

1 Marty Harper (#003416)
mharper@stklaw.com
2 Kelly J. Flood (#019772)
kflood@stklaw.com
3 Andrew S. Jacob (#22516)
ajacob@stklaw.com
4 **SHUGHART THOMSON & KILROY, P.C.**
Security Title Plaza
5 3636 N. Central Ave., Suite 1200
Phoenix, AZ 85012
6 Phone: (602) 650-2000
Fax: (602) 264-7033
7 *Attorneys for Plaintiffs*

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 ASSOCIATION,
and US AIRWAYS, INC.,
14 Defendants.

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

**PLAINTIFFS' MOTION FOR
CLASS CERTIFICATION**

15
16 Don ADDINGTON, *et al.*,
Plaintiffs,
17 vs.
18 Steven H. BRADFORD, *et al.*,
19 Defendants.
20

21 Plaintiffs Don ADDINGTON, John BOSTIC, Mark BURMAN, Afshin
22 IRANPOUR, Roger VELEZ, and Steve WARGOCKI, move this Court, pursuant to
23 Rule 23(b)(2),¹ for class certification. Plaintiffs base this motion on the First
24 Amended Complaint, the Memorandum of Points and Authorities that follows, and
25 the accompanying declarations of Marty Harper, Kelly Flood, and Andrew Jacob.
26

27
28 ¹ "Rule" refers, throughout, to the Federal Rules of Civil Procedure.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Overview**

3 Rule 23(b)(2) class action treatment will allow prompt adjudication of liability
4 and injunctive relief.

5 **A. Class Definition**

6 The proposed class of approximately 1,700 individual members is defined as:
7 “All pilots employed by the airline US Airways in September 2008 who were on the
8 America West seniority list on September 20, 2005.” All class members: (1) were
9 represented in the Nicolau Arbitration and the Transition Agreement; (2) have
10 seniority rights established by those agreements; (3) are owed a duty of fair
11 representation by Defendant U.S. Airline Pilots Association (“USAPA”); and (4)
12 have suffered injury as a consequence of USAPA’s violations of that duty.²

13 **B. Class-Wide Remedies**

14 Plaintiffs seek the six equitable remedies that follow on behalf of the class:

- 15 (1) Declaration that USAPA violated the duty of fair representation;
- 16 (2) Order that USAPA take specific affirmative steps to correct injuries caused
17 by that violation;
- 18 (3) Order that USAPA take no action reasonably likely to frustrate
19 implementation of the Nicolau seniority list and other aspects of the
20 Nicolau Award;
- 21 (4) Order vacating class member obligations to pay agency fees and
22 membership dues until such time that the Company is operating under a
23 single CBA that implements the Nicolau seniority list and other aspects of
24 the Nicolau Award;
- 25 (5) Order directing restitution of fees and dues paid to USAPA by class; and
- 26 (6) Award of attorneys’ fees and costs.

27 ² Plaintiffs rely on the Court’s familiarity with the terminology used in prior
28 pleadings.

1 **C. Common Class Issues**

2 All class claims raise common issues of fact and law, that include whether
3 USAPA:

- 4 (1) is motivated by wrongful hostility towards West Pilots;
- 5 (2) was wrongfully organized and established for the purpose of using majority
6 power to impose date-of-hire seniority in disregard of an arbitrated
7 compromise and/or without proper regard for West Pilot seniority
8 interests;
- 9 (3) wrongfully made the April, 2008, NMB election a referendum on date-of-
10 hire seniority by promising that, if it won the election, it would never
11 implement the Nicolau seniority list;
- 12 (4) has no less duty to honor, defend and support the Nicolau Award than
13 ALPA would have if it were still the bargaining representative;
- 14 (5) has a duty to bargain for a single CBA that would implement the Nicolau
15 seniority list;
- 16 (6) wrongfully proposed its date-of-hire seniority scheme to US Airways in
17 contract negotiations;
- 18 (7) must vacate any West Pilot obligations to pay agency fees and membership
19 dues because it has been in breach of its fiduciary duties;
- 20 (8) must refund West Pilot payments of agency fees and membership dues
21 because it has been in breach of its fiduciary duties; and
- 22 (9) should pay attorneys' fees and costs based on common benefit doctrine.

