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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

US Airways, Inc., a Delaware Corporation,

Plaintiff,

v.

Don ADDINGTON, an individual; John BOSTIC, an individual; Mark BURMAN, an individual; Afshin IRANPOUR, an individual; Roger VELEZ, an individual; and Steve WARGOCKI, an individual, on behalf of themselves and all other similarly-situated individuals

and

US AIRLINE PILOTS ASSOCIATION, an Unincorporated association,

Defendants.

Case No. 2:10-cv-01570-PHX-ROS

DEFENDANT USAPA'S RESPONSE IN OPPOSITION TO THE ADDINGTON DEFENDANTS' MOTION FOR CLASS CERTIFICATION

The Court should deny the instant motion for class certification (Doc. # 86; or the amended filing, Doc. # 91) on any one of three grounds:

First, at the threshold, the motion is procedurally defective. The Addington defendants cannot invoke Rule 23, as they must, because they seek to certify a class that is not supported by any class allegations before this Court, let alone any adequate allegations. Rather, they seek relief that was dismissed with the cross-claim, or that was not pled in any counterclaim.

Second, and alternatively, the motion fails on its merits. No evidence whatsoever has been offered to establish the elements of commonality, typicality, or adequate class representation, as is required under 23(a)(2), (3) and (4). And, no "incompatible standards," as required under 23(b)(1)(A), can be shown since application of the RLA, and consideration of USAPA's Answer and Counterclaim, prevent that.

Third, even if a class could be certified, as a practical matter, none is necessary. The predictable lack of standing that any West pilot would have to sue the company over bargaining, which only the union has standing to bring, together with the operation of collateral estoppel, means that no class is necessary to effectuate the relief sought by the company in its Count III or by USAPA in its Counterclaim.

I. THE ADDINGTON CO-DEFENDANTS SEEK TO CERTIFY A CLASS IN THE ABSENCE OF CLASS-ALLEGATIONS IN ORDER TO OBTAIN RELIEF DISMISSED WITH THE CROSS-CLAIM.

While the motion purports to rest on the company's complaint (*see* Doc. # 86, page 1:24 citing to Doc. # 1)[1], the class allegations *actually cited* in support of the motion are

[1] Or in the amended filing, at Doc. # 91, at p. 1, line 24. [Note: all page cites are to ECF-generated

almost entirely from the co-defendants' dismissed cross-claim, i.e. Doc. No. 34 (*see* Doc. # 86, page 5: lines 5, 9, 11, 13 and 16; page 6: line 4; page 9: line 20).[2] Yet there is no Addington cross-claim to rely upon. This Court dismissed the only one pled after finding that the Court could not "convert an unripe case into a ripe case." (Doc. # 85, p. 9:12). Hence the class allegations in the dismissed cross-claim are necessarily inadequate to support the instant motion.

Nor can the Addington defendants rely upon class allegations they make in a counterclaim because they chose not to plead any. Instead, they chose to admit the *company's* class allegations. (Doc. # 34, p. 3, ¶¶ 18-25). Yet, the Addington defendants' motion does *not invoke* the company's class allegations. Worse, defendants inexplicably seek to certify a class upon specific allegations never pled by the company while expressly seeking "class-wide remedies" not pled by any party anywhere in this action (Doc. # 86, p. 5:18).[3] Moreover, defendants present class issues invented only for the instant motion (Doc. # 86, p. 6:5-20).[4] The only pleading cited is defendants' general admission to the prayer for relief in Count I and to their *denials* of the remainder of the company's prayer for relief.

Consequently, at the threshold, the Addington defendants' motion should be denied as a matter of law on procedural grounds because it fails to properly invoke Rule 23. As presented to this Court, the defendants' motion simply does not rely upon any class allegations that are pending. That is fatal because Rule 23 expressly applies only to members of a class that "may sue or be sued..." i.e. in a pled class action. Rule 23(a). There

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page numbers; cites to line numbers are to internal line numbering]

[2] Or in the amended filing, Doc. # 91, at p. 5: lines 5, 9, 11, 13 and 16; p. 6: line 4; p. 10: line 8.

