call was as explained to the individual and he voluntarily
spoke for an hour; there was no deception and no intimidation." Plaintiffs filed their
motion eight minutes later.

1 **II. The Factual Allegations Made By Plaintiffs Are Not Made Under Penalty of**
2 **Perjury, and are Untrue.**

3 Plaintiffs' Motion for Protective Order is based only on one unsworn e-mail from
4 plaintiffs' counsel and one unsworn e-mail that purports to be from Ted Phipps. No
5 affidavit or declaration made under penalty of perjury was submitted in support of
6 plaintiffs' motion. For this reason alone, the allegations are suspect.

7 Based on the accompanying Declaration of George Diamantopoulos, made under
8 penalty of perjury, plaintiffs' allegations are untrue. Mr. Diamantopoulos told Mr.
9 Phipps that he was an attorney with Seham, Seham, Meltz & Petersen, and that he
10 represented USAPA. (Diamantopoulos Decl. ¶ 3). Neither plaintiffs' counsel nor Mr.
11 Phipps mentions in their e-mails that Mr. Phipps told Mr. Diamantopoulos that he agreed
12 to be interviewed on March 21, and asked Mr. Diamantopoulos to call him back on
13 March 22. *Id.* On March 22, Mr. Diamantopoulos again told Mr. Phipps that he was
14 with Seham, Seham, Meltz & Petersen, and that he represented USAPA. (*Id.* at ¶ 6).

15
16 Contrary to the unsworn allegations of plaintiffs' counsel and Ted Phipps, Mr.
17 Diamantopoulos: did not tell Mr. Phipps that he represented the plaintiffs (*Id.* at ¶ 7); did
18 not tell Mr. Phipps that he was "contracted out" to work for Mr. Petersen of the Seham
19 law firm (*Id.* at ¶ 10); did not tell Phipps that he was "contracted" to do witness
20 interviews (*Id.* at ¶ 11); did not tell Mr. Phipps that he "just wanted to talk about the
21 case" (*Id.* at ¶ 14); and did not state the name of his firm "quickly" (*Id.* at ¶ 17).

22 Contrary to the unsworn allegations of plaintiffs' counsel and Ted Phipps, Mr.
23 Phipps: did not ask Mr. Diamantopoulos "Did the Seham firm hire you?" (*Id.* at ¶ 12);

1 did not accuse Mr. Diamantopoulos of doing anything inappropriate (*Id.* at ¶ 13); did not
2 say to Mr. Diamantopoulos “so you’re working with the firm I did the affidavit with” (*Id.*
3 at ¶ 18); and did not say to Mr. Diamantopoulos, “Sure, I guess it doesn’t matter now,” in
4 response to being asked whether Mr. Diamantopoulos could call him back (*Id.* at ¶ 20).

5 **III. The Law Regarding Communication with Class Members is not Settled.**

6 Whether there is an attorney-client relationship between counsel for named
7 plaintiffs in a class action and members of a certified class is not a settled issue of law.
8 Some courts have held that no attorney-client relationship is created between class
9 counsel and the class members. In *Morisky v. Public Service Electric and Gas Co.*, 191
10 F.R.D. 419, 424 (D.N.J. 2000), the court stated that “[e]ven if certified as a class, ‘class
11 members are really neither parties to the litigation nor clients of plaintiffs’ counsel,’”
12 citing *Penk v. Oregon State Bd. of Higher Ed.*, 99 F.R.D. 511, 516 (D. Or. 1983).

14 **IV. The Relief Sought by Plaintiffs is Overbroad and Would Prevent USAPA
15 from Satisfying its Duties as the Labor Representative of all US Airways
16 Pilots.**

17 Plaintiffs seek an order directing USAPA’s counsel to abstain from contact with
18 all members of the West pilot class for the duration of the litigation. This relief is clearly
19 overbroad and would prevent USAPA and its counsel from carrying out their duties as
20 the labor representative, and counsel for the representative, of all US Airways pilots.

21 USAPA counsel in this case also acts as counsel for USAPA in all areas of
22 USAPA’s work, including contract negotiations, grievances and arbitration, and the
23 rendering of legal advice to the Board of Pilot Representatives, the officers, and
committees, including the Negotiating Committee and the Merger Committee. The order

1 sought by the plaintiffs would prevent USAPA counsel from communicating with any
2 West pilots who are involved in grievances or as representatives of USAPA. This would
3 include, for example, communication with West pilot Brice Lecarre, who is the Phoenix
4 domicile chairman and a member of the Board of Pilot Representatives.

5 USAPA counsel also communicates on a regular basis with West pilots in
6 representing USAPA in grievances and arbitrations. For example, USAPA counsel has
7 communicated with West pilot Mitch Vasin, who provided assistance to USAPA in TA 9,
8 and who is currently a member of the System Board of Adjustment for TA 10, which is
9 scheduled to continue on April 9-10. TA 10 concerns interpretation of the West
10 collective bargaining agreement. Plaintiffs' proposed order would mean that USAPA
11 counsel could not communicate with their board member, Mr. Vasin. USAPA counsel
12 has also communicated with West pilot Mark Burdick, who testified for USAPA in TA 8.
13 USAPA counsel also regularly communicates with West pilots who USAPA represents
14 as grievants. For example, USAPA counsel represented West pilot Keith Evans in his
15 discharge arbitration. In that case, West pilots testified as witnesses for USAPA, and one
16 West pilot was a member of the System Board of Adjustment. Plaintiffs' proposed order
17 would completely prevent USAPA from representing West pilots in their grievances
18 against the Company.
19

20 The proposed order is also overbroad because on occasion West pilots have
21 contacted either USAPA or USAPA counsel. For example, one West pilot has repeatedly
22 contacted Seham, Seham, Meltz & Petersen, to report that he has been subject to a
23 barrage of verbal and physical threats of violence, assault and property damage due to his

1 expressed interest in becoming active in USAPA as a representative. (Murphy Decl. ¶¶ 3-
2 9). The referenced West pilot sent an e-mail to USAPA counsel Lee Seham on October
3 3, 2008, detailing his concerns about the threats of physical violence, economic threats,
4 threats of destruction of his personal property, and telephone harassment. (*Id.* at ¶ 13).

5 Plaintiffs' proposed order would prevent USAPA and its counsel from investigating
6 serious complaints of this nature from the pilots who it is legally required to represent.

7 **CONCLUSION**

8 Plaintiffs' motion should be stricken for failure to comply with the discovery
9 dispute rules, or, in the alternative, the motion should be denied for the reasons stated in
10 this memorandum.
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1 Respectfully Submitted,

2 Dated: March 24, 2009

By:

/s/ Stanley J. Silverstone

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20 ATTORNEYS FOR DEFENDANT USAPA
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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
3 of the foregoing pleading, *to wit*,

- 4 • Defendant USAPA’S Memorandum in Opposition to Plaintiffs’ Motion for
5 Protective Order;
• 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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18 Who are admitted counsel for Defendant US Airways, Inc. in this matter.

19 And further that paper hard copies were provided to The Honorable Neil V. Wake,
20 District Court Judge, 401 W. Washington Street, SPC 52, Phoenix, AZ 85003.
21
22
23

1 On March 24, 2009, by:

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