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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 REPLY IN SUPPORT OF AMENDED MOTION FOR CLASS CERTIFICATION**

Plaintiffs Don ADDINGTON, John BOSTIC, Mark BURMAN, Afshin IRANPOUR, Roger VELEZ; and Steve WARGOCKI (the "Addington Pilots"), reply in support of their *Amended Motion for Class Certification*. (Doc. # 91.)

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I. OVERVIEW

On June 1, 2011, this Court ruled that US Airways' complaint for declaratory relief was ripe. (Doc. # 85 at 8:22 to 8:23.) The Court also held that the "West Pilots" are "necessary parties" because "the relief US Airways seeks cannot be granted in their absence." (*Id.* at 9:9 to 9:10.) These two rulings largely settle that this matter is suitable for class action treatment. All that remains to decide is whether the proposed class is properly represented. That is straightforward and readily addressed here.

In its Order, the Court noted that US Airways seeks one of three alternative declaratory determinations. In their motion for class certification, the Addington Pilots merely state the positions of the West Pilot Class on those alternatives to establish that the class satisfies commonality and typicality. This is entirely proper and does not, as USAPA argues, flout the Court's order dismissing the Addington Pilots' affirmative crossclaim.

The three declaratory determinations proposed by US Airways are as follows:

(1) "USAPA's seniority proposal (*i.e.*, strict 'date of hire') breaches its duty under the Railway Labor Act and its duty of fair representation and US Airways cannot adopt it;"

(2) "USAPA's seniority proposal does not breach its duty under the Railway Labor Act and its duty of fair representation and US Airways may adopt it;"

or

(3) "US Airways will not be liable to the West Pilots regardless of which seniority proposal it adopts."

(*Id.* at 3:8 to 3:13.)

The positions of the West Pilot Class on these three proposed alternative declaratory determinations are as follows:

> (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."

(Doc. # 91 at 1:21 to 2:3.)

The positions of the West Pilot Class directly correlate with the alternative declaratory judgments proposed by US Airways. For example, proof of all three positions of the West Pilot Class would establish the validity of US Airways' first alternative determination and defeat the validity of its second and third alternative determinations. Proof of the West Pilots' second position alone would defeat US Airways' second alternative determination. Proof of the West Pilots' third position alone would defeat US Airways' third alternative determination.

Any member of the West Pilot Class (including the class representatives) who would litigate the West Pilots' positions on the alternative declaratory judgments proposed by US Airways would offer the same proof: (1) evidence of USAPA's wrongful hostility; (2) legal argument that USAPA has no legitimate union purpose for its action;

(3) legal argument that the Airline would have liability; and (4) legal argument in favor of applying common benefit doctrine. (Doc. # 91 at 2:6 to 2:20.) Commonality and typicality are satisfied, therefore, because the proof of any such claim (evidence and argument) would be the same for any West Pilot Class member and for any of the Addington Pilots.

USAPA has no basis to argue otherwise. Yet, true to form, USAPA seeks to forestall progress toward a decision on the merits by raising disingenuous arguments against class certification that lack legal merit altogether.

II. LEGAL ARGUMENT

A. The Addington Pilots properly rely on allegations in the US Airways Complaint and on allegations in their Answer.

It borders on the absurd for USAPA to argue that the Addington Pilots fail to identify allegations that support class certification. The Addington Pilots cite allegations in US Airways' complaint (doc. # 1) and cite class allegations in their Answer and Crossclaim (doc. # 34). (Doc. # 91 at 1:4 to 1:17.) Regardless that the Crossclaim was dismissed, the pleading still stands. These allegations define the class, establish its size, identify elements shared in common by class members, and state the legal positions that would be validated by the class using a single set of proof. Other sources of information demonstrate adequacy of class representatives and counsel.

B. The Court can rely on factual allegations and may take judicial notice of matters of public record to determine whether an action is suitable for class action treatment.

USAPA complains that the Addington Pilots do not offer evidence to prove the elements of Rule 23(a). By and large, however, there is no

need to do so. Indeed, even if evidence is offered the Court need not conduct an evidentiary hearing on certification. *Bouman v. Block*, 940 F.2d 1211, 1232 (9th Cir. 1991).

