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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARK DUFFER, an individual, on
behalf of himself and all others similarly
situated

Plaintiff,

v.

UNITED CONTINENTAL HOLDINGS,
INC., a Delaware Corporation; UNITED
AIR LINES, INC., a Delaware
Corporation; CONTINENTAL AIRLINES,
INC., a Delaware Corporation; AIR LINE
PILOTS ASSOCIATION, INT’L, an
unknown business entity; THE
CONTINENTAL AIRLINES CHAPTER
OF THE AIR LINE PILOTS
ASSOCIATION, INT’L, an unknown
business entity, inclusive,

Defendants.

CASE NO.:

CLASS ACTION

**FIRST AMENDED COMPLAINT
FOR DAMAGES**

**(1) VIOLATIONS OF 38 U.S.C.
§4301 ET SEQ;**

**(2) VIOLATIONS OF CALIFORNIA
MILITARY AND VETERANS
CODE §394; AND**

(3) NEGLIGENCE

DEMAND FOR JURY TRIAL

1 **FILING FEE WAIVED PER 38 U.S.C. § 4323(h)**

2
3 Plaintiff Mark Duffer, on behalf of himself and the class of all other similarly situated
4 persons, complains and alleges upon information and belief based, among other things, upon
5 the investigation made by Plaintiff by and through his attorneys, as follows:

6 **I.**

7 **NATURE OF ACTION**

8 1. This is a civil class action brought pursuant to the Uniformed Services
9 Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301 et. seq.
10 (“USERRA”), California Military and Veterans Code (“MVC”) § 394, and Federal and State
11 common law. It is brought by Plaintiff on behalf of a nationwide Class of all persons
12 similarly situated, including current and former employees of United Continental Holdings,
13 Inc. (“UCH”) and its wholly owned subsidiaries, United Air Lines, Inc. (“United”) and/or
14 Continental Airlines, Inc. (“Continental”), who were or are currently serving in the United
15 States Armed Services or National Guard.

16 **II.**

17 **PARTIES**

18 2. Plaintiff, MARK DUFFER (“Plaintiff”), is a citizen of the United States and a
19 resident of the State of California. Plaintiff is currently employed by Continental as a pilot
20 and is also a Lieutenant Colonel in the United States Marine Corps Reserve.

21 3. Plaintiff is a qualified employee and member of the uniformed services for
22 purposes of 38 U.S.C. §4303(3), (9), and (16).

23 4. Defendant UNITED CONTINENTAL HOLDINGS, INC. (“UCH”) is believed
24 and therefore alleged to be a corporation organized under the laws of the State of Delaware.
25 At all relevant times, UCH was and is an employer for purposes of 38 U.S.C. § 4303(4)(A)
26 and § 4323(i).

1 5. Defendant UNITED AIR LINES, INC. (“United”), a subsidiary of UCH, is
2 believed and therefore alleged to be a corporation organized under the laws of the State of
3 Delaware. At all relevant times, United was and is an employer for purposes of 38 U.S.C. §
4 4303(4)(A) and § 4323(i).

5 6. Defendant CONTINENTAL AIRLINES, INC. (“Continental”), a subsidiary of
6 UCH, is believed and therefore alleged to be a corporation organized under the laws of the
7 State of Delaware. At all relevant times, Continental was and is an employer for purposes of
8 38 U.S.C. § 4303(4)(A) and § 4323(i).

9 7. Defendant AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
10 (“ALPA”), is believed and therefore alleged to be the labor union that represents airline
11 pilots, many of which reside in the State of California, and is believed and alleged to be an
12 association whose principal address is 1625 Massachusetts Ave NW, Washington, DC 20036.
13 At all relevant times, UAL-ALPA may be considered an employer for purposes of 38 U.S.C.
14 § 4303(4)(A) and § 4323(i).

