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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI, Plaintiffs, vs. US AIRLINE PILOTS ASSOCIATION, US AIRWAYS, INC., Defendants,	Case 2:08-cv-1633-PHX-NVW (Consolidated) **DEFENDANT USAPA'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**
Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI, Plaintiffs, vs. Steven H. BRADFORD, Paul J. DIORIO, Robert., A. FREAR, Mark. W. KING, Douglas L. MOWERY, and John A. STEPHAN, Defendants.	Case 2:08-cv-1728-PHX-NVW

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I. SUMMARY

Before the Court is Plaintiffs' motion for class certification. (Dkt. 120). Denial is required because Plaintiffs have moved to certify only a Rule 23(b)(2) "injunction" class yet they have chosen to pursue individualized money damages and even remedies not yet pled. In addition, Plaintiffs and their counsel fail to satisfy the requirements of Rule 23. Certification would also be improper due to ongoing discovery of third parties that have been revealed to be acting as the true class representatives. Finally, a class action is not necessary or manageable.

II. FACTS & PROCEDURAL HISTORY

Plaintiffs' original Complaint of September 4, 2008, did not contain any class action pleadings. Rather, Plaintiffs pursued a litigation strategy of simultaneously commencing a separate state case that explicitly pled class action claims. Subsequently, Plaintiffs' state case was removed; later, on November 21, 2008, remand was denied. (Dkt. 20, 08-1728). In apparent response to the Court's comments casting doubts on the viability of the state class action case, on November 28, Plaintiffs amended their Complaint to plead class allegations. (Dkt. 86). This amendment came only after the Court had set a trial date (now continued) and had the effect of seeking to "recast this case, originally brought by six individuals, as a class action on behalf of approximately 1800 West Pilots." (Dkt. 130, at 2:2). The state case was later dismissed, on December 24, 2008, for failure to state a claim. (Dkt. 118).

On December 15, 2008, this Court held a scheduling conference. After rejecting Plaintiffs' suggestion that class certification be addressed after the merits of the case (Tr.[1] 7:2), the Court offered the observation that: "[T]o the extent a damage class is sought ... there would be enormous factual issues specific to each individual class member that would strip the class action of a lot of the justification and value of class proceedings." (Tr. 8:1-

[1] Tr. refers to the transcript for the hearing on December 15, 2008.

11). The Court also cautioned that seeking a damages class could engender a five to six month delay. (Tr. 20:24). Per the Court's directive, USAPA served its class action discovery the following week. (Tr. 41:13; Dkt. 119). The Court also ordered that Plaintiffs file any class motion by December 29, and that USAPA respond by January 16. (Dkt. 116).

Notwithstanding the Court's order, Plaintiffs communicated to USAPA their apparent intent to provide no response to USAPA's class discovery. (Dkt. 133, Ex. C, p. 4: "we will be objecting to class discovery..."). And, contrary to representations made in open Court (Tr. 39:13; 40:2), Plaintiffs refused to make the named Plaintiffs and proposed class representatives available for depositions until *after* USAPA's brief opposing certification was to be originally due (Dkt. 116, Ex. C, p. 6). Plaintiffs also refused to extend the time for USAPA to file its response to their certification motion, resulting in the need for USAPA to bring a motion for an extension of time, which the Court granted. (Dkt. 155).[2]

After the extension was granted, USAPA deposed all six of the named Plaintiffs.[3] These depositions produced evidence demonstrating that the Plaintiffs are not adequate class representatives due to their unfamiliarity with the lawsuit and their inability to properly oversee the attorneys. The depositions also revealed that a corporation named Leonidas, LLC ("Leonidas") and its agents conceived, finance, and substantially control this litigation, even to the extent of selecting the named plaintiffs. USAPA has issued third party subpoenas on Leonidas for documents and depositions; however, Leonidas has refused full compliance with the document demands and has declined to schedule depositions pending its application – through Plaintiffs' counsel – for a protective order. In addition, Plaintiffs,

[2] Plaintiffs' obstruction has continued through the deadline for this brief, prejudicing both USAPA's response and its ability to seek a timely motion to extend. (Granath Decl. ¶¶ 28-32).

[3] Relevant pages of the named Plaintiffs' deposition transcripts are attached as Exhibits A-F to the Granath Declaration and cited throughout this memorandum by the Plaintiff's name followed by the applicable page and line numbers. (Ex.: Bostic, 1:2).

after conferral, have also failed to respond in full to class certification discovery. Therefore, concurrent with and immediately following the filing of this brief, USAPA will file motions to compel production directed to Leonidas and to Plaintiffs that are hereby incorporated by reference into this brief. USAPA requests that the Court either deny class certification based on the obfuscation of Leonidas and the Plaintiffs or stay its decision until it has ruled on USAPA's discovery motions.