[3] Or in the amended filing, Doc. # 91, p. 5:18.

[4] Or in the amended filing, Doc. # 91, p. 6:5-20.

is no mystery to this legal prerequisite. For an "action to go forward under Rule 23, the pleader must set forth sufficient *allegations* to show that the four requirements set forth in subdivision (a) are satisfied and that the action falls within one of three categories described in subdivision (b)." Wright, Miller & Kane *Federal Practice and Procedure*: Civil 3d § 1798, p. 218 (emphasis added) (*citing* numerous cases in footnote 13; *see also*: *Federal Procedure, Lawyers Edition* (2011) § 12:49 ("allegations of the facts necessary to bring a proposed class action within the requirements of Fed. R. Civ. P. 23 must be included in the complaint")); *Newberg On Class Actions* (Thomson & West, 2002), § 3.1-2 (same); *McLaughlin On Class Actions: Law and Practice 7th Edition* (2011), Vol. 1, § 3:12 (noting that the Supreme Court "has insisted on 'rigorous analysis' and a 'close look' at the claims and defenses" in the pleadings (*citing Amchem Products v. Windsor*, 521 U.S. 591, 615 (1997)). Specific *facts* must be alleged to meet Rule 23; mere invocation of the language in the rule is insufficient. *Gillibeu v. City of Richmond*, 417 F.2d 426, 432 (9th Cir. 1969). And merely purporting to bring an action on behalf of others or merely captioning pleadings as a class action is not adequate. *See e.g.*, *Cheng v. State of Ill.*, 438 F. Supp. 917 (N.D. Ill. 1977) (declining certification where no allegations appeared in pleadings despite caption); *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1970)). In the absence of class allegations a court is not free to convert an action into a class action. *See e.g.*, *Wilson v. Zarhadnick*, 534 F. 2d 55, 57 (5th Cir. 1976). In such circumstances, as are apparent here, a motion for certification cannot be granted. *See City of Fort Lauderdale v. Scott*, 2011 U.S. Dist. LEXIS 19335, at *30 (S.D. Fla. Feb. 28, 2011) (denying class certification motion given absence of "viable pleading that defines the

class").

II. ASSUMING, *ARGUENDO*, THAT THE CLASS WAS PROPERLY PLED, THE MOTION FAILS ON ITS MERITS.

A) The Addington Defendants Make No Attempt To Carry Their Burden, Preventing This Court From Making The Necessary Findings Required Under Rule 23.

Before certifying a class, a trial court "must determine" by conducting a "rigorous analysis" whether the party seeking certification has met the prerequisites of Rule 23. Rule 23(c)(1)(A); *Valentino v. Carter-Wallace, Inc*., 97 F.3d 1227, 1233 (9th Cir. 1996). The party seeking class certification "bears the burden of demonstrating that he has met each of the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b)." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001), *amended*, 273 F.3d 1266 (9th Cir. 2001). "Failure to carry the burden on any Rule 23 requirement precludes certifying a class action." *Leuthold v. Destination America, Inc.*, 224 F.R.D. 462, 469 (N.D. Cal. 2004) (*citing Burkhalter Travel Agency v. MacFarms Int'l, Inc.*, 141 F.R.D. 144, 152 (N.D. Cal. 1991)). "Although class certification is within the discretion of the court, the district court *must* still base its decision to certify on evidence." *Botelho v. State of Hawaii*, 2010 U.S. Dist. LEXIS 16936, at *18 (D. Haw. Feb. 25, 2010) (*citing Armstrong v. Davis*, 275 F.3d 849, 871 (9th Cir. 2001)) (emphasis added). Absent the presentation of any evidence in support of the motion, class certification is properly denied. *Fleming v. Travenol Laboratories, Inc.*, 707 F.2d 829, 833 (5th Cir. 1983) ("faced with a complete lack of data, evidence, memoranda or anything other than the allegations of [movant's] complaint, the district court correctly denied certification of [movant's] proposed class").

