

1 LEE SEHAM, Esq. *pro hac vice*
NICHOLAS P. GRANATH, Esq., *pro hac vice*
2 LUCAS K. MIDDLEBROOK, Esq., *pro hac vice*
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
3 445 Hamilton Avenue, Suite 1204
White Plains, NY 10601
4 Tel: 914 997-1346; Fax: 914 997-7125

5 NICHOLAS J. ENOCH, Esq., State Bar No. 016473
LUBIN & ENOCH, P.C.
6 349 North 4th Avenue
7 Phoenix, AZ 85003-1505

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

9
10 Don ADDINGTON; John BOSTIC; Mark
BURMAN; Afshin IRANPOUR; Roger
VELEZ; and Steve WARGOCKI,

11 Plaintiffs,

12 vs.

13 US AIRLINE PILOTS ASSOCIATION,
14 US AIRWAYS, INC.,
15 Defendants,

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

REPLY
MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANT'S
MOTION TO
CHANGE VENUE AND
TRANSFER TO ANOTHER
DISTRICT,
PURSUANT TO 28 U.S.C. § 1404

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

18 Plaintiffs,

19 vs.

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

23 Defendants.

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

1 USAPA respectfully submits this reply in support of its motion of November 2,
2 2009 (Doc. # 622) to change venue.

3 **A) Plaintiffs' General Objections Are Misplaced or Specious.**

4 First, it is no answer to the motion to say, as plaintiffs' primary argument does,
5 (plaintiffs' response brief, hereinafter "Resp." at Doc. # 629, p. 3) that the motion
6 attempts to "divest this Court of jurisdiction." Of course it will, but so what? That is the
7 natural and inevitable consequence of any venue change. The issue the *motion* raises is
8 whether 29 U.S.C. § 1404 and the "*Jones factors*" are met. *Jones v. GNC Franchising,*
9 *Inc.*, 211 F.3d 495, 498 (9th Cir. 2000).

10
11 Second, it is not an accurate statement of the law to suggest that the injunction this
12 Court has issued is without force, or cannot be enforced, unless this Court keeps venue.
13 Rather, the general rule, applicable here, is that transfer *preserves* the action in all
14 respects. *Norwood v. Kirpatrick*, 349 U.S. 29 (1955). For plaintiffs to maintain
15 otherwise is at least inapt as they themselves cite a case to this Court (Resp. at p. 3 and
16 11¹) that illustrates this very point: "The transferee court's powers are coextensive with
17 those of the transferor court; it may issue any order or render any judgment that could
18 have been made in the transferor court had the transfer never taken place." *Chrysler*
19 *Credit Corp. v. Country Chrysler*, 928 F.2d 1509, 1516 (10th Cir. 1991). Because the
20 transferee court can enforce the existing injunction just as much as this Court could, this
21 argument of plaintiffs opposing venue change is a red herring.
22
23

¹ Page number references to all briefs-page numbers, not docket-page numbers.

1 Third, attacking the *timing* of the motion is no answer to it. At the threshold, there
2 is no legal requirement that a venue-change motion be brought early in a case, or at any
3 certain time. The cases hold that venue can be moved at any time – even after judgment.
4 (*See* USAPA’s supporting brief, hereinafter “Brf.”, Doc. # 622-1, p. 10, citations omitted;
5 *see also* USAPA’s Supplemental Brief, hereinafter “Supp.”, Doc. # 625, p. 2-5). Venue
6 change in *this* case is appropriate at this time for reasons that should be obvious and
7 undisputed, i.e. the liability phase is over and the damages phase has yet to begin, while
8 plaintiffs have re-pled their damages claim to rely on events and witnesses outside of this
9 venue and in so doing making what was convenient now inconvenient. (*See* Resp. p. 1-2,
10 7-9). That venue was not an issue before the new damages claim was pled, and before
11 plaintiffs listed and attempted to subpoena scores of witnesses on the East coast, is of no
12 consequence to moving venue now.