21 **II. LEGAL ARGUMENT**

22 **A. Legal Standards**

23 On a motion for class certification, courts accept the factual allegations as true.
24 *Blackie v. Barack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975); *Shelter Realty Corp. v.*
25 *Allied Maint. Corp.*, 574 F.2d 656, 661 n.15 (2d Cir. 1978). Courts also apply a
26 presumption "in favor and not against the maintenance of the class action." *Esplin*
27 *v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968); see, e.g., *Brown v. Cameron-Brown Co.*,

1 92 F.R.D. 32, 49 (E.D. Va. 1981) (“[D]oubt ... as to the advisability of proceeding
2 with a class action ... should be resolved in favor of class certification.”).

3 A party seeking class certification must establish, pursuant to Rule 23(a), that:
4 (1) class size makes joinder of all members impracticable; (2) there are substantial
5 questions of law or fact common to the class; (3) the representative plaintiffs have
6 claims that are typical of class claims; and (4) the representative plaintiffs and their
7 counsel will fairly and adequately protect the interests of the class. *In re Mego*
8 *Financial Corp. Securities Litigation*, 213 F.3d 454, 462 (9th Cir. 2000). The party
9 must also satisfy the requirements of one Rule 23(b) subdivision. *Id.*

10 The proposed class satisfies Rule 23(a) and Rule 23(b)(2). Plaintiffs address
11 Rule 23(b)(2) first.

12 **B. The Court Should Certify a (b)(2) Mandatory Class.**

13 1. This matter exemplifies proper (b)(2) class treatment.

14 Class action treatment is warranted where “the party opposing the class has
15 acted or refused to act on grounds generally applicable to the class,” and the
16 representatives are seeking “final injunctive relief or corresponding declaratory
17 relief.” Rule 23(b)(2). “The (b)(2) class action is intended for cases where broad,
18 class-wide injunctive or declaratory relief is necessary to redress a group-wide
19 injury.” *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 162 (2d Cir.
20 2001). A (b)(2) class, however, “is improper if the merits of the claim turn on
21 defendant's individual dealings with each plaintiff.” *In re Harris*, 280 B.R. 876,
22 882-83 (Bankr. S.D.Ala. 2001). *See also* 2 NEWBERG ON CLASS ACTIONS § 4:11, n.1
23 (4th ed. 2008 supp.) (noting that *In re Harris* “exemplified” Rule 23(b)(2)).

24 The merits here do not turn on USAPA’s dealing with individual class members.
25 Rather, the merits turn on actions that USAPA directed at the entire group of West
26 Pilots. For example, USAPA schemed to frustrate implementation of the Nicolau
27 seniority list, formulated a date-of-hire seniority policy in disregard of the Nicolau
28

1 Arbitration, and presented a date-of-hire seniority policy to the Company as its
2 negotiating position. Each such action was directed at and impacted the entire
3 group of West Pilots. Hence, a class-wide remedy is needed.

4 Plaintiffs seek a class-wide remedy. They seek a declaration of a class-wide
5 breach of duty and they seek a class-wide injunction as remedy. This matter,
6 therefore, exemplifies a mandatory (b)(2) class.

7 2. A mandatory (b)(2) class provides conclusive adjudication for all
8 members of the class.

9 Rule 23(b)(2) class action treatment allows the court “to bind the members of
10 the class with one conclusive adjudication.” *Wetzel v. Liberty Mut. Ins. Co.*, 508
11 F.2d 239, 252-53 (3d Cir. 1975). Otherwise, if members “could elect to opt out and
12 thereby not be bound by the judgment,” it “would defeat the fundamental objective
13 of (b)(2).” *Id.* This does not create due process problems because, with (b)(2) class
14 treatment, “due process rights of absent class members generally are satisfied by
15 adequate representation alone.” *Crawford v. Honig*, 37 F.3d 485, 487, n.2 (9th Cir.
16 1994). It is, therefore, well accepted that a court can provide injunctive relief to a
17 (b)(2) class without providing members formal notice or a right to opt out. *See, e.g.,*
18 *Molski v. Gleich*, 318 F.3d 937, 949, n.13 (9th Cir. 2003); *Dosier v. Miami Valley*
19 *Broadcasting Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981).

20 3. A class seeking injunctive remedy and damages can be certified
21 under (b)(2) if the injunctive remedy is necessary.

- 22 a. A class with damages claims can be certified under
23 (b)(2) if injunctive remedy is the predominant reason for
24 the litigation.

25 “Class actions certified under Rule 23(b)(2) ... may include cases that also seek
26 monetary damages.” *Probe v. State Teachers' Retirement System*, 780 F.2d 776,
27 780 (9th Cir. 1986). “[C]ertification of a mandatory class may be appropriate even
28 when monetary damages are involved.” *Molski*, 318 F.3d at 947. The damages

1 claims must arise from the same wrongs as give rise to the right to injunctive
2 remedy. *See Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 860 (9th Cir. 2001);
3 *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 928 (9th Cir. 1982).