Rather, the Court can decide class certification based on unproven allegations. Indeed, it "is bound to take the substantive allegations of the complaint as true, thus necessarily making the class order speculative in the sense that plaintiff may be altogether unable to prove his allegations." *Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975). Although "the court may not put the plaintiff to preliminary proof of his claim, it does require sufficient information to form a reasonable judgment. Lacking that, the court may request the parties to supplement the pleadings with sufficient material to allow an informed judgment on each of the Rule's requirements." *Id.* As in other contexts, the Court may also take judicial notice of matters of public record such as filings in other litigation. *E.g.*, *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (motion to dismiss); *Escobar-Ramos v. INS*, 927 F.2d 482, 485 n.3 (9th Cir. 1991) (immigration appeal).

As shown in the *Amended Motion for Class Certification* (doc. # 91) and in the argument that follows, the allegations here and the history of the *Addington* litigation provide this Court substantial basis to make an informed judgment on the elements of Rule 23 and the suitability of class action treatment.

C. The same proof would resolve the litigation for each Addington Pilot and for each member of the West Pilot Class.

1. Commonality is satisfied.

The defect in commonality addressed in *Wal-Mart Stores, Inc. v. Dukes*, 546 U.S. —, 2011 WL 2437013 (June 20, 2011), does not apply

here. In *Dukes*, the class failed to satisfy commonality because the alleged discrimination occurred at the level of store managers who had discretion to promote employees and set their wages. Consequently, if a store manager acted wrongly he or she did so independently. Under such circumstances, no "classwide proceeding" could "generate common answers apt to drive the resolution of the litigation." *Id.* at *7. Nothing analogous prevents class certification here because USAPA's wrongdoing would occur at the highest level of the union's leadership if (in the future) it were to negotiate and implement a Non-Nicolau CBA.

Variations in circumstances among the members of the class identified by USAPA (such as seniority position on the Nicolau list) are immaterial to certification. At best, these variations indicate that there would be variations in the impact of USAPA's wrongdoing. Although this has some relevance to predominance, *Blackie*, 524 F.2d at 905, that is not at issue in Rule 23(b)(1)(A) class certification.[1] It has no relevance to commonality because it does not change the fact that proof of common issues would advance all claims. It does not change that any West Pilot making an individual claim would offer the same proof to establish that USAPA would breach the DFR if (in the future) it were to negotiate and implement a Non-Nicolau CBA.

[1] Predominance is not part of the analysis of Rule 23(a)(2) commonality. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) ("The commonality preconditions of Rule 23(a)(2) are less rigorous than the companion requirements of Rule 23(b)(3) [predominance]."); *see also, e.g.*, *Ventura v. New York City Health & Hosps. Corp.*, 125 F.R.D. 595, 600 (S.D.N.Y. 1989) ("Unlike the 'predominance' requirement of Rule 23(b)(3), Rule 23(a)(2) requires only that the class movant show that a common question of law or fact exists. . . .").

The central question here is whether USAPA would have a legitimate union purpose if (in the future) it were to negotiate and implement a Non-Nicolau CBA. Each member of the West Pilot Class would offer the same proof to answer this question. That proof would demonstrate that USAPA would not have a legitimate purpose. Nothing more is required by *Dukes* to satisfy commonality.

2. Typicality is satisfied.

The defect in typicality addressed in *Gen. Telephone Co. of S.W. v. Falcon,* 457 U.S. 147 (1982), does not apply here. *Falcon* establishes that typicality is satisfied when the class representative's claim is "typical of the class claims." *Id.* at 157. "Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Unlike commonality, which looks at whether issues are shared by members of the class, typicality looks at whether those issues are shared by the class representatives. *Dukes* clarifies, in both contexts, that such issues must "generate common answers apt to drive the resolution of the litigation." 546 U.S. ——, 2011 WL 2437013 at *7.

USAPA makes too much of the fact that *Falcon* held that typicality requires the class representative be subject to the "same injury" as the class members. 457 U.S. at 156. "Injury" has two meanings—one related to cause and the other related to effect. *See Black's Law Dictionary*, 189 (7th ed. 1999) (defining "injury" as "[t]he violation of another's legal right" and as "[h]arm or damage"). *Falcon* used "injury" to refer to the cause of harm, to explain that there had to be similar "evidentiary approaches to [prove] the individual and class claims," not similar harms from the wrongdoing. 457 U.S. at 159.