15 8. Defendant CONTINENTAL AIRLINES CHAPTER OF THE AIR LINE
16 PILOTS ASSOCIATION, INT’L (herein “CAL-ALPA”), is believed and therefore alleged to
17 be the Continental Chapter of ALPA that represents the Continental pilot group with
18 members who reside in the State of California, and is alleged and believed to be an
19 association whose principal address is 3808A World Houston Parkway, Houston, Texas. At
20 all relevant times, CAL-ALPA may be considered an employer for purposes of 38 U.S.C. §
21 4303(4)(A) and § 4323(i).

22 9. Whenever and wherever reference is made to individuals who are not named as
23 defendants in this action, but were employees/agents of defendants, or any of them herein,
24 such individuals at all times acted on behalf of defendants named in this action within the
25 scope of their respective employments and agencies.
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10. Whenever and wherever reference is made in this Complaint to any conduct of defendants, or any of them, such allegations or references shall also be deemed to mean the conduct of each defendant, acting individually, jointly and severally.

11. Plaintiff is informed and believes, and on the basis of that information and belief alleges, that at all times mentioned in this complaint, defendants were the agents and employees of their codefendants, and in doing the things alleged in this complaint were acting within the course and scope of that agency and employment.

12. Plaintiff does not seek any relief greater than or different from the relief sought for the Class of which Plaintiff is a member. The action, if successful, will enforce an important right affecting the public interest and would confer a significant benefit, whether pecuniary or non-pecuniary, on a large class of persons. Private enforcement is necessary and places a disproportionate financial burden on Plaintiff in relation to Plaintiff's stake in the matter

III.
JURISDICTION AND VENUE

13. Count I of this complaint arises under the Uniformed Services Employment and Reemployment Rights Act (“USERRA”), 38 U.S.C. §§4301-4333. The jurisdiction of this court is founded on federal question jurisdiction, 28 U.S.C. §1331, as conferred by 38 U.S.C. §4323(b)(3). Venue is proper because United and Continental maintain places of business in this district, as provided in 38 U.S.C §4323(c)(2), 28 U.S.C. §1391(b), and because ALPA and CAL-ALPA are associations with members who reside in this district.

14. Count II of this complaint arises California Military and Veterans Code (“MVC”) § 394. The jurisdiction of this court as to this Count is conferred by 28 U.S.C. §1367(a).

15. Pursuant to 38 U.S.C. § 4323(h), “No fees or court costs may be charged or taxed against any person claiming rights under [USERRA].”

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IV.

GENERAL FACTUAL ALLEGATIONS

16. Plaintiff re-alleges and incorporates herein by reference each and every allegation contained within paragraphs 1 through 15, inclusive, as though set forth at length herein and made a part hereof.

17. Plaintiff Duffer is a resident of San Diego, California, and he is employed by Continental as a pilot, based on Los Angeles, California.

18. Plaintiff is a Lieutenant Colonel in the United States Marine Corps Reserve (“USMCR”).

19. Plaintiff is also a member of and for purposes of his employment as a pilot, represented by CAL-ALPA.

20. Prior to May 2010, United and Continental were individual and independent companies operating as flag commercial air carriers.

21. On or about May 2, 2010, United and Continental announced merger plans to combine both air carriers. Plaintiff believes and alleges that during the merger and prior to integration of both carriers’ operations which has not yet occurred, the individual carriers have been owned and controlled by the holding company, UCH.

22. Plaintiff believes and alleges that the combined carriers employ more than 10,000 pilots, of which approximately 4,500 are employed at Continental, and the majority of whom are represented by CAL-ALPA. Plaintiff is informed and believes that approximately 700 of the Continental pilots are members of the United States Armed Services or National Guard.

23. The pilots of Continental have been performing their duties under a collective bargaining agreement negotiated between Continental, ALPA and CAL-APLA that was effective approximately between April 1, 2005, and December 31, 2008.

24. As part of the merger and integration process, UCH, ALPA, CAL-ALPA and the United Airlines Air Line Pilot Association (“UAL-ALPA”) negotiated a Joint United Pilot

1 Agreement (“UPA”) covering both pilot groups. The UPA was approved on or about
2 December 15, 2012 and executed on or about December 18, 2012.

