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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,

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

**DEFENDANT USAPA’S NOTICE OF
OBJECTION TO POST-TRIAL
AMENDMENT OF THE COMPLAINT
WITHOUT PLAINTIFFS’
COMPLIANCE WITH RULE 15 AND
LRCiv 15.1, AND NOTICE AND
MOTION FOR COMPLIANCE**

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

22 Defendants.

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

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

2 **NOTICE OF OBJECTION.**

3 Defendant US Airline Pilots Association (“USAPA”) provides notice of its
4 objection to Plaintiffs’ amendment of their First Amended Complaint (Doc. # 86) in the
5 absence of Plaintiffs’ compliance with the procedures set forth in Fed. R. Civ. P. 15 and
6 LRCiv 15.1 because such failure will deny Defendant its procedural rights and
7 opportunity to be heard under the same Rules. Defendant’s objection is informed by
8 the following grounds:

9 First, Plaintiffs asserted a joint and several liability theory *for the first time* in
10 briefing papers opposing Defendant’s motion for summary judgment in the damages
11 phase following the liability trial, but did not seek leave to amend their pleadings. This
12 was improper. *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir.
13 2004) (“A plaintiff may not amend her complaint through argument in a brief opposing
14 summary judgment.”).

15 Second, on July 7, 2009, in the course of a hearing on Defendant’s pending
16 motions including summary judgment, the Court stated “... I find enough merit in the
17 union's objection to the prospect of surprise than I'm going to allow and require the
18 defendants (sic) to amend their complaint in that specific detail.” (Tr. July 7, 2009 at
19 37:24). At the time the Court noted Defendant’s general objection (“You have got their
20 objection ...”; Tr. 40:25), but Plaintiffs did not at any time during the hearing verbally
21 move to seek leave to amend and therefore Defendant did not make a specific objection
22

1 under Rule 15 or LRCiv 15.1.

2 Third, on July 9, the Court issued an order (Doc. # 566) stating, “The Court will
3 allow Plaintiffs to amend their Complaint as discussed.” Plaintiffs have still not sought
4 leave pursuant to Rule 15 or LRCiv 15.1 to amend their Complaint.

5 Fourth, Defendant’s procedural rights under Fed. R. Civ. P. 15 and LRCiv 15.1.
6 will be permanently violated unless remedied before Plaintiffs amend without
7 complying with Fed. R. Civ. P. 15 and LRCiv 15.1. (While the Defendant takes this
8 opportunity to state on the record its specific objection to plaintiffs’ failure to act to date
9 pursuant to Fed. R. Civ. P. 15 and LRCiv 15.1, it preserves all other objections to any
10 amendment proposed, granted, made or served, and all other rights, arguments, claims
11 or defenses whether by motion, answer, cross claim or impleader).

12 Fifth, if Plaintiffs continue to fail to comply with Fed. R. Civ. P. 15 and LRCiv
13 15.1 then Defendant will be unfairly prejudiced by permanent deprivation of its
14 procedural rights as the non-movant under Fed. R. Civ. P. 15 and LRCiv 15.1 to: i)
15 receive a “proposed amended pleading” that indicates in “what respect it differs from
16 the pleading which it amends” (LRCiv 15.1(a))¹; ii) to receive a “lodged” proposed

17
18 ¹ In fact, a failure to provide a draft amended complaint can be, in and of itself, grounds for
19 denying a motion for leave to amend under Rule 15. *See, e.g., Meehan v. United Consumers*
20 *Club Franchising Corp.*, 312 F.3d 909, 913-14 (8th Cir. 2002) (no abuse of discretion to deny
21 leave to amend when party fails to make a motion to amend and to submit a proposed amended
22 complaint”); *Lake v. Arnold*, 232 F.3d 360, 374 (3d Cir. 2000) (failure to provide draft
amended complaint to district court is ground for denying leave to amend); *Doe v. Howe*
Military School, 227 F.3d 981, 989 (7th Cir. 2000) (proper exercise of discretion to deny
motion to amend where plaintiffs did not state specifically what amended pleadings would
allege).