Finally, the Plaintiffs' deposition testimony confirms that the Court does not have subject matter jurisdiction over this case. Consequently, USAPA intends to submit a request to the Court next week requesting authorization to submit a summary judgment motion.

III. ARGUMENT

A. The Monetary Remedies Sought by Plaintiffs Are Not Proper for Purposes of a Rule 23(b)(2) Class

Plaintiffs, in their motion for class certification, have couched an assortment of individualized money damages under the guise of "equitable remedies." First, Plaintiffs seek an "Order that USAPA take specific affirmative steps to correct *injuries* caused by" the alleged DFR violation. (Dkt. 120 at 2:16) (emphasis supplied).[4] Second, for the first time in their class certification motion, without amending their complaint, Plaintiffs also seek monetary damages on behalf of the class for fees and dues paid by any class member to USAPA. (*Id*. at 2:23). As discussed below, the individualized money damages now sought by Plaintiffs preclude certification of a (b)(2) class.

The Ninth Circuit, in *Molski v. Gleich*, 318 F.3d 937, 947 (9th Cir. 2003), held that, in order to proceed with class certification pursuant to Rule 23(b)(2) any "claim for

[4] Plaintiffs failed to specify exactly what type of relief they seek by their "affirmative steps to correct injuries" language. It is reasonable to assume that the reference is to the same "injuries" alleged in their First Amended Complaint. However, despite repeated requests by USAPA, Plaintiffs still have not clarified that they have abandoned their request for wage-related damages on behalf of Plaintiffs and the class. (Dkt. 169, 1:5-20).

monetary damages must be secondary to the primary claim for injunctive or declaratory relief." *Id.* (citations omitted). In order to be deemed secondary, the monetary damages must be found to be "merely incidental" to the primary claim for injunctive relief. *Probe v. State Teachers' Ret. Sys.*, 780 F.2d 776, 780 (9th Cir. 1986), *cert. denied*, 476 U.S. 1170 (1986).[5] Incidental damages are those "that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." *Molski*, 318 F.3d at 949 (*citing Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998)). In making its determination, the Ninth Circuit focuses on "the language of Rule 23(b)(2) and the intent of the plaintiffs in bringing the suit." *Molski*, 318 F.3d at 950.

First, when examining the intent of the Plaintiffs in bringing this suit, it is evident, from Plaintiffs' FAC and their motion for class certification, that monetary damages are at the forefront of this action. (FAC ¶¶ 25(f), 79, 102 120, 123, 123(C)). Second, the *Molski* standard that the damages flow directly from liability to the class *as a whole* cannot be satisfied. This Court, even before the dues/fees category of damages was added by Plaintiffs, recognized that the damages issues presented "enormous factual issues specific to each individual class member." (Dec. 15, 2008 Tr. at 8:4-25). Plaintiffs also concede that it would be "exceedingly impractical" for each class member to prove his damages." (FAC ¶ 121). USAPA concurs. (Declaration of Robert Davison "Davison Decl." ¶¶ 13-14).

District courts within the Ninth Circuit have applied *Molski* to deny (b)(2) class certifications where damages required individualized determinations. *In re Wal-Mart Wage & Hour Employment Practices Litig.*, 2008 U.S. Dist. LEXIS 50928 at *56-57 (D. Nev. June 20, 2008); *Grosz v. The Boeing Co.*, 2003 U.S. Dist. LEXIS 25341 at *19 (C.D. Cal. Nov. 12, 2003); *Burton v. Mountain W. Farm Bureau*, 214 F.R.D. 598, 610 (D. Mont.

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[5] *See Molski*, 318 F.3d at 950, n. 14 (noting that the "use of the word "incidental" was intended to mean "secondary" to injunctive relief.").

2003); *Robertson v. North Am. Van Lines, Inc.*, 2004 U.S. Dist. LEXIS 7788 at * 12 (N.D. Cal. Apr. 13, 2004). Nevertheless, Plaintiffs have demonstrated their unwillingness to move forward in this litigation without the inclusion of significant monetary damages that require complex, individualized analysis. Even assuming that Plaintiffs amended their FAC to strip out all of its original damage claims, the instant motion introduces new monetary claims for wages paid as dues or agency fees to USAPA. These damage claims seek to deprive USAPA of approximately one-third of the revenue to which it is entitled under § 29 of the collective bargaining agreement. (Declaration of Mark King "King Decl." ¶ 4).[6]

The West pilot class which the Plaintiffs seek to represent is fractured into numerous and sometimes overlapping categories, which (assuming liability) would require individualized damage determinations due to the broad range of legal issues, defenses, and financial obligations that apply. (*Id*. at ¶ 5).[7] As described in detail in the King Declaration, these variegated categories include: 1) Members in good standing; 2) Members in bad standing; 3) Members in bad standing who have entered into settlement agreements; 4) Members in bad standing who elect to arbitrate dues-related disputes; 5) Non-members who have not objected to non-germane expenses; 6) Non-members who have objected to non-germane expenses; 7) Non-member objectors who have challenged USAPA's agency fee calculus; 8) Apprentice members; 9) Inactive members and members on medical, personal

[6] Disputes arising pursuant to Section 29 of the CBA are subject to review by the Company followed by arbitration before a neutral referee. Moreover, the issuance of an injunction enjoining the collection of dues from dissenters is improper and "threatens the basic congressional policy of the Railway Labor Act . . ." *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 772 (1961).