This burden is all the more acute where, as here, the motion seeks to certify a *defendant* class. A motion to certify a defendant class requires a trial court to impose *greater scrutiny* for a variety of reasons not applicable to the usual plaintiffs' class. *See e.g.*, *Hansberry v. Lee*, 311 U.S. 32, 42 (1940); *Ameritech Benefit Plan Comm. v. Communication Workers*, 220 F.3d 814 (7th Cir. 2000), *cert. denied,* 531 U.S. 1127 (2001); *Weinman v. Fid. Capital Appreciation Fund*, 262 F.3d 1089, 1105 (10th Cir. 2001); *McBirney v. Autrey*, 106 F.R.D. 240 (N.D. Tex. 1985). As a result, defendant classes are seldom certified. *See Bakalar v. Vavra*, 237 F.R.D. 59, 64 (S.D.N.Y. 2006); *In re Gap Stores Sec. Litig*.,79 F.R.D. 283, 292 (N.D. Cal. 1978); *Thillens, Inc. v. Community Currency Exchange Ass'n*, 97 F.R.D. 668, 674 (N.D. Ill. 1983) (noting that defendant classes raise "due process concerns not inherent in plaintiff class actions").

Notwithstanding their heavier burden, the Addington defendants have presented *virtually no evidence* in support of their motion to certify a defendant class: indeed no evidence whatsoever upon which to find the prerequisite elements of commonality, typicality, or the adequacy of the class representatives. Instead, defendants ask this Court to prematurely certify a class of 1,800 merely by invoking a formulaic recitation of the Rule 23 requirements. Moreover, as noted above, the Addington pilots inexplicably cite to allegations contained in their cross-claim when that cross-claim has already been dismissed.

The only evidence offered would merely go to one element, the adequacy of class counsel. But even that consists of a lone affidavit submitted in the name of lead counsel attesting to the familiarity of the law firm with respect to the prosecution of class actions. While this might demonstrate counsels' qualifications, surely this is inadequate for

certification as a matter of law: certification motions supported by nothing more than *attorney affidavits* are routinely denied. *See e.g.*, *Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1310 (9th Cir. 1977) (affirming denial of class certification motion, noting that "only two affidavits were submitted by the appellants, and both were of their trial counsel" and that the "contents of those affidavits added little, if any, factual support to the class action allegations."); *Botelho*, 2010 U.S. Dist. LEXIS, at *15-16 (denying certification where the "only purported evidence submitted along with the motion [was] the affidavit of plaintiffs' counsel…"); *Romero v. Flaum Appetizing Corp.*, 2011 U.S. Dist. LEXIS 23782, at *5 (S.D.N.Y. Feb. 28, 2011) (same). Hence, the Addington defendants ask this Court for a special exception to the rule – but to accept would risk reversible error.

Furthermore, reliance on the former *Addington* trial litigation, including its class certification, is woefully misplaced. That litigation was dismissed on appeal for lack of jurisdiction and thereby rendered a legal nullity incapable of substituting for absent pleadings or evidence here. Moreover, that class certification was appealed on the merits but not reached on appeal when no jurisdiction was found. Even if it could substitute, new facts would caution against it. It is undisputed that more than two years have elapsed since certification in the prior trial. It cannot be disputed that US Airways was not actively involved in the trial litigation when the prior certification was ordered, but it is now. In addition, the present motion differs from the earlier in that the Addington defendants now seek to certify a Rule 23(b)(1)(a) class type, whereas in the earlier trial they sought and obtained 23(b)(2) class certification. Consequently, the dismissed class certification in *Addington* does not relieve the movants from satisfying their burden of class certification

