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

10 Don ADDINGTON; John BOSTIC; Mark  
BURMAN; Afshin IRANPOUR; Roger  
11 VELEZ; and Steve WARGOCKI,

12 Plaintiffs,

13 vs.

14 US AIRLINE PILOTS ASSOCIATION,  
US AIRWAYS, INC.,

15 Defendants,

16 Don ADDINGTON; John BOSTIC; Mark  
BURMAN; Afshin IRANPOUR; Roger  
17 VELEZ; and Steve WARGOCKI,

18 Plaintiffs,

19 vs.

20 Steven H. BRADFORD, Paul J. DIORIO,  
Robert A. FREAR, Mark. W. KING,  
Douglas L. MOWERY, and John A.  
STEPHAN,

21 Defendants.  
22

Case No. 2:08-cv-1633-PHX-NVW  
(Consolidated)

**DEFENDANT'S  
NOTICE AND MOTION TO  
SUPPLEMENT THE RECORD**

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

1 TO : Plaintiffs, all parties, and their attorneys of record.

2 **NOTICE.**

3 PLEASE TAKE NOTICE that Defendant US Airline Pilots Association  
4 (“USAPA”) will move this Court, to be heard without oral argument, for an order to  
5 supplement the trial record.

6 **MOTION.**

7 COMES NOW Defendant to move this Court for an order requiring Plaintiffs to  
8 supplement the trial record of the Jury liability and Bench equitable remedy phases by:

9 1) Filing on ECF Plaintiffs’ visual illustration shown to the Jury during, and in  
10 aid, of Plaintiffs’ Opening and Closing arguments;

11 2) Filing on ECF Plaintiffs’ visual presentation shown to the Court in the remedy  
12 phase of the Bench trial prior to, and during, the testimony of Plaintiffs’ witness  
13 Stockdell.

14 **GROUND.**

15 For its supporting grounds Defendant hereby states the following:

16 First, this motion is made necessary by Plaintiffs’ counsel’s refusal, on  
17 Defendant’s counsel’s request, to provide copies of visual illustrations created by  
18 Plaintiffs’ counsel and shown to the Jury during and in aid of Plaintiffs’ Opening and  
19 Closing arguments and the visual illustration shown to the Court in the bench trial  
20 during the examination of Plaintiffs’ witness Brian Stockdell (hereinafter  
21 “PowerPoints”). (Granath Decl. ¶¶ 4, 5, 6, 7).  
22

1 While it is noted that Plaintiffs did provide Defendants with a hardcopy of their  
2 Opening Statement PowerPoint during trial, this was done only after they initially  
3 refused but then relented after Defendant indicated they would bring a motion. (Granath  
4 Decl. ¶ 3). This episode only serves to illustrate the arbitrary nature of Plaintiffs'  
5 current refusal.

6 Second, supplementation is necessary to complete the trial record in anticipation  
7 of Defendant's appeal to the Ninth Circuit. While the visual displays used in the  
8 liability phase of the trial are not evidence and were not themselves objected to *per se*,  
9 nevertheless they are the visual equivalent to the words spoken by counsel that the  
10 Court properly did require a transcript be made of so that a record is preserved.  
11 Defendant anticipates, and is now preparing for, an appeal on the merits that among  
12 other grounds will focus on the Jury Instructions. The record shows that the Jury  
13 Instructions were strenuously and comprehensively objected to by Defendant and for  
14 good reason. Plaintiffs' closing argument strongly relied on the Jury Instructions in a  
15 way that Defendants will argue only amplified what was most objectionable, flawed and  
16 prejudicial about the Instructions. Key aspects of the Instructions were emphasized by  
17 display on an overhead-projection for the Jury to see during Plaintiffs' closing. In many  
18 cases what was projected was not read verbatim into the record (and where read, not  
19 necessarily accurately).