[7] Individual defenses exist against five of the six named Plaintiffs as related to their new request for "restitution of fees and dues paid to USAPA," as these individuals testified they had not paid any dues or fees to USAPA for which restitution would be available. (Bostic, 70:6-13; Burman 78:19-24; Iranpour, 99:25; Wargocki 119:19-22; Velez, 83:9-21). On the basis of the existence of these unique defenses, class certification is inappropriate. *Hanon v. Dataproducts Corp*., 976 F.2d 497, 508 (9th Cir. 1992).

or military leave; 10) Executive members. (King Decl. ¶ 5, subparagraphs 1-10).

Plaintiffs have disingenuously characterized their new claim for damages as restitution in equity and seek "an order directing USAPA to disgorge" dues-related money paid by West pilots. (Dkt. 161, 5:10-13). USAPA disagrees with Plaintiffs' mischaracterization of the dues-related damages as equitable. (Dkts. 159, 169). Moreover, federal courts have held that disgorgement is not relief contemplated under Rule 23(b)(2). *See, e.g., Sugai Prod., Inc. v. Kona Kai Farms, Inc.*, 1997 U.S. Dist. LEXIS 21503 at *30 (D. Haw. Nov. 19, 1997); *Cason v. Nissan Motor Acceptance Corp.*, 212 F.R.D. 518, 521 (M.D. Tenn. 2002); *Owner-Operator Indep. Drivers Ass'n v. New Prime, Inc.*, 213 F.R.D. 537, 545 (W.D. Mo. 2002), *aff'd*, 339 F.3d 1001 (8th Cir. 2003), *cert. denied*, 541 U.S. 973 (2004); *Clay v. American Tobacco Co., Inc.*, 188 F.R.D. 483 (S.D. Ill. 1999); *Pickett v. IBP, Inc.*, 182 F.R.D. 647, 656 (M.D. Ala. 1998); *rev'd on other grounds*, 209 F.3d 1276 (11th Cir. 2000). Plaintiffs' inclusion of claims for money damages as part of their proposed (b)(2) class is improper, and for this reason certification should be denied.

B. The Record Demonstrates Neither Plaintiffs Nor Counsel Can Fairly or Adequately Represent the Proposed Class

Fed. R. Civ. P. 23(a)(4) requires that a class representative "fairly and adequately protect the interests of the class." Adequate representation depends both on the plaintiffs and the "the qualifications of counsel". *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 390 (9th Cir. 1992) (quotation omitted), *cert. denied*, 511 U.S. 117 (1994). Neither the Plaintiffs nor their counsel fulfill this requirement.

1. Plaintiffs Cannot Adequately Represent the Proposed Class

a. A Corporation Controls the Litigation and Plaintiffs Were Solicited

The Plaintiffs' testimony and documentary evidence demonstrate that the Leonidas

corporation developed the initial litigation strategy and exercises ongoing control through its directors and the aptly named litigation "control group."[8] Leonidas was formed for the purpose of controlling the instant litigation and maintains an attorney-client relationship with the Shughart firm.[9] Not surprisingly, the evidence obtained to date shows that the Plaintiffs have effectively ceded control of the litigation to Leonidas and "the attorneys."[10]

It is Leonidas that originally retained Shughart, Thomson & Kilroy, P.C.[11] The named Plaintiffs' involvement in the litigation post-dates its conception and development, and their written retainers – executed over three months *after* the commencement of this action – emphasize Leonidas's exclusive responsibility for financing the lawsuit. (Granath Decl. ¶

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[8]Addington 49:12, 52:23, and adopted through Flood 54:9, "... not named plaintiffs, [a] control-group ..."; Bostic 52:17, "it's a West Pilot ... control group"; Burman 58:16, "the control group"; Iranpour 39:2, "the control group that's part of the Leonidas"; Wargocki 63:13, "members of the control group ... a confidante group for discussion and strategy"; Velez 54:24 "the control group board."

[9] Addington 38:3, "the Leonidas group already had them retained"; Bostic 56:1; Burman 53:4, "Leonidas ... they have an arrangement with Shugart in some form"; Iranpour 75:2-24, knows of Leonidas retainer and that it has been subpoenaed and that Shugart has refused to produce it.