3 25. As part of the UPA and described in Letter of Agreement (“LOA”) Number 24,
4 UCH has agreed to provide ALPA with a \$400 million “lump sum payment” to be divided
5 amongst the total pilot group.

6 26. The UAL-ALPA and CAL-ALPA engaged in arbitration to determine how the
7 \$400 million payment is to be divided between the two pre-merger pilot groups, CAL-ALPA
8 and UAL-ALPA. The arbitrator determined that \$175 million was to be divided amongst the
9 Continental pilot group.

10 27. Following the arbitration award, the CAL-ALPA determined the allocation
11 method for the Continental pilots and this method was included as Exhibit C of the UPA
12 LOA 24.

13 28. As part of its formula, the CAL-ALPA, with the concurrence of ALPA,
14 Continental and UCH, utilized an “earnings portion” and “availability portion” to determine
15 each pilot’s lump sum payments.

16 29. The UAL-ALPA utilized a different formula that only takes into account prior
17 earnings, not availability, when calculating payments for its represented pilots.

18 30. When determining the “availability portion” under the CAL-ALPA formula, if
19 the pilot was available for part of each month during the specific period, the pilot would be
20 entitled to the maximum payment attributed to the availability portion of the payment. If the
21 pilot was unavailable due to military leave during any full month during the period, those
22 months on military leave would be deducted from the pilot’s overall availability and the pilot
23 would receive a smaller payment than which he/she is otherwise entitled to under USERRA.

24 31. The CAL-ALPA calculations do not exclude some other forms of leave,
25 including but not limited to jury duty and sick leave.
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1 32. Plaintiff is informed and believes that UCH has held the \$400 million on behalf
2 of ALPA, CAL-ALPA and UAL-ALPA, and that payments of these funds will go directly
3 from UCH to the individual pilots.

4 33. On or about January 31, 2013, the first of approximately two payments for the
5 “lump sum distribution” occurred, and Plaintiff is informed and believes that periods of
6 military service were excluded from this payment for the entire Continental Pilot group.

7 34. Plaintiff was substantially underpaid in the first payment and will be
8 substantially underpaid in his total “lump sum” payment due to exclusion of his military
9 service periods when calculating his “lump sum payment.”

10 35. Plaintiff is informed and believes that all class members have been and will be
11 similarly underpaid due to their military commitments.

12 36. USERRA (38 U.S.C. §§4301-4333) prohibits “discrimination against persons
13 because of their service in the uniformed services.”

14 37. Section 4311 of USERRA protects persons who serve in the uniformed services
15 from acts of discrimination and reprisal; for example, a person “who is a member
16 of,...performs, has performed,...or has an obligation to perform service in a uniformed
17 service shall not be denied...retention in employment or any benefit of employment by an
18 employer on the basis of that membership,...performance of service, or obligation.”

19 38. “Benefit” is defined as:

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21 The term ‘benefit’, ‘benefit of employment’, or ‘rights and benefits’ means the
22 terms, conditions, or privileges of employment, including any advantage, profit,
23 privilege, gain, *status*, account, or interest (including wages or salary for work
24 performed) that accrues by reason of an employment contract or agreement or an
25 employer policy, plan, or practice and includes rights and benefits under a pension
26 plan, a health plan, an employee stock ownership plan, insurance coverage and
27 awards, bonuses, severance pay, supplemental unemployment benefits, vacations,
28 and the opportunity to select work hours or location of employment.”

38 U.S.C. §4303(2).

1 39. More specifically, Section 4316 of USERRA provides that any period of
2 absence from employment due to or necessitated by uniformed service is not considered a
3 break in employment, so an employee absent due to military duty must be treated as though
4 they were continuously employed.

