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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

US AIRWAYS, INC., a Delaware corporation, *et al.*, *Plaintiff*, vs. Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI, on behalf of themselves and all other similarly-situated individuals, and US AIRLINE PILOTS ASS'N, an unincorporated association, *Defendants*.	CASE NO. 2:10-cv-01570-PHX-ROS **ADDINGTON DEFENDANTS AMENDED MOTION FOR CLASS CERTIFICATION**

Plaintiffs Don ADDINGTON, John BOSTIC, Mark BURMAN, Afshin IRANPOUR, Roger VELEZ; and Steve WARGOCKI (the "Addington Pilots"), move this Court, pursuant to Rule 23(b)(1)(A), for class certification. Plaintiffs base this motion on the *Complaint for Declaratory Relief* (Doc. 1), the *Memorandum of Points and Authorities* that follows, and the declaration of Marty Harper, Doc. 87.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

A. Class Definition

The proposed "West Pilot Class" is comprised of approximately 1,800 individuals. (Doc. 1 at ¶ 20; Doc. 34 at ¶ 21). It is defined as: "All pilots employed by the airline US Airways in September 2008 who were on the America West seniority list on September 20, 2005." (Doc. 1 at ¶ 19). All of these class members: (1) were represented in the Nicolau Arbitration and the Transition Agreement (Doc. 34 at ¶ 38); (2) have the right to a fair and equitable integration of their seniority with that of the pilots of the pre-merger U.S. Airways (id. at ¶¶ 50-51); (3) are owed a duty of fair representation ("DFR") by Defendant U.S. Airline Pilots Association ("USAPA") (Doc. 1 at ¶ 14; Doc. 34 at ¶ 82); and (4) will suffer injury if USAPA enters into and implements a collective bargaining agreement ("CBA") that disregards the Nicolau Arbitration award on seniority integration ("Nicolau Award") (Doc. 34 at ¶¶ 78-81).

B. Class-Wide Remedies

The Addington Pilots seek the following declaratory relief on behalf of the West pilot Class:

(1) U.S. Airways would neither commit an unfair labor practice nor a status quo violation if it were to refuse to bargain for a CBA that used a seniority list other than the Nicolau Award ("Non-Nicolau CBA");

(2) USAPA would be in breach of its DFR if, at sometime in the future, it were to implement a Non-Nicolau CBA;

and

(3) U.S. Airways would be liable to the West Pilots if, at some time in the future, it were to implement a Non-Nicolau CBA.

(*Id.* at ¶¶ 62-64).

C. Common Class Issues

Each class member has a claim for the same relief claimed by the Addington Pilots. Such claims would raise issues of fact and law that would be common to all class members. These issues include:

(1) Whether USAPA would be motivated by wrongful hostility towards West Pilots if it were to implement a Non-Nicolau CBA?

(2) Whether, if USAPA were to implement a Non-Nicolau CBA in the future, it would have no legitimate union purpose for doing so?

(3) Whether US Airways would be liable to the West Pilots if it knowingly participated in the implementation of a Non-Nicolau CBA?

and

(4) Whether USAPA must pay the Addington Pilots' attorneys' fees and costs incurred enforcing the DFR?

II. LEGAL ARGUMENT

A. Legal Standards

1. There is a strong presumption in favor of class certification.

On a motion for class certification, courts accept the moving party's factual allegations as true. *Blackie v. Barack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975); *Shelter Realty Corp. v. Allied Maint. Corp.*, 574 F.2d 656, 661 n.15 (2d Cir. 1978). Courts also apply a

presumption "in favor and not against the maintenance of the class action." *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968). In so doing, if the court has doubts about the merits of class action treatment, those doubts "should be resolved in favor of class certification." *Brown v. Cameron-Brown Co.*, 92 F.R.D. 32, 49 (E.D. Va. 1981).

2. The Court should treat the West Pilot Class as if it were a plaintiff class.

The concerns applicable to certification of a defendant class do not apply here. This is so because in the context of a declaratory action "the definitions of 'claimant' and 'respondent' are effectively reversed." *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1322 (9th Cir. 1998); *see also County Materials Corp. v. Allan BlockCorp.*, 502 F.3d 730, 734 (7th Cir. 2007) (explaining, "the roles of plaintiff and defendant are reversed" in a declaratory judgment action). Because the roles are reversed, a defendant class in a declaratory action is "in effect a plaintiff class." *Henson v. East Lincoln Township*, 814 F.2d 410, 413 (7th Cir. 1987). Consequently, in the context of a declaratory action, a court should apply Rule 23 to a defendant class as if it were a plaintiff class. This Court should do so here.