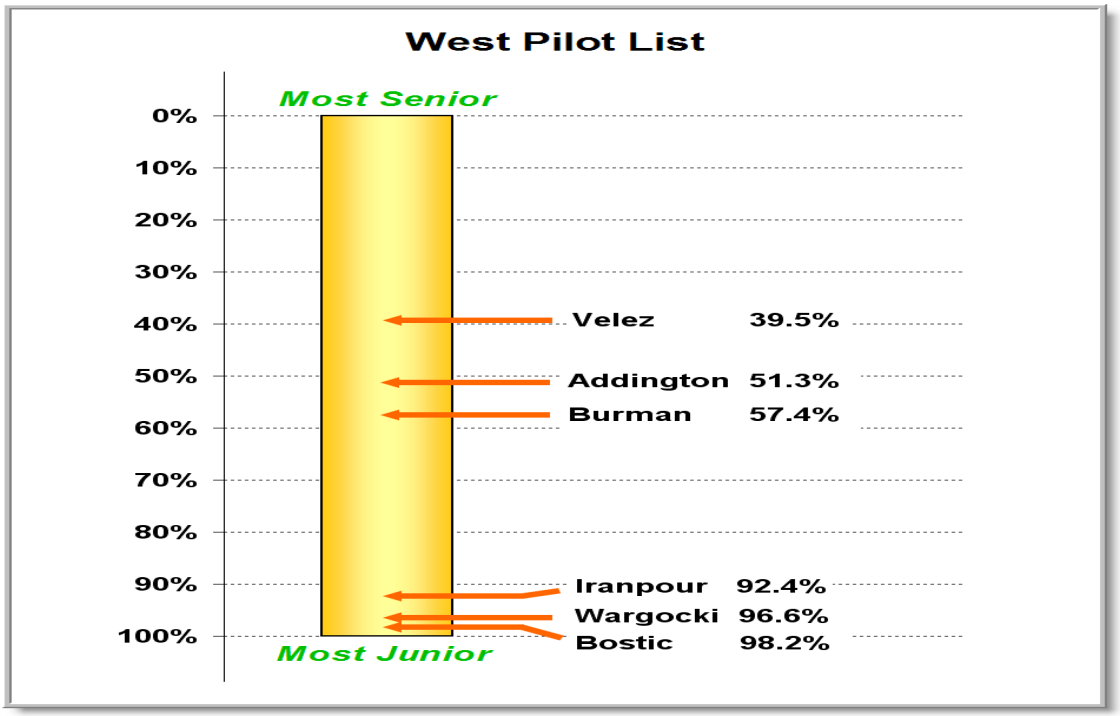
now. *See Zimmerman v. Epstein Becker & Green, P.C.*, 2010 U.S. Dist. LEXIS 67835, at *8 (D. Mass. July 8, 2010). "Rule 23 exists precisely to ensure that class certification is based upon something more than a generalized assumption." *Brockman v. Barton Brands*, Ltd., 2007 U.S. Dist. LEXIS 86732, at *36 (W.D. Ky. Nov. 21, 2007).

B) Commonality and Typicality Under 23(a)(3) and (4) Cannot Be Established Because the Named Representatives Were 'Cherry-Picked' at the Outset of the *Addington* Litigation Based on Facts No Longer Relevant and Remain Junior Within the West Group.

Even if the Addington defendants had made an attempt to present evidence in support of their motion, which they did not, they would still be unable to satisfy the commonality or typicality requirements of Rule 23(a)(2) & (3). The defendants' class certification motion (and the company's complaint) portrays the East and West pilot groups as two, separate but otherwise *monolithic* entities. In truth, both pilot groups, combined or separate, are a complex mosaic of mixed interests and shifting factions, all with corresponding potential for political compromise, expedient or otherwise, just as any typical bargaining unit is. Every pilot has different seniority from every other pilot; arbitrary groupings can be compared but no one group is *all* junior or *all* senior. While generalities can be drawn, various seniority terms, or proposals for them, will have various effects. While it is possible to take a static snap-shot of seniority and test it against certain assumptions, it is not always possible to project over time each pilots' interest, as every pilots' seniority changes over time and circumstances.

The six pilots now proposed by the Addington defendants as class representatives are the same representatives as last time proposed. They were 'cherry-picked' at the outset of the earlier *Addington* litigation to address the exigency of the moment at the inception of

that lawsuit, namely to meet the consequences of US Airways' June 12, 2008 announced pilot *furloughs*.[5] Hence they are not representative of any *class-wide* generality about seniority that can be posited for the West pilots today:



