LEE SEHAM, Esq. *pro hac vice*
LUCAS K. MIDDLEBROOK, Esq. *pro hac vice*
NICHOLAS P. GRANATH, Esq., *pro hac vice*
STANLEY J. SILVERSTONE, 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

NICHOLAS J. ENOCH, Esq., State Bar No. 016473
LUBIN & ENOCH, P.C.
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 RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR DISCOVERY (DOC. # 469)**
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

Defendant US Airline Pilots Association ("USAPA") submits this memorandum in opposition to "Plaintiffs' Motion For Leave To Conduct Discovery Related To The Damages Phase Expedited Consideration Requested" (Doc. # 469). This motion should be denied because:

First, the motion constitutes an attempt to **end-run Fed. R. Civ. P. 56(f)** and granting it would unfairly prejudice Defendant by excusing Plaintiffs from complying with Rule 56(f). The motion comes after this Court *ordered* Defendant to submit its summary judgment motion on damages, and *ordered* Plaintiffs to respond (Doc. # 454). The summary judgment filings are pending. Plaintiffs' motion must be considered in this context. In that context, Plaintiffs are no different than any other non-movant facing a Rule 56 motion. Unless Plaintiffs can satisfy Rule 56(f), additional discovery should be denied.

Second, Plaintiffs casually shrug off compliance with Rule 56 yet they **fail to even attempt to show that they could satisfy 56(f) – and this is for the good reason that they could not**. Rule 56(f) is not optional for non-movants facing summary judgment, which surely Plaintiffs are – given Doc. # 454. "Parties who ignore Rule 56(f)'s affidavit requirement do so at their own peril." *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 246 (4th Cir. 2002). Rule 56(f) requires:

- A formal motion. *See Been v. O.K. Industries, Inc.*, 495 F.3d 1217, 1235 (10th Cir. 2007); *Hackworth v. Progressive Casualty, Ins. Co.*, 468 F.3d 722, 732 (10th Cir. 2006), *cert. denied*, 127 S. Ct. 2883 (2007); *Velez v. Awning Windows, Inc.*, 375 F.3d 35, 40 (1st Cir. 2004).

- A sworn affidavit. 56(f); *Doe v. Abington Friends School*, 480 F.3d 252, 255 n.3 (3d Cir. 2007); *Ball v. Union Carbide Corp.*, 376 F.3d 554, 561 (6th Cir. 2004); *American Chiropractic Ass'n v. Trigon Healthcare, Inc*. 367 F.3d 212, 237 (4th Cir. 2004), *cert. denied*, 543 U.S. 979 (2004).

- A showing of: 1) a description of the particular discovery the movant intends to seek; 2) an explanation showing how that discovery would preclude the entry of summary judgment; 3) a statement justifying why this discovery had not been or could not have been obtained earlier. *Family Home and Finance Center, Inc. v. Federal Home Loan Mortgage Corp.*, 525 F.3d 822, 827 (9th Cir. 2008); *Garcia v. U.S. Air Force*, 533 F.3d 1170, 1179 (10th Cir. 2008); *Adams v. Travelers Indem. Co. of Connecticut*, 465 F.3d 156, 162 (5th Cir. 2006).

- A statement that the movant has been diligent in pursuing discovery to date. *Chance v. Pac-Tel Teletrac Inc.*, 242 F.3d 1151, 1161 n. 6 (9th Cir. 2001); *Beattie v. Madison County School Dist.*, 254 F.3d, 606 (5th Cir. 2001).

Given Plaintiffs' refusal to even attempt to satisfy Rule 56(f), it can be safely inferred that the reason they do not attempt to do so is because they could not satisfy the Rule. At any rate – until they do – no new discovery is appropriate.