[10] Addington 46:10-47:7, 53:3, law firm directed by "group effort" that includes "Leonidas Board members"; Bostic 67:4, "control group" including Leonidas made decision to convert federal action to a class action; Burman 40:22, Leonidas decided to commence this litigation; Iranpour 39:16 the "control group" including Leonidas decided whether to participate in the TA No. 9 arbitration; Wargocki 82:10-18 "control group" including Leonidas controls 'legal strategy on this case'; Velez 54:21-55:15 'legal strategy' controlled by Leonidas and individuals outside Leonidas other than named plaintiffs.

[11] Addington 38:2, "I did not personally select them. The Leonidas group already had them retained" Bostic 50:20, "Leonidas was already connected with them and talking to them about options"; Burman 49:13 "... either Leonidas, LLC, or Eric [Ferguson] or Jeff [Koontz], or a combination thereof ..."; Iranpour 70:21 "I wasn't involved in that selection"; Wargocki 72:3-11, "I wasn't involved in selecting Shugart ... I believe it was ... Ferguson and Jeff Koontz"; Velez, 39:13-17, "I did not contact them myself ... it was the Leonidas board that ... contacted STK"

13, Ex. I).[12] Not one of the Plaintiffs has ever seen an invoice from their attorneys.[13]

Plaintiffs Addington, Burman, Bostic and Wargocki all testified that they were asked to be plaintiffs.[14] Plaintiff Iranpour testified that the litigation had "already started" before he was solicited to be a named plaintiff. (Iranpour, 60:11). Plaintiff Addington testified that he "was informed by Eric Ferguson[15] that there would be a lawsuit, and he asked if I would be a plaintiff." (Addington, 39:15). Plaintiff Wargocki testified that preparation of the lawsuit had already been in progress by the time he got involved. (Wargocki 62:10).[16]

The exploitation of named Plaintiffs as figureheads or as a "key" to the courthouse door renders them inadequate as class representatives. *Saylor v. Lindsley*, 456 F.2d 896, 900 (2d Cir. 1972); *Beck v. Status Game Corp*., 1995 U.S. Dist. LEXIS 9978 at *4 (S.D.N.Y. 1995); *Griffin v. GK Intelligent Sys., Inc*., 196 F.R.D. 298, 302 (S.D. Tex. 2000) (rejecting the proposed representative who "have taken little or no supervisory role over lead counsel ... do not participate in litigation decisions, do not receive regular cost/expense information, and they learn of activity in the case when they're copied on matters already completed"). Similarly, a proposed class representative is inadequate where they are "a mere *alter ego* for one too embarrassed or otherwise constrained from suing in his own right." *Norman v.*

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[12] Addington 59:10; Bostic 66:12; Burman 68:2; Iranpour 91:16; Wargocki 99:16; Velez 65:14.

[13] Addington 43:2; Bostic 56:10; Burman 55:15, "what monthy invoices?"; Iranpour 76:10; Wargocki 79:2 "No, I'm completely detached from any money issue"; Velez 53:22.

[14]Addington 39:16, asked by Ferguson; Burman 49:24 "I don't know specifically why they were chosen by Leonidas or Eric or Jeff"; Bostic 50:20; Wargocki 62:1.

[15] The operating agreement of Leonidas, LLC lists Jeffrey Koontz and Eric Ferguson as the "sole Managers." (Granath Decl. ¶ 12, Ex. H).

[16] Plaintiff Burman testified that he did not personally authorize his counsel to convert the present litigation to a class action. (Burman, 71:20-25).

ARCS Equities Corp., 72 F.R.D. 502, 506 (S.D.N.Y 1976) (italics in original).[17] The named Plaintiffs are just that – alter egos for the managers of Leonidas and the "control group" who have chosen to control this litigation from the shadows.[18]

A district court within the Ninth Circuit recently held that, where named plaintiffs had been solicited to front a litigation strategy developed by others, the "conduct . . . does not look good, does not sound good, and does not smell good. In fact, it reeks. … [and the] court [should] not participate in this scheme by certifying a class." *Bodner v. Oreck Direct, LLC*, 2007 U.S. Dist. LEXIS 30408 at *7 (N.D. Cal. Apr. 25, 2007).

b. <u>Plaintiffs Lack Familiarity With the Action and Do Not Understand Their Fiduciary Obligations as Class Representatives</u>

Plaintiffs' depositions revealed that, in varying degrees, each of them lacked familiarity with this case necessary to fulfill his role as proposed class representative. Evidence of this lack of familiarity includes:

