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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Don ADDINGTON, *et al.*, Plaintiffs, vs. US AIRLINE PILOTS ASSOCIATION, and US AIRWAYS, INC., Defendants.	CONSOLIDATED CASES NO. 2:08-CV-1633-PHX-NVW; 2:08-CV-1728-PHX-NVW **PLAINTIFFS' RESPONSE OPPOSING USAPA'S MOTION TO EXTEND TIME TO RESPOND**
Don ADDINGTON, *et al.*, Plaintiffs, vs. Steven H. BRADFORD, *et al.*, Defendants.	

Plaintiffs Don ADDINGTON, John BOSTIC, Mark BURMAN, Afshin IRANPOUR, Roger VELEZ, and Steve WARGOCKI, *Respond in Opposition to Defendant USAPA's Motion for Extension of Time* (doc. 131). The Court should deny this motion because, contrary to the policy underlying to Rule 23(c)(1),[1] it is intended only to delay this litigation. Plaintiffs base this Response on the Memorandum of Points and Authorities that follows.

[1] "Rule" refers, throughout, to the Federal Rules of Civil Procedure.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Overview

USAPA does not have an unqualified right to discovery before the Court considers Plaintiffs' motion for Rule 23(b)(2) class certification. USAPA is only entitled to discovery that is relevant to the issues the Court will address when determining class certification. Even then, the Court need not and should not delay its determination of class certification unless there is a credible basis to believe that discovery could yield information that would influence that determination. USAPA does not identify any credible basis to have such a belief. The Court should, therefore, deny USAPA's motion and proceed with expedited class certification.

II. LEGAL ARGUMENT

A. Legal Standards

1. USAPA is entitled only to discovery that would be useful or necessary in determining class certification.

"Discovery is not to be used as a weapon, nor must discovery on the merits be completed precedent to class certification." *National Organization for Women, Farmington Valley Chapter v. Sperry Rand Corp.*, 88 F.R.D. 272, 277 (D.C. Conn. 1980) (limiting discovery sought by plaintiffs). "The court will delay its ruling [on class certification] only if it finds that discovery would be useful or is necessary in making that determination." Wright & Miller, 7AA *Fed. Prac. & Proc. Civ.3d* § 1785.3 (timing of class certification). "[D]efendant ordinarily should not be permitted to engage in a broad fishing expedition, in pretrial discovery, to seek to turn up such facts." NEWBERG ON CLASS ACTIONS § 7:8, 27 (4th ed 2002).

Discovery is required only where "the existing record is inadequate for resolving the relevant issues" for certification determination. *Chateau de Ville Productions, Inc. v. Tams-Witmark Music Library, Inc.*, 586 F.2d 962, 966 (2d Cir. 1978). *See*, e.g., *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1086 (6th Cir. 1996)

(inadequate facts on "fairness and adequacy of representation"); *Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 459 n.16 (11th Cir. 1996) (need to "define the proper scope of an alleged class or subclass").

Discovery, for example, is appropriate where defendants have valid reason to: (1) "test the plaintiff's alleged typicality of claims;" (2) "challenge specific areas which the defendant reasonably believes involve potential conflicts with class members;" or (3) "question the qualifications of the plaintiff to serve as representative." 3 NEWBERG ON CLASS ACTIONS § 7:8, 27. "[T]he extent of the knowledge of the plaintiff of claims of absent class members is irrelevant and an improper subject for discovery." *Id.*; *see also McPhail v. First Command Financial Planning, Inc.,* 251 F.R.D. 514, 517 (S.D.Cal. 2008) (same).

2. Certification of a (b)(2) class is less rigorous.

Rule 23(b)(2) class certification is less rigorous because it does not trigger the expense of class notice and does not require the court to determine superiority, which is required for (b)(3) certification. *See Kamm v. California City Development Co.*, 509 F.2d 205, 212 (9th Cir. 1975) ("Rule 23(b)(3) superiority determinations must 'take into account several different interests'.").