3. The West Pilot Class satisfies Rules 23(a) and 23(b)(1)(A).

Pursuant to Rule 23(a), a party seeking class certification must satisfy four conditions: (1) class size makes joinder of all members impracticable; (2) substantial questions of law or fact are common to the class; (3) the representative plaintiffs' claims are typical of class-wide claims; and (4) the representative plaintiffs and their counsel will fairly and adequately protect the interests of the class. *In re Mego Financial Corp. Securities Litig.*, 213 F.3d 454, 462 (9th Cir. 2000). The proposed class must also satisfy the requirements of one subdivision

of Rule 23(b). *Id.* The proposed West Pilot Class satisfies Rule 23(a) and Rule 23(b)(1)(A).

B. The West Pilot Class Satisfies Rule 23(a).

1. Numerosity

Rule 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." *East Texas Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 405 (1977). There is no specific number cut-off for class size. *Ballard v. Equifax Check Servs., Inc.*, 186 F.R.D. 589, 594 (E.D. Cal. 1999). Indeed, one court found numerosity satisfied by as few as 39 class members. *Patrick v. Marshall*, 460 F. Supp. 23, 26 (N.D. Cal. 1978). The West Pilot Class has about 1800 members. It, therefore, readily satisfies numerosity.

2. Commonality

The Supreme Court refined its standards for commonality in *Wal-Mart Stores, Inc. v. Dukes*, 2011 WL 2437013 (June 20, 2011). The Court explained:

> What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Id. at *7 (*quoting* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N. Y. U. L. Rev. 97, 132 (2009)). The class in *Dukes* lacked commonality because there could be numerous answers to the question of the propriety of Wal-Mart's pay and promotion decisions. This is because Wal-Mart provides "local managers[ ] discretion over pay and promotions." *Id.* at *4; *see also id.* at *8 ("The whole point of [Wal-Mart] permitting discretionary decisionmaking is to avoid evaluating employees under a common standard."). Wal-Mart has no

"uniform employment practice" that could be evaluated class-wide in a single determination:

> The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's "policy" of allowing discretion by local supervisors over employment matters .On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy against having uniform employment practices.

Id. at *9. The proof for the *Dukes* class representatives, therefore, would not be the same proof as that for class members who worked at different stores. *See Gen. Telephone Co. of S.W. v. Falcon*, 457 U.S. 147, 159 (1982) (reversing class certification because the class representative offered different proof for his personal claim than what was offered for the class).

Dukes does not impact certification here. The West Pilots challenge what would be a uniform practice—USAPA and US Airways negotiating and implementing a Non-Nicolau CBA (in the future). Whether this would be a breach of duties owed to West Pilots is susceptible to a single answer applicable to all West Pilots. The answer and proof for the class representatives would be the same as that for the class as a whole. The West Pilot Class, therefore, readily satisfies commonality.

3. Typicality

"The question of typicality in Rule 23(a)(3) is closely related to the preceding question of commonality." *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). The difference is that typicality considers whether, in regard to material issues, "the interest of the named representative aligns with the interests of the class." *Hannon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Typicality does

not apply to all aspects of a plaintiff's "interest." Hence, it is not necessary that all class members share the named plaintiffs' enthusiasm for the litigation. *See Abrams v. Communications Workers of Am.*, 59 F.3d 1373, 1378 (D.C. Cir. 1995) (typicality is satisfied regardless that it is not established that all class members favor the litigation).

Like other West Pilots, the Addington Pilots were on the America West seniority list in 2005 and 2008. (Doc. 34 at ¶¶ 3-8). Like other West Pilots, they would be aggrieved if USAPA (in the future) were to implement a Non-Nicolau CBA. Like other West Pilots, they have an interest in preventing the implementation of a Non-Nicolau CBA. Like all West Pilots, they have an interest in seeing USAPA consistently adhere to its DFR. The Addington Pilots, therefore, are sufficiently typical of the class they seek to represent.

4. Adequacy

The question of adequacy considers the qualifications of class counsel and of the proposed class representatives. The analysis depends on three factors: (a) "the qualifications of counsel for the representatives;" (b) "an absence of antagonism, a sharing of interests between representatives and absentees;" and (c) and "the unlikelihood that the suit is collusive." *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994). "[T]he named representatives must appear able to prosecute the action vigorously through qualified counsel" and "the representatives must not have antagonistic or conflicting interests with the unnamed members of the class." *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978); *see also Wetzel* v. *Liberty Mut. Ins. Co.,* 508 F.2d 239, 247 (3d Cir. 1975) ("Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified,

experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class.").