Third, Plaintiffs' motion is untimely, and granting it would unfairly prejudice Defendant. Plaintiff had ample opportunity to address the Court on the need for any additional discovery as well as the schedule when the Court openly invited comment on the record in the bench trial phase. **Plaintiffs did not raise discovery then, instead they consented to the schedule the Court ordered; that constitutes waiver.**[1]

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[1] Plaintiffs' counsel, without any mention of additional discovery, welcomed the accelerated summary judgment schedule. *See* May 13, 2009 Tr. at 87:9-13. ("MR. HARPER: And we've gotten used to the accelerated schedule for the past two months, so to the extent they file something then we will respond promptly, and they can do their reply and we can get it teed up as quickly as possible for your consideration.").

1 Fourth, if the Court were to grant this motion then it would unfairly prejudice
2 Defendant if the Court did not also **simultaneously grant reciprocal discovery and to**
3 **amend the schedule for summary judgment**. Indeed, it would be a waste of the
4 Court's time to receive any summary judgment until all such discovery is completed. In
5 the meantime, the impact on this case and on all parties' interest is exactly what this
6 Court hoped to avoid – either delay in getting an appealable order or additional
7 expensive litigation that saps the union's ability to negotiate and causes further
8 divisiveness within the bargaining unit (as the Court once noted, this dispute has its
9 "toxic" aspect, Doc. # 288, p. 4:8).
10 Fifth, Plaintiffs' **motion is devoid of any specifics**, not only with respect to a
11 substantive justification for discovery, but any specifics of how, what and when such
12 discovery could be conducted on either the Court's ordered summary judgment
13 schedule or the August trial date. A safe inference is that granting Plaintiffs' motion
14 would blow the existing schedule set by this Court out of the water.
15 Sixth, **Plaintiffs' motion is utterly futile because there is no genuine issue of**
16 **material fact that Defendant has not caused any delay** in the implementation of the
17 Nicolau List because it is undisputed that: i) no list could be implemented without a
18 new, single CBA; ii) that neither the Transition Agreement or ALPA Merger Policy set
19 a timetable to agree on a new CBA; and iii) that Defendant has not delayed obtaining a
20 new CBA – for any reasons, notwithstanding the fact that Defendant did not intend to
21 and has not proposed the Nicolau List (Pre-Trial transcript Tr. 42:8: Stevens to Court:
22

"We're not saying that they delayed any section. It's just that the seniority section they did do didn't include Nicolau.")

For all the foregoing reasons, Defendant respectfully requests Plaintiffs motion be denied.

Respectfully Submitted,

Dated: May 19, 2009

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

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

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

James K. Brengle, Esq. (*pro hac vice*)
Duane Morris, LLP
30 South 17th Street
Philadelphia, PA 19103-4196

Nicholas Enoch, Esq. State Bar No. 016473
stan@lubinandenoch.com
LUBIN & ENOCH, PC
349 North 4th Avenue
Phoenix, AZ 85003-1505

Attorneys for Defendant
US Airline Pilots Association

1 **CERTIFICATE OF SERVICE**

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3 This is to certify that on the date indicated herein below true and accurate copies of the foregoing documents and their attachments, *to wit*,

4
- DEFENDANT USAPA'S RESPONSE IN OPPOSITION TO PLAINTIFFS MOTION FOR DISCOVERY (DOC. # 469)

5
- Certificate of Service

6 were electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all admitted counsel who have registered with the ECF system, including but not limited, to:

7

8 Marty Harper
MHarper@Polsinelli.com
Kelly J. Flood
KFlood@Polsinelli.com

9 Don Stevens
DStevens@Polsinelli.com
Katie Brown
KVBrown@Polsinelli.com

Andrew S. Jacob
AJacob@Polsinelli.com

10 Further, I certify that paper hard copies shall be provided to The Honorable Neil V. Wake, District Court Judge, 401 W. Washington Street, SPC 52, Phoenix, AZ 85003.

11

12 On May 19, 2009, by:

13 ***/s/ Nicholas Paul Granath, Esq.***

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