- Ignorance of how many causes of action were in the complaint and/or which causes of action remained before the court (Addington 16:10, "I don't know", 27:15, "I don't know how to answer that"; Iranpour 39:11, there are "five" causes of action);
- Disagreement with their attorney's representations to the Court that the case no longer involves contract-based claims. (Bostic 39:13, breach of contract still part of lawsuit "yes"; Wargocki 57:11, breach of contract "it's in count III");
- Ignorance of why their counsel chose not to participate in an arbitration hearing before a single arbitrator that will in all likelihood be dispositive of Count One. (Addington 126:17, "I don't recall"; Bostic 22:14 "you'd have to ask the attorneys"; Burman 34:6, "I don't know who made the final decision on that, but I believe that that's counsel"; Wargocki 36:18, "if they did, I have no knowledge of that"; Velez 25:13, "I had no real knowledge of that");

[17] *See also Kamean v. Local 363, Int'l Bhd. of Teamsters*, 109 F.R.D. 391, 396 (S.D.N.Y. 1986); *Miller v. Calvin*, 1984 U.S. Dist. LEXIS 21057 (D. Colo. Dec. 20, 1984).

[18] The facts as to who controls Leonidas (and thereby the litigation) are unclear. Plaintiff Velez, supposedly a Leonidas director, testified that he had not attended a corporate meeting for over a year. (Velez, 91:13-92:6). Additionally, Plaintiff Velez identified an individual by the name of Kevin Horner as one of the directors of Leonidas who is currently employed as an American Airlines pilot. (Velez, 60:23, 100:4-103:24).

- Expressing the understanding that contractual damage claims against USAPA could be re-introduced into the litigation at a later date. (Burman 39:18, "... that could come in at some later date ..."; Iranpour 50:15, "I don't know"; Wargocki 54:25:55:3, admits he can neither agree or disagree whether the suit contains a breach of contract claim; Velez 35:3 "not in this case, but, you know I still believe that");
- Plaintiffs' denials that their attorneys had explained to them their fiduciary duties despite the production of apparently misleading documentary evidence "confirming" that Shughart explained these duties the day before it filed its amended complaint. (Addington 15:7, "I don't know that there are [any] personally, no"; Bostic 12:9 "I don't know"; Burman 14:2, "I'm not entirely sure to the extent of my fiduciary responsibilities"; Velez 18:19);
- Plaintiffs' deference to Leonidas and the other members of the control group for all important decisions. (Legal strategy determined by "control group" including Leonidas: Addington 45:10-47:8; Bostic 52:22 "the function of the control group is to work and interact with the plaintiffs on decisions. It's a representative body."; Burman 58:14 "most of the decisions or discussions are among the plaintiff group and the control group ..."; Iranpour 78:5 "for the most part" legal strategy is controlled by the control group consisting of Leonidas; Wargocki 82:10-23 legal strategy is a "collective effort" with the "control group, Leonidas"; Velez 55:15); (Financing controlled by Leonidas: Addington 41:12; Bostic 55:4; Burman 53:4; Iranpour 73:19; Wargocki 79:18-81:7; Velez 51:6 "through the Leonidas group").

The most astonishing indication of the disconnect between these proposed class representatives and their counsel was the Plaintiffs' uniform testimony that they understand USAPA's bargaining objective to be the negotiation of a single CBA incorporating a seniority list conforming to USAPA's constitutional policy.[19] Plaintiffs have thus uniformly disavowed the allegation – pled on their behalf – that USAPA has been conspiring with US Airways to stall negotiations in order to perpetuate Separate Operations.[20] It was this allegation that formed the Court's sole enunciated basis for finding jurisdiction over this matter. (Dkt. 84, 13:1-5). USAPA intends, in the coming week, to request the Court's

[19] Addington 97:20, "that's my understanding"; Bostic 107:1, "they are trying to negotiate towards a single" CBA; Burman 44:9; Iranpour 66:16, "I believe that USAPA is willing to negotiate a single CBA ..."; Wargocki 158:17, "yes, I believe that is their objective"; Velez 48:7, "yes"

[20] Addington 98:15, no evidence of delay; Iranpour 67:12, admits USAPA's 'current objective' is to negotiate a single CBA.

permission to submit a summary judgment motion dismissing this action for lack of subject matter jurisdiction.