> In an action seeking **primarily declaratory or injunctive relief** for the class, the best interests of class counsel are usually served by having an initial class ruling as early as possible in the litigation. An early ruling creates no particular problems concerning notice to class members, because notice of the pendency of a class action is not required in those suits which would normally be certified under Rule 23(b)(1) or (b)(2).
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> The judicial burdens of certifying a class in a suit for declaratory or injunctive relief are light, in contrast to those for classes seeking damages for individual members, so that the courts have assumed a rather flexible role in the granting or deferring of formal class rulings in these cases.

NEWBERG ON CLASS ACTIONS at § 7:2.

3. USAPA does not have an unqualified right to discovery.

USAPA premises its motion on a theory that it is "entitled to discovery into class certification." USAPA Memo. at 3:10. This is not so, and it is surely not so in the context of a defendant resisting certification of a (b)(2) class. Consequently, USAPA has no authority for its position.

The authorities that USAPA cites in its memorandum address (b)(3) class certification. All but one addressed denying, not granting, class certification. Although these courts supported the opportunity for discovery, they did so becasue there was reason to believe that a fact material to certification might be in dispute.

The case cited from the Ninth Circuit is particularly clear on this last point:

> The propriety of a class action cannot be determined in some cases without discovery, as for example, where discovery is necessary to determine the existence of a class or set of subclasses. To deny discovery in a case of that nature would be an abuse of discretion. Where the necessary factual issues may be resolved without discovery, it is not required.

Kamm, 509 F.2d at 210; *see also Parker v. Time Warner Entertainment Co., L.P.*, 331 F.3d 13, 21 (2d Cir. 2003) (addressing (b)(3) class certification where the trial court denied the plaintiff both discovery and even the opportunity to file a motion for certification); *Zeidman v. J. Ray McDermott & Co.*, Inc. 651 F.2d 1030, 1037 (5th Cir. 1981) (addressing a civil rights (b)(3) class certification, and holding that a court "should be loathe to deny the justiciability of class actions without the benefit of the fullest factual background").

In re American Medical Systems, Inc., 75 F.3d 1069, was the one case that addressed an appeal of class certification made by a defendant. It found that class certification was "improper" because the court made "no finding of superiority." *Id.* at 1085. Superiority is a (b)(3) issue that is not relevant in a (b)(2) class determination. Moreover, there were multiple reasons in that case to determine that the defendant was unfairly prejudiced. *See id.* at 1086 (noting that defendant "had no opportunity to respond to the complaint, let alone conduct any discovery on

any of the plaintiffs or to submit a brief to the district court or seek a hearing addressing the class actions issues"). This case certainly does not support the proposition that a defendant has an inviolate and unfettered right to discovery.

B. Only (b)(2) Class Certification Is at Issue.

1. Plaintiffs moved only for (b)(2) class certification.

Plaintiffs have always primarily sought injunctive relief and now seek certification of a (b)(2) class. *See Plts.'s Mot. Class Certification,* 1:22-23 (Dec. 29, 2008) (doc. 120) ("mov[ing] this Court, pursuant to Rule 23(b)(2), for class certification"). Indeed, Plaintiffs mention Rule 23(b)(3) only once in their motion and then solely for the purpose of distinguishing "[t]he difference between (b)(2) and (b)(3) classes." *Id.* at 6:4-6. Rule 23(b)(3) is clearly not at issue.

2. The relevant issues are defined by Rules 23(a) and 23(b)(2).

Rule 23(c)(1) allows certification of a (b)(2) class if the four elements of Rule 23(a) and the standards of Rule 23(b)(2) are satisfied. *See In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 462 (9th Cir. 2000). The four elements of Rule 23(a) are that:

(1) class size makes joinder of all members impracticable;

(2) there are substantial questions of law or fact common to the class;

(3) the representative plaintiffs have claims that are typical of class claims; and

(4) the representative plaintiffs and their counsel will fairly and adequately protect the interests of the class.