5 40. Section 4311(c) further provides:

6 An employer shall be considered to have engaged in actions prohibited:

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8 (1) under subsection (a), if the person's membership, application for membership,
9 service, application for service, or obligation for service in the uniformed services
10 is a motivating factor in the employer's action, unless the employer can prove that
11 the action would have been taken in the absence of such membership, application
12 for membership, service, application for service, or obligation for service.

13 38 U.S.C. §4311(c).

14 41. The pilots and other labor groups at Continental are subject to collective
15 bargaining agreements. This lawsuit does not contest the interpretation of any collective
16 bargaining agreement. It only refers to items that may be covered under collective bargaining
17 agreements that penalize employees for military service in violation of USERRA and in order
18 to provide background and a general understanding of Plaintiff's allegations. This lawsuit
19 does address a specific violation of USERRA and it addresses the CAL-ALPA's failure to
20 properly represent a large segment of its own members.

21 42. The exclusion of military service periods from the "availability" portion of the
22 lump sum payment constitutes a violation of USERRA with respect to Plaintiff and the class
23 of similarly situated present and former pilots who have taken military leave while employed
24 with Continental.

25 43. Plaintiff brings this action on behalf of himself and all others similarly situated,
26 as a class action pursuant to Rule 23(a) and 23(b)(1), 23(b)(2), and/or (b)(3) of the Federal
27 Rules of Civil Procedure. The nationwide class which Plaintiff seeks to represent is
28 composed of and defined as follows (hereinafter the "Class"):

1 All past and present pilots of Continental who are or were members of the United
2 States Armed Services or National Guard and who have taken military leave from
3 January 1, 2009 to the present while employed by Continental.

4 44. Plaintiff is a member of the class he seeks to represent.

5 45. The members of the class are sufficiently numerous that joinder of all members
6 is impracticable. Plaintiff is informed and believes that the class exceeds 100 present and
7 former pilots of Continental.

8 46. There are questions of law and fact common to the class, and these questions
9 predominate over individual questions. Such questions include, without limitation: whether
10 defendants have excluded periods of military service from the “availability” periods when
11 calculation the lump sum payments provided to the pilots per the UPA; whether defendants’
12 acts and practices have violated USERRA by discriminating against Continental pilots who
13 are members of the Armed Forces and have taken military leave; whether Plaintiff and class
14 are entitled to compensatory and/or liquidated damages; and whether injunctive and other
15 equitable remedies for the class are warranted.

16 47. The claims by Plaintiff are typical of the claims of the class.

17 48. The named Plaintiff will fairly and adequately represent and protect the
18 interests of the class, and has no conflict of interests with the class

19 49. Plaintiff knows of no difficulty to be encountered in the management of this
20 action that would preclude its maintenance as a class action.

21 50. Class certification is appropriate pursuant to Fed. R. Civ. Proc. Rule 23(b)(2)
22 because defendants have acted on grounds generally applicable to the class, making
23 appropriate declaratory and injunctive relief to Plaintiff and the class as a whole. The class
24 members are entitled to injunctive relief to end defendants’ practices that have caused
25 military affiliated pilots to be excluded from certain benefits and to be treated differently than
26 pilots who have taken comparable types of leave.
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51. Appropriate injunctive relief suspending all future payments until this matter is resolved is appropriate in order to prevent a depletion of the funds that would be required to properly compensate pilots who have taken military leave during the period.

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V.

FIRST CAUSE OF ACTION

(As against Defendants UCH, CONTINENTAL, ALPA and CAL-ALPA)

Violations of 38 U.S.C. §4301 et seq.

52. Plaintiff hereby alleges and incorporates all paragraphs 1-51 above by reference herein.

53. Plaintiff's protected status as a USMC Reservist was a substantial motivating factor in Defendants' denial of benefits, conditions and privileges of Plaintiff's employment without good cause.

54. Plaintiff had performed military service during a substantial portion of the period used to calculate the "lump sum" payments.