1 amendment (LRCiv 15.1(b)); iii) the opportunity to object pursuant to Rule 15(b)(1); iv)
2 clearly determine the effective date of service and the fixing of dates for the purpose of
3 relating back under LRCiv 15.1(c) and under Rule 15(c)(1).

4 Under the present circumstances, “[a]bsent the opposing parties' written consent to
5 amend the FAC, Plaintiff *must* seek the court's leave.” *Vinciinv Co., Inc. v. Mid-*
6 *Century Ins. Co.*, 2008 U.S. Dist. LEXIS 82628, at *6 (C.D. Cal. Sept. 30, 2008) (*citing*
7 *Fed. R. Civ. P. 15(a)(2)*) (emphasis added). Plaintiffs have failed to properly seek
8 appropriate leave under Rule 15 and LR15.1 to amend their FAC. “All civil litigants
9 are required to follow applicable procedural rules.” *Meehan*, 312 F.3d 914. There
10 should be no exception for these plaintiffs.

11 The failure to properly seek leave and submit the proposed amendment is
12 especially improper here, because plaintiffs themselves are ignorant as to how they
13 intend to amend their complaint, with their lead counsel even asking the Court for
14 direction as to what amendments should be made:

15 MR. HARPER: But I would like to just make a point that can you be a
16 little bit more specific for us in the way you want us to amend the
17 complaint to deal with this specific situation so that we get it right the first
18 time out?

19 (7/7/09 Tr. at 40:20-23). Without a specific indication of what amendments the
20 plaintiffs intend to make, USAPA is denied a reasonable opportunity to respond to the
21 propriety of such amendments, and the Court has nothing upon which to base a
22 decision, under Rule 15, to grant or deny leave. This is not the proper amendment
procedure envisioned by the Federal Rules. *Spadafore v. Gardner*, 330 F.3d 849, 853

1 (6th Cir. 2003) (“Without viewing the proposed amendment, it was impossible for the
2 district court to determine whether leave to amend should have been granted.”). In
3 short, the Court cannot grant leave to amend without a proposed amendment before it
4 because as Mr. Harper’s comments indicate, no one knows what the proposed
5 amendment is.

6 **NOTICE OF MOTION.**

7 PLEASE TAKE NOTICE that Defendant US Airline Pilots Association
8 (“USAPA”) will move this Court, to be heard without oral argument, for an order
9 directing Plaintiffs to comply with Fed. R. Civ. P. 15 and LRCiv 15.1 prior to seeking
10 or asserting any amendment of the pleadings.

11 **MOTION.**

12 COMES NOW Defendant to move this Court for an order directing Plaintiffs to
13 comply with Fed. R. Civ. P. 15 and LRCiv 15.1 prior to seeking or asserting any
14 amendment of the pleadings.

15 This Motion is supported by the grounds stated herein above in support of
16 Defendant’s Notice of Objection. For support of its motion Defendant relies on this
17 document, all the pleadings, papers and other records on file, the record at trial, and any
18 oral argument had.

1 Respectfully Submitted,

2 Dated: July 10, 2009

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

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13 *Attorneys for Defendant*
14 *US Airline Pilots Association*

CERTIFICATE OF SERVICE

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

- Defendant USAPA’s Notice Of Objection To Post-Trial Amendment Of The Complaint Without Plaintiffs’ Compliance With Rule 15 And LRCiv 15.1, And Notice And Motion For Compliance
- Certificate of Service

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:

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Who are admitted counsel for the Plaintiffs in this matter, and,

Robert A. Siegle <u>rsiegel@omm.com</u>	Rachel S. Janger <u>rjanger@omm.com</u>	
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who are admitted counsel for US Airways, Inc. in this matter.

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.

On July 10, 2009, by:

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