20 On appeal, and possibly in post-trial motions, Defendant will argue that the Jury  
21 Instructions unfairly and prejudicially compelled, or resulted in, a verdict in favor of  
22

1 Plaintiffs. Plaintiffs' Closing PowerPoint display magnified the Instructions and the  
2 Jury returned a verdict with scarcely any time to deliberate, strongly suggestive of the  
3 prejudicial effect of the Jury Instructions. Plaintiffs' counsel's PowerPoint constitutes  
4 information presented to the jury in open court that relates to a key issue now identified  
5 for appeal but which is not currently reflected in the record. That should be corrected  
6 now in order that the Appeals Court not be faced with a motion to supplement or that  
7 Defendant not be unfairly prejudiced on appeal for an avoidable error now brought to  
8 this Court's attention. This potential prejudice to Defendant must be balanced against  
9 the complete lack of prejudice to Plaintiffs occasioned by an order to supplement the  
10 record with a PowerPoint that has already been developed and presented in open court.

11 Third, as the record now stands it is unclear whether Plaintiffs' counsel's  
12 illustration presented to the Court in the Bench trial phase was offered as evidence, or  
13 offered to illustrate argument, or simply constituted attorney vouching. The document  
14 and presentation were repeatedly objected to at the time. Specifically, at the time,  
15 Defendant asked this Court to order Plaintiffs to provide the document.

16 MR. GRANATH: I would like for your Honor to order the plaintiffs,  
17 since they will not voluntarily provide me with a copy of the overview  
that counsel has just displayed –

18 THE COURT: You mean the PowerPoint they just did?

19 MR. GRANATH: Yes, sir. And I would like that for the appellate record,  
20 sir.

21 THE COURT: Okay. You don't have any problem having that in the  
22 record, do you?

1 MR. JACOB: No.

2 THE COURT: All right. That will be taken care of.

3 MR. GRANATH: Will I get that today, your Honor, from plaintiffs?

4 THE COURT: Counsel, when can you get them a copy of that?

5 MR. JACOB: As soon as I can get wi fi service out in the hallway I can  
6 send it to them.

7 (5/13/09 Tr. at 26:22 – 27:12). The Court did not explicitly order Plaintiffs to produce  
8 this PowerPoint based on Mr. Jacob's representations that it would be provided.  
9 However, Mr. Jacob has refused to provide this despite repeated requests he do so.  
10 (Granath Decl.). And, the explanation given to date, that lead attorneys need to approve  
11 (Granath Dec. ¶¶ 5, 7), seems but an admission of a lack of candor given counsel's  
12 uninhibited representation in court, or a mere pretext given that lead counsel was both  
13 present in court when this representation was made and remained silent upon hearing it.  
14 (5/13/09 Tr. at 2:5 and 27:13).

15 Moreover, while Plaintiffs claim that they withdrew Stockdell's testimony, it is  
16 not clear whether the Bench-trial PowerPoint was offered as the witness' or Counsel's  
17 exhibit, so it is of no moment that the testimony was supposedly withdrawn (and if  
18 Plaintiffs seek to rely on Stockdell's testimony in the damages trial that is yet another  
19 reason to grant this motion). This document, too, may be required on post-trial motions  
20 or on appeal but is not now in the record because Plaintiffs have regrettably  
21 misrepresented their intentions.

22 Fourth, this Court should err on the side of completeness of the record for sake of

1 all parties and order the requested relief, now made necessary by Plaintiffs' post-trial  
2 contumacy.

3 **RELIEF REQUESTED.**

4 That the Court order Plaintiffs to immediately file on ECF their visual  
5 illustrations shown to the Jury during and in aid of Plaintiffs' Opening and Closing  
6 arguments in the liability phase of the trial; That the Court further order Plaintiffs to  
7 immediately file on ECF the visual illustration shown to the Court in the bench trial.

8 Respectfully Submitted,

9 Dated: June 1, 2009

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

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21 *Attorneys for Defendant*  
22 *US Airline Pilots Association*

1 **CERTIFICATE OF SERVICE**

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

- 4 • Defendant’s Notice And Motion To Supplement The Record (and supporting  
5 Declarations)  
6 • Certificate of Service

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

|                        |                         |                       |
|------------------------|-------------------------|-----------------------|
| Marty Harper           | Don Stevens             | Andrew S. Jacob       |
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| Kelly J. Flood         | Katie Brown             |                       |
| KFlood@Polsinelli.com  | KVBrown@Polsinelli.com  |                       |

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

12 On June 1, 2009, by:

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