As the above chart demonstrates, three of the plaintiffs – Iranpour, Wargocki and Bostic – are *extremely* junior first officers in the lowest tenth percentile of seniority at 92.4, 96.6, and 98.2 percent respectively. (Davison Decl. ¶ 6). This is because they were selected based on their then immediate vulnerability to the company's planned furlough of 175 West pilots in 2008. This is a contingency that has no relevance to the instant action nor is there any claim to the contrary. The remaining three proposed class representatives – Velez, Addington, and Burman – are also junior pilots whose seniority was 39.5, 51.3, and 57.4 percent respectively. (Davison Decl. ¶ 7). They too were selected due to their vulnerability

[5] Fittingly, this Court recognized in its June 1 Order that the named litigants and class representatives in *Addington* were, "actually a subset of West Pilots…" (Doc. # 85 at 2, fn. 2).

to immediate demotion or lost promotion resulting from the furlough. The most that can be said for the proposed class representatives is that they are representative of some percentile of the most junior of all the West pilots – hence predictably the most militant to reduce the seniority of all those above them – East or West. So not only are the proposed class representatives then and now decidedly atypical of the class that they seek to represent (all 1800 or 1900 West pilots), they were deliberately atypical to serve a litigation purpose in 2008, at the outset of *Addington*, which no longer exists.[6]

Moreover, this atypicality of the proposed representatives has actually *increased* since they were cherry-picked in 2008. Three of the proposed representatives were furloughed near the end of 2008 or beginning of 2009.[7] The litigation interests of these furloughed pilots sharply diverges from that of the remainder of the actively employed West pilot group, since the bump/displace prohibition contained in the Transition Agreement would prevent them from obtaining any immediate benefit from implementation of the Nicolau list in any case. (Trans. Agmt. § IV.A.2).

And the senior forty percent of the West pilot group clearly has divergent interests from the proposed representatives who are not representative of *that* percentile. In fact, this group of West pilots risks being *prejudiced* by the proposed representatives' stubborn insistence upon a Nicolau-proposal-or-nothing dictate. These senior West captains simply

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[6] The company seeks 1,900 (Doc. # 1, ¶ 20), the Addington defendants arbitrarily seek 1,800 (Doc. # 86 p. 5:5, or in the amended filing, Doc. # 91, p. 5:5); the bargaining unit actually consists of approximately 5,000 active duty pilots. Presumably the company means to prevent *any* pilot-generated litigation resulting from the company bargaining to include or exclude the Nicolau proposal; if so the class as proposed is surely under-inclusive.

[7] Neither the Addington defendants nor the company has presented this Court with any evidence related to the current employment status of these proposed representatives. (*See infra* § 2.C for discussion).

do not face imminent loss of employment (or even of their captaincies). Moreover, under USAPA's current seniority integration proposal, the West captains' Phoenix-based positions are in fact secured both against more senior East pilots and the more senior pilots of future merger partners. (Davison Decl. ¶ 9).

Commonality requires more than alleging that the class has suffered a violation of a common provision of law or shares the same claim. It requires showing that the class has "suffered the same *injury*." *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982) (emphasis added). And while common contention of injury capable of classwide resolution is necessary – here that is a *legal impossibility*. The Ninth Circuit specifically held in *Addington* that there *has been no "sufficiently concrete injury" to the West pilots* as a group, and there *may never be any injury* "even if [the ultimate seniority proposal] is not the Nicolau Award." *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1181 (9th Cir. 2010), *cert. denied*, __ U.S. __, 131 S. Ct. 908 (2011). Certification under Rule 23 requires more:

> 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.

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. __ (June 16, 2011), slip opinion page 10 (emphasis added)[8] (*citing Nagareda*, Class Certification in the Age of Aggregate Proof, 84 N.Y. U.L. Rev. 97, 132 (2009)). *See also Bacon v. Honda of Am. Mfg., Inc*., 370 F.3d 565 (6th Cir. 2004) (denying certification in an employment case where class member affected differently by complained of acts therefore lacked commonality). Where there is no

[8] Also at: 2011 U.S. LEXIS 4567; or WL 2437013.

common injury, there can be no commonality. *See e.g.*, *Insolia v. Philip Morris Inc*., 186 F.R.D. 535 (W.D. Wis. 1998) (no commonality over common claims that smoking is harmful where the issue was whether the class members have been harmed); *Doe v. Unified School Dist*., 240 F.R.D. 673 (D. Kan. 2007) (commonality not satisfied where there was no evidence that potential class members suffered an actual or threatened injury). Here, there is no injury to West pilots and it is speculative there ever will be.