4 The difference between (b)(2) and (b)(3) classes, then, is not in whether there
5 are damages claims. It is also not in whether such damages can be determined on a
6 class-wide basis. *See Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) (approving
7 (b)(2) class certification where damages claims would be decided in “case-by-case
8 adjudication”). Rather, it is in whether damages are the predominant reason for the
9 litigation. *See Molski*, 318 F.3d at 950.

10 Where injunction is the predominate reason for the litigation, therefore, a class
11 that has damages claims can be certified as a (b)(2) class.

12 b. Injunction is the predominant reason for the litigation
13 where it is a necessary remedy.

14 To decide whether injunction is the predominant reason for the litigation, courts
15 focus on “the intent of the plaintiffs in bringing the suit.” *Id.* Injunction in the
16 predominant reason where “reasonable plaintiffs would bring the suit to obtain an
17 injunction,” whether or not they had a claim for money damages. *Dukes v. Wal-*
18 *Mart, Inc.* 509 F.3d 1168, 1188 (9th Cir. 2007); *see also Molski*, 318 F.3d at 950,
19 n.15. In other words, based on the premise that reasonable plaintiffs pursue only
20 necessary litigation, an injunction is the predominant reason for litigation only
21 where it is a necessary remedy.

22 c. An injunction is a necessary remedy where it is needed
23 to satisfy the goal of the litigation.

24 An injunction is a necessary remedy where the plaintiffs could not satisfy the
25 goal of the litigation without it. Two recent Ninth Circuit district court class
26 certification rulings illustrate the application of this rule. The first decision
27 addressed plaintiffs who sought to remedy the defendant’s violations of email
28 privacy. *Murray v. Financial Visions, Inc.*, 2008 WL 4850328 (D.Ariz. 2008). The

1 court declined to certify a (b)(2) class because it found that the “predominant
2 remedy sought [wa]s monetary damages,” not injunction. *Id.* at 4. The court
3 identified two reasons for this finding. First, the fact that the “[p]laintiffs’ original
4 complaint requested only monetary damages” showed that they lacked a subjective
5 motivation to obtain injunctive relief. *See id.* Second, the fact that the defendant
6 ceased the objectionable conduct “as soon as plaintiffs complained, and ...
7 committed not to resume” showed that the plaintiffs could achieve their goal of
8 keeping their email private without an injunction. *Id.* Consequently, the *Murray*
9 court did not certify a mandatory (b)(2) class.

10 The second decision addressed plaintiffs who sought to remedy civil rights
11 violations by the LAPD. *Multi-Ethnic Immigrant Workers Organizing Network v.*
12 *City of Los Angeles*, 246 F.R.D. 621 (C.D.Cal. 2007). In contrast to *Murray*, this
13 court approved (b)(2) class certification because, it found, injunction was the
14 predominant remedy, regardless that the LAPD had agreed to stop the conduct. *Id.*
15 at 633. The difference was that the LAPD’s failure to abide by that agreement was
16 the cause of the litigation. *See id.* The plaintiffs in *Immigrant Workers* sought
17 what was, in effect, an order of specific performance. In other words, “the primary
18 goal of the litigation [wa]s to secure ... rights ... in the future.” *Id.* The *Immigrant*
19 *Workers* court certified a mandatory (b)(2) class because an agreement alone had
20 not secured those rights.

21 4. The Court should certify a (b)(2) class because the injunction
22 here is necessary to achieve the goal of the litigation.

23 Plaintiffs here seek an injunction that will, in effect, compel USAPA to honor
24 the agreement to abide by the Nicolau Award and its seniority list. This matter,
25 therefore, is analogous to the *Immigrant Workers* decision. Injunction was
26 necessary in *Immigrant Workers* because the plaintiffs could not rely on LAPD to
27 honor its agreed upon obligations. Injunction is necessary here because Plaintiffs
28

1 similarly cannot rely on USAPA to honor existing obligations to treat the Nicolau
2 Award as final and binding. The result here, therefore, should be the same as in
3 *Immigrant Workers*—the Court should certify a mandatory (b)(2) class.