14 Fourth, it is not appropriate for plaintiffs to respond to this motion, or any motion,
15 by appealing to this Court to invest itself in plaintiffs’ case. Yet plaintiffs openly argue
16 that “any reason advanced by USAPA ... is mere pretext [for] an unjustified change in
17 judge.” (Resp. 3:22-23). The direct implication of this argument is that the Court now
18 has, or should take, a personal stake in this case. There is no recusal motion before this
19 Court. USAPA is entitled to a fair consideration of its venue motion on its merits which,
20 after all, was prompted by *plaintiffs’* new claims that make events and witnesses on the
21 East coast the entire focus of the remainder of this case. Anything else is a naked appeal
22 to bias – which this Court should not sanction.
23

1 Fifth, in a similar vein, to inject, as plaintiffs have, the argument made by USAPA
2 to the Ninth Circuit in the matter pending appeal there (Resp. 3:16), namely that USAPA
3 was unfairly prejudiced by impartiality in the liability trial, seems calculated to appeal to
4 or attempt to, inflame this Court and divert it from the merits of the motion and a
5 dispassionate analysis of the applicable law. Plaintiffs might as well have said that they
6 are sure they will receive partial treatment in this Court so on *that* basis the motion to
7 change venue should be denied.

8 Sixth, while plaintiffs admit that *Jones* is controlling, they nevertheless argue that
9 their choice of forum can trump a more convenient forum. But under the § 1404(a) and
10 the *Jones* analysis, a plaintiff's choice is *but a factor* among several: "A motion to
11 transfer venue under § 1404(a) requires the court to weigh multiple factors in its
12 determination whether transfer is appropriate in a particular case." *Jones*, 211 F.3d at
13 498. The only question concerning plaintiffs' choice of forum is how much *weight* it
14 should be afforded in the "flexible and individualized" analysis required for each case.
15 *Id.* (citing *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988)). Hence,
16 even a forum selection clause "is not dispositive." *Stewart*, 487 U.S. at 31.

17 Finally, conveniently for this motion but in stark contrast to their amended
18 Complaint, plaintiffs now distinguish between acts by ALPA's East MEC and acts of
19 USAPA claiming that "all the factors ... relate to actions by the ALPA MEC or other
20 East Pilots and not actions by USAPA" (Resp. 7:9) and there is "no evidence of actions
21 taken by USAPA directly ..." (Resp. 7:16). In other words, to suit plaintiffs, the Court is
22 expected to treat the same claims differently between two motions both *now pending*.
23

1 For the motion to dismiss, the Court is asked to accept that USAPA is responsible for the
2 ALPA East MEC and indeed any and all East pilot “wrongdoers” acting before
3 certification – but not for the venue motion. The hypocrisy aside, these are judicial
4 admissions that directly undercut the amended claim.

5 **B) Other than Plaintiffs’ Preference, the *Jones* Factors Favor Transfer to a Venue**
6 **Convenient for the Damages Phase.**

7 **1. Location.**

8 Plaintiffs’ response dodges the indisputable fact that their theory of damages
9 focuses exclusively on the East MEC’s vote and the following hiatus in negotiations.
10 There is no dispute these events took place in Washington D.C. To say that USAPA had
11 no involvement certainly goes to the motion to dismiss the Complaint, but it hardly
12 addresses the first factor which necessarily looks to the allegations of the complaint.
13 Plaintiffs cannot have it both ways. (In addition, while it is not material where USAPA is
14 negotiating, it is both false to say it has never negotiated in Washington D.C. and of
15 course false to say it will not do so again because USAPA has just invoked the services
16 of the NMB.)²

17
18 **2. State’s Familiarity.**

19 Plaintiffs concede that this factor is relevant to diversity cases and not to federal
20 questions cases, nevertheless they point to *this* Court’s familiarity. Granted, this Court is
21 familiar but that should have little or no consideration here. Relying on familiarity in a
22 federal question case risks sanctioning, or risks giving the appearance of sanctioning,

23 _____
² USAPA has held at least two mediated bargaining sessions in Washington D.C. since
June of this year.