The Plaintiffs' lack of familiarity with the case, ignorance of their fiduciary duties, and abdication of supervisory control over legal counsel, render them inadequate class representatives. *Azoiani v. Love's Travel Stops & Country Stores, Inc.*, 2007 U.S. Dist. LEXIS 96159 at * 5 (C.D. Cal. Dec. 18, 2007) (citations omitted); *Burkhalter Travel Agency v. Macfarms Int'l, Inc.*, 141 F.R.D. 144, 153-54 (N.D. Cal. 1991); *Beck*, 1995 U.S. Dist. LEXIS 9978 at *16; *Darvin v. Int'l Harverster Co.*, 610 F. Supp. 255, 257 (S.D.N.Y. 1985).

c. <u>The Proposed Representatives Have Foreclosed the Possibility of Settlement</u>

Each Plaintiff testified that he had foreclosed any possibility of settlement in this action.[21] Plaintiffs' failure to even consider the possibility of settlement in this matter falls markedly short of satisfying their duty, as class representatives, to "use wise judgment in negotiating and approving a fair settlement at the right time." *Norman*, 72 F.R.D. at 506. *See also Kamean v. Local 363, Int'l Bhd. of Teamsters*, 109 F.R.D. 391, 395-96 (S.D.N.Y. 1986).

d. <u>The Proposed Representatives Abandoned Absent Class Members by Seemingly Removing the Request for Wage-Related Damages</u>

A recent Leonidas publication reports that the Plaintiffs' abrupt decision to abandon wage-related damages caused certain class members to "suddenly feel abandoned. . ." (Granath Decl. ¶ 14, Ex. J). Leonidas justified its decision based on a litigation strategy of expediting the trial, whereas several of the named Plaintiffs could not provide a rationale or

[21] Addington 32:24, "no"; Bostic 45:11; Burman 90:23, 126:11, no compromise even if economic circumstances change; Iranpour 150:12, no compromise even if jobs preserved; Wargocki 61:2, 178:20; Velez 39:4, 120:10, any deviation from Nicolau award unacceptable for all of class.

professed ignorance. (*Id.*).[22] This type of claim splitting solely for dubious strategic purposes, combined with the Plaintiffs' ignorance of the strategic rationale for the decision, demonstrates the inadequacy of Plaintiffs to represent the putative class members. *Colindres v. Quietflex Mfg., 235 F.R.D. 347, 375* (S.D. Tex. 2006) ("courts have found class representatives who are willing to risk waiving absent class members' compensatory damages inadequate under Rule 23(a)(4)"); *Miller v. Balt. Gas & Elec. Co*., 202 F.R.D. 195, 203 (D. Md. 2001) (declining to allow amendment to complaint to forego claim for damages because "the proposed removal of the compensatory and punitive damages claims raises serious questions regarding the ability of the named plaintiffs to represent the putative class adequately"); *Zachery v. Texaco Exploration & Prod., Inc*., 185 F.R.D. 230, 244 (W.D. Tex. 1999).

2. Plaintiffs' Counsel Cannot Adequately Represent the Proposed Class

A court must carefully scrutinize the adequacy of legal counsel as a condition of class certification. *Wrighten v. Metro. Hosp., Inc.*, 726 F.2d 1346, 1352 (9th Cir. 1984); *Fendler v. Westgate-California Corp.*, 527 F.2d 1168, 1170 (9th Cir. 1975); *Sweet v. Pfizer*, 232 F.R.D. 360, 371 (C.D. Cal. 2005). When analyzing legal counsel's qualifications, it is appropriate to consider potential ethical breaches that arise in the context of the proposed class representation. *See, e.g., Stavrides v. Mellon Nat'l Bank & Trust Co.*, 60 F.R.D. 634, 637 (W.D. Pa. 1973).

a. Zeal and Competence Shown To Be Lacking

As described in greater detail in the Granath and Murphy Declarations, the litigation to date reflects numerous manifestations of inadequate zeal and competence, including:

- The Court-recognized failure to zealously pursue injunctive action (Granath Decl. ¶

[22] Addington 58:4-16; Bostic 59:7-14; Iranpour 80:10; Wargocki 85:25, 86, "... but to get 1800 people to agree on anything is a fairly hard task, so its doesn't surprise me ..."; Velez 58:4-16.

17);

- Counsel's failure to participate in arbitration proceedings held on January 8, 2009, which will be dispositive of Plaintiffs' Count One claims. (Granath Decl. ¶ 18) (Declaration of Theresa Murphy, Esq. ¶ 4);
- Counsel and Plaintiffs' failure to accept the proffered date of January 9, 2009 for an arbitration hearing for its Count Two claims. (Granath Decl. ¶ 19);
- The filing of a class action state court lawsuit that counsel admitted was "duplicative" of the federal action and has been dismissed for failure to state a claim. (*Id*. at ¶ 20);
- Counsel's eleventh hour amendment of its federal complaint to allege a class action thereby defeating the Plaintiffs' interest in an expedited trial (*Id*. at ¶ 21);
- Counsel's sudden decision to jettison its own prior demand for a jury trial and almost immediate introduction of dues/fees-related claims undermining that new objective (*Id*. at ¶ 22);
- Counsel's filing of stipulated facts (Dkt. 77) without adequate prior review. (*Id*. at ¶ 23, Ex. O);
- Counsel's conspicuous inconsistency in founding its lawsuit on USAPA's failure to give due consideration to West pilots' interests while promoting, through the dues-related portion of its class motion a policy that would *perpetuate the West pilots' self-exclusion*;
- Counsel's serving subpoenas without providing parties prior notice in violation of Rule 45(b)(1). (*Id*. at ¶ 24, Ex. P);
- Counsel's failure to advise the named Plaintiffs of potential conflicts existent amongst themselves and between themselves and Leonidas, LLC; (Addington 42:18, not asked to consent; Bostic 56:7, not asked to consent; Burman 52:22, not asked to consent; Iranpour 75:6, cannot recall if ever asked; Wargocki 78:2, "you know, I don't know"; Velez 53:18 "no. Well – yeah, no").

