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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 vs.

13 US AIRLINE PILOTS ASSN., and
14 US AIRWAYS, INC.,

15 *Defendants.*

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

**PLAINTIFFS' RESPONSE TO USAPA'S
MOTION TO SUPPLEMENT RECORD**

16 Don ADDINGTON, *et al.*,
17 *Plaintiffs,*

18 vs.

19 Steven H. BRADFORD, *et al.*,

20 *Defendants.*

21
22 Plaintiffs oppose USAPA's Motion to Supplement the Record both as to (a)
23 the Plaintiff's PowerPoint slides used in closing argument, or (b) in the
24 withdrawn exhibit used during the examination of Mr. Stockdell in the
25 remedy trial to the Court.

26 **A. PowerPoint information for the record is already in the record.**
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1 The Federal Rules of Appellate Procedure, Rule 10 provides: “The
2 following items constitute the record on appeal: (1) the original papers and
3 exhibits filed in the district court; (2) the transcript of proceedings, if any,
4 and (3) a certified copy of the docket entries prepared by the district clerk.

5 As to the PowerPoint slides used during Plaintiff’s closing argument by
6 Mr. Harper, the information contained on each slide was described and
7 discussed by Mr. Harper as an outline of the argument. The transcript will
8 reveal that for each slide, Mr. Harper described the admitted Exhibit that
9 any excerpt was derived from. There is no claim, nor could there be, that
10 there was any error in using the PowerPoint slides. No objection was made
11 during the closing argument or immediately thereafter. Given the vigorous
12 objections made by USAPA’s counsel throughout the trial about every other
13 possible topic, the Court should find that if there was anything in these
14 slides, Mr. Seham would have objected immediately.
15

16 There is no prejudice to USAPA because the transcript that contains Mr.
17 Harper’s argument on the record, and the contents of the Exhibits in evidence
18 are truly the “best evidence” of the matters properly included in the record on
19 appeal. There is also a risk that the slides do not accurately represent the
20 amount of time each slide was displayed to the jury, and therefore the static
21 slides do not form a separate basis for alleged error. When there is a complete
22 transcript of the testimony and the PowerPoint slides are merely used as an
23 outline, the record on appeal is complete and nothing further is required to
24 preserve USAPA’s record on appeal.

25 Regarding the voluntary production by Plaintiffs’ counsel Don Stevens of
26 the PowerPoint slides used in opening statement, there is no waiver. In
27 opening statement, the parties were expressly instructed not to argue or
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1 display actual documents, but instead provide a preview of the evidence to be
2 introduced. A professional courtesy of responding to a request by one's
3 opponent, regardless of how frivolous the request, is not a waiver of any
4 subsequent objection. The Court will recall that USAPA hired a Real-Time
5 Court reporter at its own expense and had a complete transcript of the
6 opening statement scrolling across its screen in real time. No objection was
7 made during the opening statement that required that the display of the
8 specific slide being objected to being made part of the record. In fact, Mr.
9 Seham's closing argument gleefully quoted back some of the statements made
10 in Plaintiff's opening statement, but never argued that Plaintiff had failed to
11 produce the evidence that had been promised, nor did Mr. Seham raise any
12 objection or comment that could give rise to an appellate issue.

13
14 In fact, the lack of merit in USAPA's request is found in its admission
15 that: "While the visual displays used in the liability phase of the trial are not
16 evidence and were not themselves objected to *per se*, nevertheless they are
17 the **visual equivalent** to the words spoken by counsel that the Court properly
18 did require a transcript be made of so that a record is preserved." Since
19 USAPA admits that it made no objection and has a transcript of what was
20 actually said, the "visual equivalent" is redundant and unnecessary.

21 USAPA has the full transcript and admitted exhibits that are specified in
22 Rule 10, FRAP, nothing further is required and the Motion to Supplement
23 should be denied. This is a frivolous motion and a nominal sanctions in the
24 amount of \$250.00 should be imposed to prevent USAPA from continuing the
25 motion practice that has plagued this case and increased costs in time, effort
26 and money for all concerned.

27 **B. The Stockdell illustrative exhibit was withdrawn.**

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In the remedy trial to the Court that immediately followed the liability trial, Brian Stockdell testified about information he derived from readily available public records about alternatives available for the Court to consider. The effort was short lived and the Court indicated that since the Plaintiff withdrew the exhibit and rested without making any further argument referring to the exhibit, nothing further needed to be done. This is in accord with Rule 10, FRAP, and there is not need to include an illustrative exhibit that will play no part in any remedy fashioned by the Court.

For all of the foregoing reasons, Plaintiffs request that the USAPA Motion to Supplement be denied in all respects.

Dated this 15th day of June, 2009.

Polsinelli Shughart, P.C.

/s/ Don Stevens
By: _____
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CERTIFICATE OF SERVICE

I hereby certify that on June_15, 2009, I electronically transmitted the foregoing document to the U.S. District Court Clerk’s Office by using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing. I also emailed a copy of the pleading to counsel of record.

s/ Don Stevens