In *Falcon*, the class representative's claim was based on alleged "discrimination in promotion." 457 U.S. at 152. The class members' claims were based on "discrimination in hiring." *Id.* Proof of the former was made with evidence of "intentional discrimination" directed at the representative personally. *Id.* at 159. Proof of the latter was made with "statistical evidence of disparate impact." *Id.* The Supreme Court reversed the class certification order because with such disparate means of proof, "a class action did not advance the efficiency and economy of litigation." *Id.* at 160 (internal quotation mark omitted).

None of the concerns in *Dukes* or *Falcon* impair certification here. A claim by an individual class representative and a claim by an individual class member would ask the same questions (such as whether USAPA would be acting for a legitimate union purpose), would offer the same proof, and would obtain the same answers. Answers to these questions will drive resolution of the litigation. Circumstances identified by USAPA (such as a pilot's position on the Nicolau list) make no difference.

Nothing more is needed to satisfy commonality or typicality. The Court, therefore, should reject USAPA's arguments and find that the West Pilots Class satisfies commonality and typicality.

D. The Court has ample evidence of adequacy.

"In demonstrating a class representative's adequacy, the burden is not a heavy one." *In re CBC Companies, Inc. Collection Letter Litig.*, 181 F.R.D. 380, 382 (N.D. Ill. 1998) (alteration marks omitted). To determine adequacy, the Court considers 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).

The Court has ample basis to conclude that the Addington Pilots are able to prosecute the action vigorously and otherwise satisfy the standards for adequacy. The Court can take judicial notice of how the Addington Pilots and counsel represented this same class in the related *Addington* litigation. It can take notice, for example, that both sides of the divided Ninth Circuit panel commented quite favorably on the quality of that representation. *Addington*, 606 F.3d at 1179 (noting that "considerable time, effort, and expense have been devoted to the merits of Plaintiffs' DFR claim"); *id.* at 1185 (Bybee, C.J., dissenting) (noting that "[t]he issues . . . were well developed in district court proceedings"). Nothing more can be asked of class representatives.

There is no need whatsoever to conduct discovery here into adequacy. Judge Wake allowed such discovery in *Addington* and found that it produced so little relevant evidence that there was no need to hold an evidentiary hearing:

> Now that the briefing is complete, the Court doubts that any such hearing is necessary and is inclined to vacate the order directing preparation for such a hearing (doc. # 210). Both parties have had the opportunity to present evidence with their briefs, and it appears that no hearing is necessary for a prompt ruling to be issued on the certification motion (doc. # 120). A needless hearing would only divert time and resources from the merits of this case.

Addington v. USAPA 08-cv-01633 (doc. # 223).

Notwithstanding that USAPA has the *Addington* discovery at its disposal, it failed to identify any basis to find a lack of adequacy here. It makes no difference, for example, that some of the Addington Pilots have been furloughed or that some of them have declined a recall to work as an East Pilot. Even taken in the most favorable light possible, this does not (and cannot) show a deficit in adequacy. The Court, therefore, should find that the West Pilots Class satisfies adequacy.

E. The risk of imposing incompatible standards on US Airways is obvious, making this is a proper Rule 23(b)(1)(A) class.

USAPA has no genuine basis to dispute that US Airways could be prejudiced if this matter were litigated against the Addington Pilots in their individual capacities only. US Airways would be prejudiced, for example, if other West Pilots were to independently adjudicate the same issues and obtain a materially different result. In one lawsuit, the Airline might prevail and obtain declaratory judgment that it is free to negotiate and implement such a CBA. Yet, in the other lawsuit, other West Pilots could prevail and obtain declaratory judgment that the Airline is not free to negotiate and implement such a CBA. With such conflicting rulings, what is US Airways to do? USAPA's confused argument fails to answer this question. The Court, therefore, should find that the West Pilots Class satisfies Rule 23(b)(1)(A).

III. CONCLUSION

Rule 23(b)(1)(A) class certification will allow efficient adjudication of common issues and will provide a means to obtain a single consistent result. USAPA's arguments fail to show otherwise. The Court, therefore should certify a class pursuant to Rule 23(b)(1)(A).

Dated this 7th day of July, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of July 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 _____