1 forum shopping by plaintiffs. Certainly it invites the Court to abuse its discretion by
2 taking a personal interest in a case under the guise of “familiarity.” Lastly, it is just
3 speculation to say that the *parties* will bear any cost in money or time while a new court
4 “familiarizes” itself: it is the court that will, and any court is taxed to untangle plaintiffs’
5 theories, shifting and Byzantine as they are.

6 **3. Plaintiffs’ Choice.**

7 This factor disfavors transfer but it is not dispositive, as stated before herein.
8 *Pacific Car & Foundry Co. v. Pence*, 403 F.2d 949, 954 (9th Cir. 1968) (“plaintiff’s
9 choice of forum ... is not the final word ... If operative facts have not occurred within the
10 forum of original selection and that forum has no particular interest in the parties or the
11 subject matter, the plaintiff’s choice is entitled to minimal consideration”). The current
12 venue has no operative facts that occurred in it. The other points made by plaintiffs here
13 do not address this factor *per se*, and are speculative or obviously inaccurate, as for
14 example the assertion that it is equally inconvenient for USAPA to go from Charlotte to
15 Washington D.C. as to go further to Phoenix.

17 **4. Parties’ Contacts with the Forum.**

18 Plaintiffs freely concede, here, that the “factors that USAPA cites ... relate to
19 actions by the ALPA MEC ...” Yes, that is the body that the Complaint says USAPA is
20 responsible for and there is no dispute that its actions that plaintiffs have made relevant to
21 this suit took place in Washington D.C. This is why almost all witnesses either side
22 could call will come from or nearer to that venue. In addition, USAPA does have
23 contacts with Washington D.C., including a domicile Representative situated there, its

1 members who reside there, and for past and ongoing bargaining for the CBA over which
2 plaintiffs have sued in order to write according to their desired terms.²

3 **5. Differences in Costs.**

4 Plaintiffs' response makes the point that three of the named plaintiffs have a cost
5 advantage in staying in this venue, but what plaintiffs ignore is the greater cost to the vast
6 majority of witnesses that either side will or could call. In terms of the number of
7 persons inconvenienced by remaining in this venue, there are far more witnesses, some
8 80-100 identified by name so far, beyond the 6 plaintiffs. Of those witnesses who are
9 active US Airways pilots, it is *not* true that flight "privileges" make it more convenient to
10 attend this venue than a closer one on the Eastern seaboard: the longer the distance the
11 more time and effort to secure a seat.

12
13 Also, plaintiffs claim that USAPA "functionally moved its union headquarters to
14 Phoenix during the two-week trial." That is false; at all times the headquarters has
15 remained and functioned in Charlotte, N.C. And, unlike plaintiffs, USAPA has a duty to
16 continue to represent thousands of pilots, and is currently heavily engaged in all aspects
17 of that representation.

18 **6. Availability of Compulsory Process.**

19 Plaintiffs' response misses the point of this factor. Plaintiffs do *not* claim that if the
20 transfer occurred they would be unable to compel testimony of non-party witnesses.
21 Indeed, they freely concede that they are prepared to depose by videotape "so that their
22 testimony is available at trial." (Resp. 8:22). Since there is no dispute that the vast
23 majority of witnesses are on the East coast, near or north of Washington D.C., and

1 plaintiffs were already planning on securing their testimony as shown by last summers'
2 many subpoenas for depositions in Pennsylvania, New Hampshire, North Carolina and
3 Washington D.C., plaintiffs will have ample process if venue is moved.