The law of this case is clear: until ratification of a new contract, no West pilot can possibly suffer any seniority-injury. Hence, they do not presently have a ripe claim based on a seniority proposal put forward or not put forward by their union. Similarly, whether the company hypothetically accepts one or another seniority proposal cannot inflict injury. So, in effect, the Addington defendants' certification motion asks this Court to pretend that 1800 pilots of varying seniority, both junior and senior, who have yet to suffer any cognizable injury to their seniority, can somehow constitute a class with common seniority issues and further be represented by only junior pilots who themselves have no standing to advance any ripe seniority claim. More fundamentally, such a putative West class ignores the question of whether exclusion of the *East* pilots makes any sense in an action where the company seeks a declaration of its bargaining rights *vis-a-vis* the union and *all* pilots it represents, East, West, junior, and senior. Certainly factions from *both* East and West groups have demonstrated a willingness to-date to bring suit over the issue of seniority integration (West factions in *Addington*, East factions in *Breeger v. US Airline Pilots Ass'n*, 2009 U.S. Dist. LEXIS 40489 (W.D.N.C. May 12, 2008) (unpublished). While the company may suppose a threat only from the Addington pilots, how can this Court certify a

West-only class and ignore the demonstrated litigation threat from East factions?

C) <u>In the Absence of Evidence, To Show Adequate Class Representatives Under 23(a)(4), Discovery Would Be Necessary.</u>

There were no affidavits submitted in the name of *any* of the proposed class representatives to support the instant motion; there were none submitted in the name of a single *absent* class member. Yet "as with all factors in a motion to certify a class, the movant bears the burden of proof on the question of adequacy." *Ogden v. Americredit Corp.*, 225 F.R.D. 529, 533 (N.D. Tex. 2005). The failure to present even a single affidavit in the name of any of the proposed class representatives prevents this Court from determining whether the six pilots are adequate because the adequacy of the proposed representatives cannot be presumed. *See Eslava v. Gulf Tel. Co.*, 2007 U.S. Dist. LEXIS 57959, at *16 (S.D. Ala. Aug. 7, 2007) (*citing Berger v. Compaq Computer Corp*., 257 F.3d 475, 481-482 (5th Cir. 2001) ("reversible error for district court to afford plaintiff 'presumption' of adequacy").

Indeed, evidence would suggest that the proffered representatives are no longer adequate even if they once might have been. Some are furloughed. At least one, Mr. Wargocki, was not even accessible to review or approve the original motion. (*See* Doc. # 86, fn. 1).[9] In fact, Mr. Wargocki was offered recall to a West pilot position, *but he turned it down*.[10] And Mr. Bostic, though he has not been offered recall to a West position, has twice been offered recall to an *East* position and turned both down; he currently remains on

[9] Three days before USAPA's response to the instant motion was due, the Addington defendants filed an "amended" motion, Doc. # 91, (apparently without court approval) that now purports to add Mr. Wargocki. No evidence, detail or explanation for this inclusion was provided, however.

[10] *See* Declaration of Courtney Borman, ¶ 9 (hereinafter "Borman Decl.").

furlough. (Borman Decl. ¶ 8). Whatever the current status of the proposed representative is, whatever changes in their status during the pendency of this action will bring, all are undetermined in the absence of evidence (or discovery). But clearly class representatives who are self-interested to seek or maintain positions outside of US Airways or outside of the proposed class cannot be expected to share the interests of the proposed class. Although unstated in Rule 23 itself, a necessary prerequisite for class action certification, implied by the case law, is that the representatives must actually *be* members of the putative class. *Wright*, Civil 3d § 1761 (citing cases at fn. 1, 2, 3, *inter alia*, *Great Rivers Cooperative v. Farmland* Indus., 120 F.2d 893 (8th Cir. 1997)). A representative who is not a member of the class cannot adequately represent its members. *East Texas Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395 (1977); *see also DeRosa v. Mass. Bay Commuter R. Co*., 694 F. Supp. 2d 87 (D. Mass. 2010) (a former employee is an inadequate representative for an employee class).