4 This matter is also distinguishable from the *Murray* decision. The *Murray*
5 court had two reasons to not certify a (b)(2) class. Neither of these reasons applies
6 here. First, unlike the defendant in *Murray*, USAPA did not cease its wrongful
7 conduct “as soon as plaintiffs complained.” 2008 WL 4850328 at 4. Rather, USAPA
8 refuses to admit that its conduct is wrongful and continues such conduct after
9 Plaintiffs filed this litigation (*e.g.* USAPA proposed a date-of-hire seniority scheme
10 in contract negotiations with the Company). Second, unlike the plaintiffs in
11 *Murray*, Plaintiffs here included injunctive relief in their original complaint.
12 Plaintiff’s situation, therefore, is opposite that in *Murray*. The result here,
13 therefore, should be opposite to that in *Murray*—the Court should certify a
14 mandatory (b)(2) class.

15 **C. The West Pilot Class Satisfies Rule 23(a).**

16 Rule 23(a) provides that a class must satisfy numerosity, commonality,
17 typicality, and adequacy. *In re Mego Financial Corp.*, 213 F.3d at 462. The
18 proposed class readily satisfies these standards.

19 1. Numerosity

20 Rule 23(a)(1) requires that a class be “so numerous that joinder of all members
21 is impracticable.” *East Texas Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 405
22 (1977). There is no specific number cut-off for class size. *Ballard v. Equifax Check*
23 *Servs., Inc.*, 186 F.R.D. 589, 594 (E.D. Cal. 1999). For example, one court held that
24 numerosity is said to be “easily met” when there are “hundreds of class members.”
25 *Satchell v. FedEx Corp.*, 2005 WL 2397522, *4 (N.D. Cal. Sept. 28, 2005). Another
26 court found numerosity satisfied by as few as 39 potential class members. *Patrick*
27
28

1 *v. Marshall*, 460 F.Supp. 23, 26 (N.D. Cal. 1978). The West Pilot Class has about
2 1700 members. It, therefore, readily satisfies numerosity.

3 2. Commonality

4 “A class has sufficient commonality if there are questions of fact and law which
5 are common to the class.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir.
6 1998). This requirement is said to be “minimal” because all questions of law and
7 fact need not be common. *Id.* at 1020. “The existence of shared legal issues ... is
8 sufficient,” regardless that there may be “divergent factual predicates” or “disparate
9 legal remedies within the class.” *Id.* at 1019. In fact, a single material issue
10 common to all members of the class can be sufficient to meet the (a)(2) commonality
11 standard. *Wehner v. Syntex Corp.*, 117 F.R.D. 641, 644 (N.D. Cal. 1987).

12 In this instance, USAPA owes every member of the West Pilot Class the same
13 duty of fair representation. Every member of the West Pilot Class has rights
14 established by the 2004 CBA, Transition Agreement and Nicolau Arbitration.
15 USAPA’s duty requires that it give due consideration to those rights and fairly
16 represent every member of the class. This provides each member of the West Pilot
17 Class a common basis to make a claim against USAPA.

18 The West Pilot Class, therefore, readily satisfies commonality.

19 3. Typicality

20 “The question of typicality in Rule 23(a)(3) is closely related to the preceding
21 question of commonality.” *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992).
22 The difference is that typicality considers whether “the interest of the named
23 representative aligns with the interests of the class.” *Hannon v. Dataproducts*
24 *Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Generally, those interests align where the
25 named plaintiff shares the right that would be vindicated on behalf of the class. *Id.*

26 Typicality does not require, however, that all class members share the named
27 plaintiffs’ enthusiasm for the litigation. *See Abrams v. Communications Workers of*
28

1 *Am.*, 59 F.3d 1373, 1378 (D.C. Cir. 1995) (typicality is satisfied regardless that it is
2 not established that all class members favor the litigation).³ Typicality also does
3 not require that the named plaintiffs’ claims “be substantially identical” to the
4 claims of all class members. *Hanlon*, 150 F.3d at 1020. All that is needed is that
5 injuries to the named plaintiffs class members arise out of the same conduct that
6 injured other class members. *See Keele v. Wexler*, 149 F.3d 589, 593 (7th Cir.
7 1999). Similarly, the fact that a “different amount of damage” is claimed by
8 individual named plaintiffs does “not negate a finding of typicality.” *Thomas &*
9 *Thomas Rodmakers, Inc., v. Newport Adhesives & Composites, Inc.*, 209 F.R.D. 159,
10 164 (C.D. Cal. 2002).

11 Hence, it does not matter here whether some Plaintiffs and some West Pilot
12 Class members have claims for lost wages. I would not matter if some class
13 members did not support this litigation. Because Plaintiffs have the same interests
14 as class members to see implementation of the Nicolau Award and because
15 USAPA’s wrongful conduct has impaired those interests, Plaintiffs are typical of the
16 class membership.