55. The months that Plaintiff performed military service were excluded from the "availability" portion of the payment provided to Plaintiff and Plaintiff has been informed that the remaining "lump sum" payment will be similarly reduced. This reduction resulted and will result in a substantially lower "lump sum" payment provided to Plaintiff and all those class members whose availability was reduced due to their military service obligations.

56. Section 4311 of USERRA protects persons who serve in the uniformed services from acts of discrimination and reprisal; for example, a person "who is a member of, ... performs, has performed, ... or has an obligation to perform service in a uniformed service shall not be denied ... retention in employment or any benefit of employment by an employer on the basis of that membership, ... performance of service, or obligation."

57. Defendants, and each of them, knowingly and willfully violated Sections 4311 and 4312 of USERRA, among other ways, by discriminating against Plaintiff, and by denying

1 him employment benefits “on the basis of” his “obligation to perform service in a uniformed
2 service.”

3 58. As a direct and proximate result of the conduct of defendants as set forth in this
4 count, Plaintiff has suffered injuries and damages including but not limited to, loss of past
5 and future earnings, loss of past and future benefits, all to his damage in an amount to be
6 proven at trial.

7 59. Plaintiff alleges such violations of USERRA were willful and requests
8 liquidated damages in an amount equal to the amount of his lost wages and other benefits
9 pursuant to 38 U.S.C. §4323(d)(1)(C).

10 60. Plaintiff seeks injunctive relief to prevent future payments of the \$175 million
11 “lump sum” payments to the Continental pilot group until this matter is resolved in order to
12 prevent a depletion of the funds which will result in the inability of Plaintiff and the class to
13 be made whole.

14 61. Pursuant to 38 U.S.C. §4323(h), Plaintiff further requests an award of
15 reasonable attorney's fees, expert witness fees, and other litigation expenses.

16 **VI.**

17 **SECOND CAUSE OF ACTION**

18 **(As Against Defendants UCH, Continental, ALPA and CAL-ALPA)**

19 **Violations of California Military and Veterans Code §394**

20 62. Plaintiff hereby alleges and incorporates all paragraphs 1-61 above by reference
21 herein.

22 63. Plaintiff brings this claim under California state law with federal court
23 jurisdiction being conferred by 28 U.S.C. §1367(a).

24 64. California Military & Veterans Code §394 provides that no person shall
25 discriminate against any member of the military or naval forces of the United States because
26 of that membership. Section 394 also provides that no employer or person shall discharge
27 any person from employment because of the performance of any ordered military duty, or
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1 prejudice or harm him in any manner in his employment, position, or status by reason of
2 performance of military service or duty.

3 65. Defendant's motive for excluding the Plaintiff and the class members periods of
4 military service from the "availability" portion of Plaintiff's and the class members' "lump
5 sum" payment, as set forth above, was their participation in National Guard and Military
6 Reserve duty, in violation of §394.

7 66. As a direct and proximate result of the conduct of defendants, and each of them,
8 as set forth in this count, Plaintiff has suffered injuries and damages including but not limited
9 to, loss of past and future earnings, loss of past and future benefits, all to his damage in an
10 amount to be proven at trial.

11 67. As a further direct result of the conduct of defendants, and each of them, as set
12 forth in this Count, Plaintiff suffered emotional distress including but not limited to,
13 depression, frustration, anger, loss of self worth, and humiliation, all to his damage in an
14 amount to be proven at trial.

15 68. Pursuant to MVC §394(g), Plaintiff requests an award of attorney fees against
16 defendants, and each of them.

17 **VII.**

18 **THIRD CAUSE OF ACTION**

19 **(As Against Defendants UCH, Continental, United, ALPA and CAL-ALPA)**

20 **Negligence**

21 69. Plaintiff hereby alleges and incorporates all paragraphs 1-68 above by reference
22 herein.

23 70. Defendants UCH, Continental, United, ALPA and CAL-ALPA each had a duty
24 of care to ensure that no statues or laws are violated by the UPA or during the performance of
25 the UPA.