Here, in the absence of evidence (or without discovery), no finding on the adequacy of the proposed class representatives is currently possible. Yet it appears from the absence of support for the instant motion that the Addington pilots presume this Court will simply rubber-stamp their motion based solely on the fact that a class action was granted by the district court in *Addington v. US Airline Pilots Ass'n*, 2009 U.S. Dist. LEXIS 39090 (D. Ariz. Mar. 10, 2009). If that were to happen, however, the Addington defendants would have shifted the burden *they* bear on to USAPA – the party opposing class certification. That, in effect, asks this Court to commit reversible error by requiring an opponent of class certification to *dis*prove that certification is appropriate. *See e.g., Berger v. Compaq*

Computer Corp., 257 F.3d 475, 481 (5th Cir. 2001) (holding that district court erred by shifting burden to defendants to show that class representatives were inadequate); *In re American Medical Systems, Inc*., 75 F.3d 1069, 1086 (6th Cir. 1996). Therefore, at a minimum, as the party opposing class certification, USAPA is entitled to adequate discovery into class certification issues prior to a decision being rendered on the instant motion. *See Kamm v. California City Development Co.*, 509 F.2d 205, 210 (9th Cir. 1975) (denial of discovery into issue of class "would be an abuse of discretion"); *Parker v. Time Warner Entertainment Co.*, L.P., 331 F.3d 13, 21-22 (2d Cir. 2003) (reversing denial of certification because denial precluded any discovery into size of the putative class); *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1037 (5th Cir. 1981) (district court has "special responsibility to withhold its decision on class certification until an adequate record has been developed"); *In re Am. Med. Sys.*, 75 F.3d 1069, 1086 (6th Cir. 1996).[11]

E) <u>It Is Impossible to Establish a Risk of Incompatible Standards Pursuant to 23(b)(1)(A) Considering RLA Law Allowing Separate Contracts, or Recognizing Count III or USAPA's Counterclaim.</u>

The Addington defendants attempt to justify their request for certification of a Rule 23(b)(1)(A) "incompatible standards" type of class by arguing that the "inherent nature of integrating pilot operations after a merger *requires a single CBA* [contract] and a single merged pilot seniority list," and therefore that "US Airways must have a single standard of conduct to integrate pilot operations." (Doc. # 86, p. 12:20-26) (emphasis added)[12]. Yet this argument is legally flawed in its premise so it cannot be relied upon to show incompatible standards. The flaw is that a single contract is *not* legally required. Courts have held, as has

[11] USAPA is prepared to do this on an expedited and block basis.
[12] Or in the amended filing, Doc. # 91, p. 13:7-13.

the National Mediation Board ("NMB"), that while the same bargaining unit can have only one union it can have more than one contract. This is entirely permissible under the RLA. *See e.g.*, *Bishop v. ALPA*, 1998 U.S. Dist. LEXIS 11948, *27 (N.D. Cal. 2005), *affirmed*, 2000 U.S. App. LEXIS 3270 (9th Cir. 2000); *Association Of Flight Attendants v. USAir, Inc*., 24 F.3d 1432, 1437 (D.C. Cir. 1994). Thus, nothing in the RLA requires employees of the same craft or class in a particular system to be subject to the same terms and conditions of employment.[13] While the NMB has long interpreted the RLA to require system-wide representation certifications, it has *not* similarly construed the RLA to require system-wide contracts. It has also recognized that carriers subject to the RLA are not precluded from negotiating multiple contracts covering employees of the same craft or class. *See Grand Trunk Western Railroad Co.*, 19 N.M.B. 226, 232 n.1 (1992). In fact, prior to its decertification (and replacement by USAPA), ALPA had begun to pursue interim modifications to the existing contracts in order to pursue exactly this type of 'two-contract solution' in order to bridge-over the East and West pilot divide regarding seniority integration in the wake of the corporate merger. (Doc. # 88 at 16, ¶ 35).