USAPA submits that the issues referenced above support the conclusion that Plaintiffs' counsel does not possess adequate zeal and competence to represent the putative class.

b. <u>Counsel and Named-Plaintiffs' Conflict Of Interest Over the Dues Issue</u>

Counsel and Plaintiffs, through their new class-based efforts to block any dues obligation whatsoever, are not only undermining the political influence of the class members they seek to represent, but counsel has placed itself in conflict with the policies of its other

client, and bankroller of this litigation, Leonidas. According to Leonidas, its long-held position is that the West pilots' collective self-interest, as well as their "good faith" obligation, *requires them to pay full dues* and become members in good standing of USAPA. (Granath Decl. ¶¶ 25-26).

Thus, not only are the Plaintiffs' litigation goals in conflict with the interests of fellow class members, and the class as a whole, but Plaintiffs' counsel is acting in conflict with the interests of its pre-existing and current client – Leonidas, LLC. Such conflict renders Plaintiffs' counsel, and Plaintiffs, inadequate *See*, ER 1.8(f), Ariz. S. Ct. R. 42; *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994) ("adequate representation depends on the qualifications of counsel for the representatives" including an "absence of antagonism."); *Arnold v. United Artists Theatre Circuit*, 158 F.R.D. 439, 448-449 (N.D. Cal. 1994); *East Tex. Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 405 (1977) (*citing Hansberry v. Lee*, 311 U.S. 32, 44-45 (1940)); *Kamean*, 109 F.R.D. at 395 ("to satisfy this requirement, the named plaintiffs must demonstrate that neither they nor their attorneys are subject to extraneous influences that would create a conflict").

C. **The Proposed Class Does Not Meet the Prerequisites of Rule 23(a)**

1. **Numerosity: Joinder is Practicable**

Plaintiffs make but a single argument attempting to satisfy the numerosity requirement: that because the putative class has "1700 members" *therefore* it suffices. But the rule is not satisfied merely by some quantity of members. *See, e.g., Bacon v. Honda of Am. Mfg. Inc.*, 370 F.3d 565, 570 (6th Cir. 2004), *cert. denied*, 543 U.S. 1151 (2005) ("there is no automatic cutoff point at which the number of plaintiffs make joinder impractical, thereby making a class-action suit the only viable alternative"). Rather, the test is whether joinder is impracticable. Incredibly, Plaintiffs do not even address the practicality of joinder and fail to offer any evidentiary support whatsoever.

As discussed in further detail in the Davison Declaration (¶¶ 15-18), this leaves multiple problems for Plaintiffs, including: 1) there is no basis for characterizing joinder of interested West pilots as "impractical" given their common work environment and Leonidas' sophisticated communications network; 2) the maximum relevant class size should be deemed to be 49 or so pre-merger West pilot furloughees; 3) Plaintiffs' utter failure to address the individualized nature of dues-related damages precludes any determination as to the appropriateness of class designation or appropriate class-size; 4) joinder is facilitated by Plaintiffs being domiciled exclusively in the Company's Phoenix and Las Vegas bases. *See, e.g., Lawrence v. Town of Irondequoit*, 246 F. Supp. 2d 150, 173 (W.D.N.Y. 2002); *Brosious v. Children's Place Retail Store*, 189 F.R.D. 138 (D.N.J. 1999); *Mollen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999).

2. **Commonality & Typicality: Named Plaintiffs Were Cherry-Picked for the Dismissed Counts Based on Furloughs**

Plaintiffs' counsel and their client Leonidas 'cherry-picked' the named-Plaintiffs for the problem of the moment that existed at the inception of this lawsuit, namely, the consequences of US Airways' pilot furloughs announced on June 12, 2008. Thus, three of the plaintiffs – Iranpour, Wargocki and Bostic – are junior first officers in the lowest tenth percentile of seniority at 92.4, 96.6, and 98.2 percent respectively. They were selected based on their immediate vulnerability to the Company's planned furlough of 175 West pilots. (Dkt. 1, ¶¶ 84-85; Dkt. 77, ¶¶ 41-42). The remaining three Plaintiffs – Velez, Addington, and Burman – were junior captains whose seniority was 39.5, 51.3, and 57.4 percent respectively. They were selected due to their vulnerability to immediate demotion or lost promotion. (Dkt. 1 ¶¶ 86-87). Not only are the Plaintiffs decidedly atypical of the class which they seek to represent, they are deliberately so. (Davison Decl. ¶¶ 5-8).

