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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 REPLY IN  
SUPPORT OF ITS MOTION TO  
EXTEND TIME TO ANSWER  
PLAINTIFFS' SECOND AMENDED  
COMPLAINT**

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,  
21 Douglas L. MOWERY, and John A.  
STEPHAN,

22 Defendants.

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

1 On August 20, 2009, this Court indicated and subsequently ordered (Doc. # 606)  
2 that Defendant would be allowed to file any motion to dismiss directed to the as-of-then  
3 un-served Second Amended Complaint, not later than October 23, 2009. The Court  
4 indicated that this was to accommodate the parties in expeditiously focusing on the  
5 pending appeal with the Ninth Circuit. The Order did not, however, expressly allow  
6 Defendant an extension to file an Amended Answer if that became necessary.

7 Consequently, pursuant to Fed. R. Civ. P. 15(a)(3), “unless the court orders  
8 otherwise, any required response to an amended pleading must be made within the time  
9 remaining to respond to the original pleading or within 10 days after service of the  
10 amended pleading, whichever is later.” In this circumstance, then, it is a ten (10) day  
11 response time that would apply unless the Court orders an extended time; noting that  
12 three days would be added under Fed. R. Civ. P. 6(d), as this Court has previously  
13 observed (Doc. # 220, at 2:4), because Plaintiffs served their Second Amended  
14 Complaint solely by ECF filing, **making the Amended Answer due this Friday,**  
15 **September 18.**

16 Because of this timing issue, Defendant sought an extension of time to answer.  
17 *See General Mills, Inc. v. Kraft Foods Global, Inc.*, 495 F.3d 1378, 1380 (Fed. Cir.  
18 2007). Defendant then contacted Plaintiffs by phone and email (Doc. 609 at 4:2) to  
19 request a voluntary extension in order to avoid the need to petition this Court. (Granath  
20 Decl., Attachment A). Plaintiffs, however, unreasonably denied Defendant’s request  
21  
22

1 (Granath Decl., Attachment B).<sup>1</sup>

2 This unreasonable failure to consent necessitated the pending motion (Doc. #  
3 609) requesting an extension of time to answer. Now, Plaintiffs have failed to file any  
4 response in opposition to the motion that was made necessary by their unreasonable  
5 refusal to consent.<sup>2</sup>

6 Local Rule 7.2(i) provides:

7 Briefs or Memoranda of Law; Effect of Non-Compliance. If a motion does  
8 not conform in all substantial respects with the requirements of this Local  
9 Rule, or if the unrepresented party **or counsel does not serve and file the**  
10 **required answering memoranda**, or if the unrepresented party or counsel  
11 fails to appear at the time and place assigned for oral argument, **such non-**  
12 **compliance may be deemed a consent to the denial or granting of the**  
13 **motion and the Court may dispose of the motion summarily.** [emphasis  
14 added]

15 *See also Ghazali v. Moran*, 46 F.3d 52, 53-54 (9th Cir. 1995) (providing that the district  
16 court did not abuse its discretion in summarily granting defendants' motion to dismiss  
17 pursuant to local rule where *pro se* plaintiff had time to respond to the motion but failed  
18 to do so); *Childress v. Scottsdale Healthcare Corp.*, 2009 U.S. Dist. LEXIS 70907 (D.  
19 Ariz., Aug 11, 2009) (under LRCiv 7.2(i), if a party “does not serve and file the  
20 required answering memoranda, ... such non-compliance may be deemed a consent to

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21 <sup>1</sup> The Court already ordered a “stay of discovery on the damage claims until it has ruled  
22 on the motions challenging the Amended Complaint” (Doc. # 606); an extension would  
not delay the proceedings any more than has already been imposed by the Court.

<sup>2</sup> USAPA’s Motion to Extend was filed via ECF on August 27, 2009. LRCiv 7.2(c)  
requires that an “opposing party shall ... have ten (10) days after service ... within  
which to serve and file a responsive memorandum.” Without counting intervening  
weekends and holidays and allowing three (3) additional days for service by electronic

1 the denial or granting of the motion and the Court may dispose of the motion  
2 summarily”); *Parra v. Arpaio*, 2008 U.S. Dist. LEXIS 80838 (D. Ariz., Sep. 11, 2008)  
3 (“Plaintiff’s failure to respond to the motion may be construed as a consent to the  
4 granting of it”).

5 Plaintiffs’ unreasonable refusal to consent necessitated this motion. The motion  
6 is on its merits sound. *See General Mills, Inc. v. Kraft Foods Global, Inc.*, 495 F.3d  
7 1378, 1380 (Fed. Cir. 2007) (“Rule 15(a) permits a district court to otherwise order a  
8 different deadline for responding to an amended complaint”) (*citing Horstman v. Cantu*,  
9 2007 U.S. Dist. LEXIS 8503, at \*6 (E.D. Cal. Jan. 18, 2007) (ordering answer to  
10 amended complaint within the time provided by Rule 12(a)(4)(A))).

11 Plaintiffs’ failure to respond allows this Court to summarily grant the motion  
12 regardless of its merits. (Local Rule 7.2(i)).

13 Further, Plaintiffs’ failure to respond after unreasonably refusing to consent is  
14 justification for an award of attorney’s fees that Defendant has unnecessarily incurred in  
15 making this motion.<sup>3</sup>

16  
17  
18 means, Plaintiffs’ response was due September 16, 2009.

19 <sup>3</sup> This continues a pattern of unnecessary litigation that has increased the costs of this  
20 matter, *e.g.* requiring a court order for production of fee agreement (Transcript Feb. 20,  
21 2009 at 6:8 and 12:17; Doc. # 207); requiring a motion for extra time to conduct class  
22 certification discovery (Doc. # 155); a rejected attempt to pierce the attorney client  
privilege on a blind “fishing” expedition (Doc. # 185 at 3); pleading a jury trial, then  
denying it, forcing motion and ruling granting a jury trial (Doc. # 202), seeking a  
baseless “disgorgement” of dues remedy (Doc. # 287), etc.

1 **REQUESTED RELIEF.**

2 Defendant respectfully requests this Court enter an order granting USAPA's time  
3 to answer Plaintiffs' Second Amended Complaint until ten (10) days following the  
4 Court's disposition of USAPA's forthcoming Rule 12 motion to dismiss, and to grant  
5 such an Order before the requested relief becomes moot.

6 A proposed order has already been separately submitted.

7 Defendant also requests the Court award its attorney's fees for this motion.

8 Respectfully Submitted,

9 Dated: September 17, 2009

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

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18 *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 Reply In Support Of Its Motion To Extend Time To Answer Plaintiffs’ Second Amended Complaint
- Declaration of Nicholas Paul Granath, Esq. with its attachments

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:

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

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 September 17, 2009, by:

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