Apart from the Addington defendants' single-contract flaw, their argument for incompatible standards also suffers fundamentally by their ignoring USAPA's Answer (noting that defendants filed before USAPA served its responsive pleadings but after seeing it they nevertheless maintained and amended their motion). USAPA's Answer admitted (in the alternative) the relief sought by the company in Count III while its Counterclaim seeks

[13] Of course, any claim that there is a *contractual* requirement is a minor dispute over which this Court has no jurisdiction and must refer for arbitration to an RLA-established System Board of Adjustment.

the same relief. Given that pleading, and that the company has pled its three counts in the *alternative*, there is no dilemma for the company as posited by defendants' motion (Doc. # 86, p. 13:1-9).[14] Hence it is a false choice that there are two outcomes for the company depending on whether Nicolau is "implemented" or not. A declaration granting the same relief sought in Count III or in USAPA's Counterclaim simply does not require a "single standard of conduct to integrate pilot operations."[15] *Thompson v. Jiffy Lube*, 250 F.R.D. 607 (D. Kan. 2008) (where likelihood is that party seeking class will not be subjected to inconsistent standards, certification denied); *Pruitt v. Allied Chem*., 85 F.R.D. 100 (E.D. Va. 1980) (speculation of inconsistent remedies not enough).

III. THERE IS NO NEED TO CERTIFY ANY CLASS OF PILOTS IF THE COURT WERE TO GRANT COUNT III OR USAPA'S COUNTER CLAIM.

This Court has discretion to deny certification even if it concluded that the procedural and merits defects of the instant motion could be overcome. *See Sprint Communications v. APCC Services, Inc*., 554 U.S. 269 (2008) ("class actions are permissive, not mandatory"). Here, class certification serves no purpose and is not needed to effectuate the relief the company seeks in Count III, or that USAPA also seeks in its Counterclaim:

First, if this Court declares that the company can have no liability regardless of the type of seniority term it agrees to then no individual pilot, or group of individual pilots, will have standing to sue – whether for a collusive-DFR, or for a failure to bargain in good faith in violation of the RLA. The law is clear that as individual employees any faction of West (or East) pilots would lack the standing necessary under the RLA to pursue any claim for

[14] Or in the amended filing, Doc. # 91, p. 13:15-23.

[15] Morever, such a declaration lowers the risk of entangling this Court in dictating substantive terms of bargaining with all its attendant dangers.

failure to bargain with the union. *Bensel v. Allied Pilots Ass'n*, 387 F.3d 298, 319 (3d Cir. 2004), *cert. denied,* 544 U.S. 1018 (2005) (individual pilots "lack[ed] an implied private right of action to bring claims asserting breaches of the duty to bargain and duty to negotiate in good faith . . . because they are not and have never been a certified representative of the ... pilots"); *see also Marcoux v. American Airlines, Inc*., 2008 U.S. Dist. LEXIS 55751 at *51-52 (E.D.N.Y. 2008); *Cooper v. TWA Airlines, LLC*, 349 F. Supp. 2d 495, 503 (E.D.N.Y. 2004).

Second, while direct judgment of this Court or res judicata will not bind absent parties, the issue of the company's liability under the RLA will have been litigated, thus barring any re-litigation pursuant to the doctrine of collateral estoppel. There can be no question but that after years of contentious litigation in which all US Airways pilots are presumably informed and interested, opportunity to participate in this litigation is now apparent. "A class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. at page 8 (*citing Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). Here, no class is needed if the Court acts on the convergence of pleadings now before it to grant the relief sought by both the company and the union: a prospect that would at last free the parties to bargain for a ratifiable contract as the Ninth Circuit has indicated they should. *Addington*, 606 F.3d at 1184.

Respectfully submitted:

Dated: June 27, 2011 By: ***/s/ Nicholas Granath***

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CERTIFICATE OF SERVICE

Case No. 2:10-CV-01570-PHX-ROS

I hereby certify that on this day of June 27, 2011, I electronically transmitted the foregoing document and all its attachments to the U.S District Court Clerk's Office using the ECF System for filing and transmittal.

By: ***/s/ Nicholas Granath, Esq.***