The senior forty percent of the West pilot list clearly has divergent interests from the named Plaintiffs and may be *prejudiced* by the instant litigation. These senior West captains

do not face imminent loss of employment or even of their captaincies. Moreover, under USAPA's proposal, their Phoenix and Las Vegas-based captains' positions are secured both against more senior East pilots and the more senior pilots of future merger partners, e.g., United. (Davison Decl. ¶ 9).

As discussed in detail in the Gentile Declaration, USAPA's proposal also offers the means to break through the logjam that existed under ALPA Merger Policy, paving the way for wage and benefit increases that, under ALPA, were effectively unattainable. Unlike a uniform consumer products case where every litigant stands to obtain a monetary benefit, it could not be said that *any* West pilot necessarily shares an interest in litigation that disrupts the current collective bargaining process and undermines the ability of the collective bargaining representative to finance its efforts to advocate on behalf of collective interests.

The atypicality of the named Plaintiffs has actually increased with the passage of time with two of the Plaintiffs already on furlough and a third Plaintiff scheduled for furlough no later than April 1, 2009. The litigation interests of these furloughed Plaintiffs sharply diverges from that of the remainder of the West pilot group since the bump/displace prohibition contained in the Transition Agreement would prevent them from obtaining any immediate benefit from the implementation of the Nicolau list. (Trans. Agmt. § IV.A.2). Their status could drive them to advocate prolonging litigation or to a settlement that protects their more particularized interests in re-employment. (Davison Decl. ¶ 16).

D. Class Certification is Not Necessary or Manageable in This Case

Neither the injunctive nor the monetary relief sought by the Plaintiffs requires class certification:

A successful injunction by the named Plaintiffs culminating in an order requiring USAPA to negotiate toward the implementation of the Nicolau list would have the same impact *with or without class* certification thereby rendering class certification both

unnecessary and "inappropriate." *Owner-Operator*, 213 F.R.D. at 545; *Ruhe v. Block*, 507 F. Supp. 1290, 1295 (E.D. Va. 1981); *Gray v. Int'l Bhd. of Elec. Workers*, 73 F.R.D. 638, 640 (D.D.C. 1977). The downside of such unnecessary certification is the compulsion of individual West pilots to be parties to a lawsuit that may be contrary to their interests.

Plaintiffs' failure to even attempt to supply this Court with a Trial Plan constitutes an admission that this case is not manageable. The burden to present a Trial Plan is on Plaintiffs, but they have not even tried to meet it. *See Valentino v. Carter-Wallace*, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001), *opinion amended on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001) (party seeking class certification bears the burden of presenting a suitable and realistic plan for trial of the class claims).

E. Plaintiffs Have Waived Any Class Beside the (b)(2) Class Sought

This Court set a firm deadline for Plaintiffs to "file whatever motions for class certifications they wish by December 29." (Dkt. 116). The Court gave the Plaintiffs the benefit of the Court's observations at the hearing on December 15. Now, Plaintiffs have sought certification confined to a (b)(2) class. Fairness, the avoidance of prejudice to Defendants, and waste of judicial resources all dictate that Plaintiffs have waived certification on any class other than the (b)(2) class they sought – just the same and no less had Plaintiffs failed to move for certification in a timely manner under an applicable local rule. *See Grandson v. Univ. of Minn.*, 272 F.3d 568, 574 (8th Cir. 2001); *Howard v. Gutierrez*, 474 F. Supp. 2d 41 (D.D.C. 2007); *Seils v. Rochester City Sch. Dist.*, 192 F. Supp. 2d 100, 126 (W.D.N.Y. 2002), *judgment aff'd*, 99 Fed. Appx. 350 (2d Cir. 2004), *cert. denied*, 544 U.S. 920 (2005) ("plaintiffs' failure to move [under local rule] in a timely fashion is deemed an intentional abandonment and waiver of all class allegations).

IV. REMEDY

For the above stated reasons, USAPA respectfully requests that the Court deny, with prejudice, Plaintiffs' motion for class certification (Dkt. 120), and order the class allegations in the Amended Complaint (Dkt. 86) struck. Alternatively, USAPA requests adequate time to complete discovery that has been delayed by the non-cooperation of Leonidas, LLC and the Plaintiffs.

Respectfully Submitted,

Dated: February 17, 2009 By:

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