Id. Rule 23(b)(2) has two elements:

(1) "the party opposing the class has acted or refused to act on grounds generally applicable to the class," and

(2) the representatives are seeking "final injunctive relief or corresponding declaratory relief."

Id. Using different language, one court has said that (b)(2) certification "is improper if the merits of the claim turn on defendant's individual dealings with each plaintiff." *In re Harris*, 280 B.R. 876, 882-83 (Bankr. S.D.Ala. 2001). Taking this as a third (b)(2) standard, the Court has seven issues to evaluate when determining (b)(2) certification here.

C. There Is No Justification Here To Delay Certification.

USAPA must have a reason for discovery. If it seeks discovery in good faith, it must have a reason to believe that, with discovery, one of the seven issues relevant to (b)(2) class certification might be disputed. In other words, USAPA must offer a rational reason to believe that, with discovery, it can defeat certification. USAPA fails to show that it has such a reason.

1. USAPA does not identify a valid basis to deny (b)(2) certification.

USAPA does not address a single element of Rule23(a) or 23(b)(2) in its memorandum. USAPA does not assert that it has any basis to question that: (1) the class size is large enough; (2) there are sufficient common issues; (3) Plaintiffs share the class claims; or (4) Plaintiffs and counsel are adequate representatives. USAPA, therefore, does not offer any reason to believe that discovery will find evidence that it could use to demonstrate that Rule 23(a) is not satisfied.

USAPA does not argue that it has any basis to question that: (1) Plaintiffs are making a claim that USAPA acted or refused to act on grounds generally applicable to the class; (2) Plaintiffs are seeking "final injunctive relief"; or (3) class members' rights to such relief do not turn on USAPA's individual dealings with each class member. USAPA, therefore, does not offer any reason to believe that discovery will find evidence that it could use to demonstrate that Rule 23(b)(2) is not satisfied.

USAPA, therefore, does not offer any reason to believe that the Court would resolve any factual issues relevant to class certification differently if it had more

time to conduct discovery. Absent USAPA offering such a reason, the Court has no basis to delay determination of class certification. *See Kamm*, 509 F.2d at 210.

2. That Plaintiffs intend to seek ancillary money damages has no bearing on class certification.

The fact that Plaintiffs seek money damages does not defeat (b)(2) certification. "Class actions certified under Rule 23(b)(2) … may include cases that also seek monetary damages." *Probe v. State Teachers' Retirement System*, 780 F.2d 776, 780 (9th Cir. 1986). This does raise other issues, such as whether the damages claims arise from the same wrongs as give rise to the right to injunctive remedy, *see Kanter v. Warner-Lambert Co.,* 265 F.3d 853, 860 (9th Cir. 2001); *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 928 (9th Cir. 1982), and whether "reasonable plaintiffs would bring the suit to obtain an injunction," if they did not have a claim for money damages, *Dukes v. Wal-Mart, Inc.* 509 F.3d 1168, 1188 (9th Cir. 2007). Neither of these issues supports a need for discovery. USAPA fails to even address these standards, regardless that they were well demonstrated in *Plaintiffs' Motion for Class Certification* (doc. 120). USAPA, therefore, fails to make any showing that discovery would affect the Court's class certification determination.

III. CONCLUSION

Rule 23(b)(2) class certification will provide efficient adjudication of common issues and a means to obtain class-wide injunctive relief. USAPA seeks to delay that relief with abusive discovery. Because USAPA fails to identify any valid need to conduct discovery prior to class certification, the Court should deny USAPA's *Motion to Extend Time to Respond*.

/ / /

Dated this 8th day of January, 2009.

SHUGHART THOMSON & KILROY, P.C.

/s/ Andrew S. Jacob

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CERTIFICATE OF SERVICE

I hereby certify that on January 8th, 2008, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing.

s/ *Andrew S. Jacob*