26 71. As part of and during the negotiations that resulted in a total lump sum payment
27 of \$400 million to the overall pilot group, defendants UCH, Continental, United, ALPA and
28

1 CAL-ALPA each had a duty of care to ensure that the total agreed to amount would be
2 enough to account for periods of military service in any availability period calculations.

3 72. Defendants UCH, Continental, United, ALPA and CAL-ALPA have breached
4 their duty of care by allowing violations of federal and state laws including but not limited to
5 USERRA and the California MVC, when calculating availability as applied to the “lump
6 sum” calculations and payments.

7 73. Furthermore, defendants UCH, Continental, United, ALPA and CAL-ALPA
8 have breached their duty of care by negotiating a total “lump sum” payment amount that is
9 insufficient in providing for “lump sum” payments that included periods of military service.

10 74. As a direct and proximate result of the negligent conduct of defendants, and
11 each of them, as set forth in this count, Plaintiff and the class have suffered injuries and
12 damages including but not limited to, loss of past and future earnings, loss of past and future
13 benefits, all to his damage in an amount to be proven at trial.

14 **VIII.**

15 **PRAYER FOR RELIEF**

16 **WHEREFORE**, based on the foregoing, Plaintiff prays for relief against defendants,
17 and each of them, as follows:

18 1. Determine that this action may proceed and be maintained as a class action,
19 designating Plaintiff as Lead Plaintiff, and certifying Plaintiff as the class representative
20 under Rule 23 of the Federal Rules of Civil Procedure and their counsel of record as Class
21 Counsel;

22 2. Declare that the acts and practices complained of herein are unlawful and are in
23 violation of USERRA, 38 U.S.C. § 4301, et.seq. and the MVC § 394;

24 3. Require that UCH, Continental, United, ALPA, CAL-ALPA and UAL-ALPA
25 fully comply with the provisions of USERRA and MVC by providing Plaintiff and Class
26 Members all employment benefits denied them as a result of the unlawful acts and practices
27 under USERRA and MVC described herein, including, but not limited to the inclusion of
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1 periods of military service in the availability portion of the “lump sum” calculations and
2 payments.

3 4. Enjoin UCH, Continental, United, ALPA, CAL-ALPA and UAL-ALPA from
4 taking any action against Plaintiffs and members of the Class that fails to comply with the
5 provisions of USERRA and MVC;

6 5. As to the First and Second Cause of Action, fees and expenses, including
7 attorneys’ fees pursuant to 38 U.S.C. §4323(h) and California Military and Veterans Code
8 §394(g), respectively;

9 6. Award Plaintiff and the class prejudgment interest on the amount of lost wages
10 or employment benefits found due.

11 7. Order that UCH, Continental, United, ALPA, CAL-ALPA and/or UAL-ALPA
12 pay compensatory and/or liquidated damages in an amount equal to the amount of lost
13 compensation and other benefits suffered by reason of Continental’s willful violations of
14 USERRA.

15 8. Grant an award for costs of suit incurred.

16 9. Grant a preliminary injunction preventing any future “lump sum” payments to
17 the Continental pilot group until this matter is fully resolved so as to prevent the depletion of
18 “lump sum” payment fund.

19 10. Grant such other and further relief as may be just and proper and which Plaintiff
20 and the class may be entitled to under all applicable laws.

21
22 Respectfully Submitted,

23 Dated: February 12, 2013

24 PILOT LAW, P.C.
25 STONEBARGER LAW, APC

26 By: /s/ Brian J. Lawler

27 BRIAN J. LAWLER
28 GENE J. STONEBARGER
Attorneys for Plaintiff and the Class

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DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff hereby demands a trial by jury of all issues triable as of right by a jury in the above action.

Respectfully Submitted,

Dated: February 12, 2013

PILOT LAW, P.C.
STONEBARGER LAW, APC

By: /s/ Brian J. Lawler
BRIAN J. LAWLER
GENE STONEBARGER
Attorneys for Plaintiff and the Class