4 **7. Access to proof.**

5 Plaintiffs state without evidence and in contrast to what they have pled that the
6 “documents that Plaintiffs will rely upon ... have already been produced in the litigation
7 in Arizona ...” (Resp. 8:27). This will be a statement to remember in the coming
8 discovery battles to be sure, but it is not much help to the Court on this motion because
9 the relevant point is that nearly all the 80-100 witnesses identified by *both* sides are much
10 closer to Washington D.C. than to Phoenix AZ. On this point plaintiffs do not quarrel
11 because they cannot.
12

13 Plaintiffs rely on *Pilkington v. United Airlines, Inc.*, 855 F. Supp. 1248 (M.D. Fla.
14 1994) but not for good reasons. Unlike *Pilkington*, USAPA has not waited two years
15 before seeking a change: this motion comes before discovery has progressed beyond
16 initial statements and before there is even a schedule for discovery or trial (in *Pilkington*
17 the case was “nearly ready for trial,” *Id.* at 1251). Unlike *Pilkington*, the vast majority of
18 witnesses are outside the district; unlike *Pilkington* USAPA is not in the position as was
19 United to transport its own witnesses; and unlike *Pilkington* there is no proof of
20 substantial hardship here (just conclusory statements without supporting declarations or
21 affidavits). Indeed, here plaintiffs’ counsel subpoenaed multiple witnesses and was
22 prepared to take video depositions and fly their team of trial attorneys from locations
23 ranging from New Hampshire to Washington D.C.

1 Plaintiffs also argue that USAPA “misleads this court by identifying only the
2 witnesses it finds relevant ... completely omitting the Plaintiffs as relevant.” (Resp.
3 10:7). But there is no dispute that plaintiffs had nothing whatsoever to do with the East
4 MEC, which they have made the center-piece of their new causation theory. And
5 USAPA’s motion certainly does rely on those witnesses that plaintiffs have disclosed to
6 date as was stated in its brief. (Brf. 7:18 and 8:6). This is also contrary to settled case law
7 that holds that movants on a venue change motion have an obligation to identify the key
8 witnesses they will rely on. *See e.g., Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d
9 Cir. 1978), *cert. denied*, 440 U.S. 908.

11 Finally, plaintiffs point out that “nearly all of the witnesses USAPA lists in its
12 Motion [which included both sides] ... live close to the more heavily populated US
13 Airways domiciles of Philadelphia, PA and Charlotte, NC ...” (Resp. 10:9). We agree
14 and add that Washington D.C. is closer to Philadelphia or Charlotte than Phoenix. If this
15 Court looks at what has been pled and what witnesses will be involved, then the current
16 venue is not the convenient one for the next phase of this case. So for the convenience of
17 the witnesses and parties, it is requested that the Court transfer this action *either* to the
18 Unites States District Court for the District of Columbia, as suggested by USAPA, *or* to
19 the Western District of North Carolina or Eastern District of Pennsylvania, as suggested
20 by plaintiffs.
21
22
23

1 Respectfully Submitted,

2 Dated: December 11, 2009

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

4 Nicholas P. Granath, Esq. (*pro hac vice*)
5 ngranath@ssmplaw.com
6 SEHAM, SEHAM, MELTZ & PETERSEN, LLP
7 2915 Wayzata Blvd.
8 Minneapolis, MN 55405

9 Lee Seham, Esq. (*pro hac vice*)
10 Stanley J. Silverstone, Esq. (*pro hac vice*)
11 Lucas K. Middlebrook, Esq. (*pro hac vice*)
12 SEHAM, SEHAM, MELTZ & PETERSEN, LLP
13 445 Hamilton Avenue, Suite 1204
14 White Plains, NY 10601

15 Nicholas Enoch, Esq. State Bar No. 016473
16 nick@lubinandenoch.com
17 LUBIN & ENOCH, PC
18 349 North 4th Avenue
19 Phoenix, AZ 85003-1505
20
21
22
23

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

CERTIFICATE OF SERVICE

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

This is to certify that on the date indicated herein below true and accurate copies of the foregoing documents and any 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
MHarper@Polsinelli.com

Andrew S. Jacob
AJacob@Polsinelli.com

Kelly J. Flood
KFlood@Polsinelli.com

Katie Brown
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 December 11, 2009, by:

/s/ Nicholas P. Granath, Esq.

Nicholas P. Granath