17 The West Pilot Class, therefore, readily satisfies typicality.

18 4. Adequacy

19 The question of adequacy considers the qualifications of class counsel and the
20 qualifications and interests of the proposed class representatives. The analysis of
21 adequate representation depends on three factors: (a) “the qualifications of counsel
22 for the representatives;” (b) “an absence of antagonism, a sharing of interests
23 between representatives and absentees;” and (c) and “the unlikelihood that the suit
24 is collusive.” *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994). “[T]he named
25 representatives must appear able to prosecute the action vigorously through
26

27 ³ In fact, a very substantial majority of West Pilots support this litigation.
28

1 qualified counsel” and “the representatives must not have antagonistic or
2 conflicting interests with the unnamed members of the class.” *Lerwill v. Inflight*
3 *Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978) (citing *Natl. Assoc. of Reg'l*
4 *Med. Programs, Inc. v. Matthews*, 551 F.2d 340 (D.C. Cir. 1976)); see also *Wetzel*,
5 508 F.2d at 247 (“Adequate representation depends on two factors: (a) the plaintiff’s
6 attorney must be qualified, experienced, and generally able to conduct the proposed
7 litigation, and (b) the plaintiff must not have interests antagonistic to those of the
8 class.”).

9 The standards for determination of the adequacy of class council are further
10 codified in Rule 23(g). *Hill v. Merrill Gardens, L.L.C.*, 2005 WL 2465250, *3 (N.D.
11 Ind. 2005). Rule 23(g)(1)(C) provides:

12 In appointing class counsel, the court ... must consider: (i) the work counsel
13 has done in identifying or investigating potential claims in the action, (ii)
14 counsel’s experience in handling class actions, other complex litigation, and
15 claims of the type asserted in the action, (iii) counsel’s knowledge of the
16 applicable law, and (iv) the resources counsel will commit to representing
17 the class.

18 *Id.* A court also “may consider any other matter pertinent to counsel's ability to
19 fairly and adequately represent the interests of the class ...” Rule 23(g)(1)(C)(ii).

20 a. Counsel readily satisfies adequacy.

21 Plaintiffs have engaged class counsel who are experienced in prosecuting large
22 class actions. (See Marty Harper, Decl. (Dec. 29, 2008).) They also have experience
23 in prosecuting complex Railway Labor Act matters. See, e.g., *Airline Pilots Assn.,*
24 *Intl. v. O’Neill*, 499 U.S. 65 (1991); *Rachford v. Air Line Pilots Assn., Intern.*, 2006
25 WL 927742 (N.D. Cal. 2006) (Case No. C-03-3618-PJH). The Court should readily
26 find that the class counsel here satisfy the adequacy standards of Rule 23(g), and on
27 that basis satisfy Rule 23(a)(4).
28

1 b. Plaintiffs readily satisfy adequacy.

2 In regard to the adequacy of representative plaintiffs, “[t]he court is bound to
3 take the substantive allegations of the complaint as true.” *Blackie*, 524 F.2d at 901,
4 n.17. Nothing in the allegations here suggests that Plaintiffs have any interests
5 antagonistic to the interests of the class. Rather, Plaintiffs seek no relief for
6 themselves other than the class-wide relief sought for all West Pilots. The Court,
7 therefore, should find that Plaintiffs satisfy adequacy.

8 **III. CONCLUSION**

9 Rule 23(b)(2) class certification, as proposed herein, will provide efficient
10 adjudication of common issues and a means to obtain class-wide injunctive relief.
11 Accordingly, Plaintiffs respectfully ask this Court to certify the proposed West Pilot
12 (b)(2) class.

13 Dated this 29th day of December, 2008.

14 SHUGHART THOMSON & KILROY, P.C.

15 */s/ Andrew S. Jacob*

16 By: _____

17 Marty Harper
18 Kelly Flood
19 Andrew S. Jacob
20 Security Title Plaza
21 3636 N. Central Ave., Suite 1200
22 Phoenix, AZ 85012
23 *Attorneys for Plaintiffs*

24 **CERTIFICATE OF SERVICE**

25 I hereby certify that on December 29, 2008, I electronically transmitted the
26 foregoing document to the U.S. District Court Clerk’s Office by using the CM/ECF
27 System for filing and transmittal of a Notice of Electronic Filing.

28 *s/ Andrew S. Jacob*