"Although questions concerning the adequacy of class counsel were traditionally analyzed under the aegis of the adequate representation requirement of Rule 23(a)(4) . . . those questions have, since 2003, been governed by Rule 23(g)." *Sheinberg v. Sorensen*, 606 F.3d 130, 132 (3d Cir. 2010). Rule 23(g) provides, in relevant part, as follows:

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

Rule 23(g)(1)(C).

Rule 23(g) also provides that a court "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class. . ." Rule 23(g)(1)(B). Due to the unusual procedural posture of this case, the Court has particularly pertinent evidence of counsel's abilities. The Court has the evidence of counsel's performance in the closely related class litigation conducted before Judge Wake in Case 2:08-cv-0163. That litigation involved the same class representatives, same attorneys, and same class definition. See *Addington v. US Airline Pilots Ass'n*, 2:08-cv-0163 (Mar. 10, 2009) (Doc. 248 in that matter). In a little over four months, this team was able to go from class certification to a favorable jury verdict and injunctive relief. *Id.* (Doc. 593 in that matter). This is compelling evidence of adequacy. Additional evidence is addressed below.

a. Counsel readily satisfies adequacy.

Class counsel is experienced in prosecuting large class actions. *See* Marty Harper, *Decl.* (June 10, 2011) (Doc. 87). Counsel is also experienced in prosecuting complex Railway Labor Act matters. *See, e.g., Airline Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65 (1991); *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174 (9th Cir. 2010); *Rachford v. Air Line Pilots Ass'n., Int'l*, 2006 WL 927742 (N.D. Cal. 2006) (Case No. C-03-3618-PJH). The Court should readily find that counsel satisfies the adequacy standards of Rule 23(g), and on that basis satisfies adequacy.

b. Plaintiffs readily satisfy adequacy.

In regard to the adequacy of representative plaintiffs, "[t]he court is bound to take the substantive allegations of the complaint as true." *Blackie*, 524 F.2d at 901, n.17. There is no suggestion here that any of the Addington Pilots have interests antagonistic to the interests of the class. There is no such evidence, for example, in the record of the litigation before Judge Wake. The Court, therefore, should find that Plaintiffs also satisfy adequacy.

C. The West Pilot Class Satisfies Rule 23(b)(1)(A).

Rule 23(b)(1)(A) applies where "individual adjudication of the controversy would prejudice . . . the party opposing the class." *United Broth. of Carpenters & Joiners of America, Loc. 899 v. Phoenix Assoc., Inc.*, 152 F.R.D. 518, 521 (S.D.W. Va. 1994). The potential for prejudice to the party opposing the class is most acute "where the party is obliged by law to treat the members of the class alike (a utility acting toward customers; a government imposing a tax), or where the party must treat all alike as a matter of practical necessity (a riparian

owner using water as against downriver owners)." *Amchem Products Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

For purpose of class certification, US Airways is the party "opposing the class" (but not opposing class certification) for whom "inconsistent or varying adjudications . . . would establish incompatible standards of conduct." Rule 23(b)(1)(A). This is so because the inherent nature of integrating pilot operations after a merger requires a single CBA and a single merged pilot seniority list. *See, e.g., Bernard v. Air Line Pilots Ass'n, Int'l*, 873 F.2d 213, 218 (9th Cir. 1989) (remedy directing the airline to operate using a single CBA and a single "system for promotions and furloughs"). This means that, as a practical necessity, US Airways must have a single standard of conduct to integrate pilot operations. The circumstances here, therefore, strongly favor Rule 23(b)(1)(A) certification.

Consider, for example, what would happen if two West pilots sued separately and obtained different outcomes—one outcome that US Airways is liable if it implements a Nicolau CBA and the other outcome that it is liable if it implements a Non-Nicolau CBA. With both such outcomes, US Airways cannot avoid liability. If it implements a Non-Nicolau CBA, the prevailing West pilot could hold it liable for doing so. If it refuses to do so, USAPA could hold it liable for refusing to bargain in good faith. Class certification solves this dilemma by binding all West Pilots to one outcome.

In short, because there can only be one scheme of seniority integration, there can only be one outcome on the class members' claims. To limit the class members' claims to one outcome, there must be class action treatment pursuant to Rule 23(b)(1)(A).

III. CONCLUSION

Rule 23(b)(1)(A) class certification, as proposed herein, will provide efficient adjudication of common issues and a means to obtain a single result consistent with the practicality that there can only be one scheme of seniority integration.

Dated this 24th day of June, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June 2011, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the ECF System for filing and transmittal.

/s/Andrew S. Jacob
By _____