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US Airways, Inc.

UNITED STATES DISTRICT COURT
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

PLAINTIFF US AIRWAYS, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

US Airways seeks the certification of a West Pilot defendant class that is exactly the same as the West Pilot plaintiff class certified by Judge Wake in the prior *Addington* litigation.[1] Certification of the proposed West Pilot Class is appropriate because all four requirements of Rule 23(a) are met: (i) the class consists of approximately 1,900 individuals, which far exceeds the threshold for numerosity; (ii) this action presents common questions of law regarding USAPA's duty of fair representation to the West Pilots and US Airways' potential liability to the West Pilots if it were to agree to USAPA's demands for a non-Nicolau seniority list – questions which can be readily answered based on facts common to all West Pilots without the need to examine individualized circumstances; (iii) the Named Addington Pilots' claims are co-extensive with and typical of those of the West Pilots; and (iv) the Named Addington Pilots and their counsel, who have been aggressively seeking to clarify and enforce the rights of the West Pilots for several years, are adequate representatives of the proposed West Pilot class.

The class also meets the requirements of Rule 23(b)(1)(A) and 23(b)(2). Rule 23(b)(1)(A) is satisfied because, unless all West Pilots are bound by the same declaratory judgment as to US Airways' potential liability to them, US Airways will be subject to the possibility of incompatible standards of conduct resulting from inconsistent judgments obtained by individual West Pilots in separate proceedings. Rule 23(b)(2) is satisfied because it was specifically designed for situations like this one, in which a party will have acted (or not acted) for reasons generally applicable to the group as a whole and declaratory relief is sought against that group as a whole.

[1] US Airways supports the result requested in the Named Addington Pilots' motion for certification of the West Pilot Class. (*See* US Airways' Stmnt. in Supp. of Addington Pilots' Mot. for Class Certif. [Doc. No. 96].) US Airways' motion for class certification is based on grounds in addition to those invoked by the Named Addington Pilots (i.e., Rule 23(b)(2) in addition to Rule 23(b)(1)(A)). US Airways has also provided a response to arguments that USAPA has made in opposition to the Named Addington Pilots' motion.

The above considerations, among others, led Judge Wake to conclude that class certification was proper in *Addington*. (*See* Hollinger Decl. Exh. B, at p. 7 (noting that "the only questions raised . . . relate to USAPA's unitary duty to represent its whole membership fairly" and whether "this duty was breached in the same manner with respect to all proposed class members."); and p. 4 (noting that "Rule 23(b)(2) was made for cases like this one," because the class shares both a common injury and a common remedy in connection with USAPA's decision to "abandon the Nicolau Award solely for the benefit of the East Pilots.").) The result should be the same here.

STATEMENT OF FACTS

The predecessor to the current US Airways, Inc. ("US Airways") merged with America West Airlines, Inc. ("America West") in May 2005. (Hemenway Decl. ¶ 2.) At the time, both airlines' pilot groups were represented by the Air Line Pilots Association ("ALPA"). *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1177 (9th Cir. 2010). Approximately 5,000 pilots, known as "East pilots," more than 1,000 of whom were on furlough, were on the pre-merger US Airways seniority list. (*See id.*; *see also* Nicolau Award [Doc. No. 34-6], at p. 14.) And, approximately 1,900 pilots, known as "West pilots," none of whom were on furlough, were on the pre-merger America West seniority list. *Addington*, 606 F.3d at 1177. Overall, the East Pilots had been employed at the pre-merger US Airways longer than the West Pilots had been employed at the pre-merger America West, and, accordingly, the West Pilots' "dates of hire" with pre-merger America West were generally more recent than those of the East Pilots with pre-merger US Airways. (Hemenway Decl. ¶ 3.)

At the time of the merger in 2005, ALPA represented the East Pilots and West Pilots in two separate bargaining units, or "crafts or classes." *Addington*, 606 F.3d at 1177. Pursuant to ALPA's Merger Policy, if two ALPA-represented pilot groups in an airline merger could not agree on an integrated seniority list through direct negotiations or mediation, the next step was integration of the pre-merger seniority lists on a "fair and equitable" basis through "final and binding" arbitration. (ALPA Merger Policy [Doc.

No. 34-3], at pp. 6, 8.) The East Pilots and West Pilots could not agree on an integrated seniority list, so – consistent with ALPA's Merger Policy and a September 23, 2005 Transition Agreement negotiated between ALPA, the East Pilots, the West Pilots, and pre-merger US Airways, Inc. and America West Airlines, Inc. – the East Pilots and West Pilots participated in a seniority-integration arbitration before neutral arbitrator George Nicolau. (*See id.*; Transition Agreement [Doc. No. 34-2]; *see also Addington*, 606 F.3d at 1177-78.) Arbitrator Nicolau rendered his decision in May 2007 (the "Nicolau Award"). (Nicolau Award [Doc. No. 34-6].) The Nicolau Award did not integrate pilots based strictly on each pilot's "date-of-hire" with their pre-merger airline, as the East Pilots had sought, but instead purported to fashion a "fair and equitable" integration attributing importance to "career expectations" at each pre-merger airline. (*Id.* at p. 28; *Addington*, 606 F.3d at 1176.) The Nicolau Award placed approximately 500 East Pilots at the top of the seniority list, 1,700 then-furloughed East Pilots at the bottom of the list, and blended the remainder of the East Pilots with the West Pilots generally according to their relative positions on their pre-merger seniority lists. (Nicolau Award [Doc. No. 34-6]; *Addington v. US Airline Pilots Ass'n,* No. CV 08-1633-PHX-NVW, 2009 WL 2169164, at *3 (D. Ariz. July 17, 2009).)

In the September 2005 Transition Agreement, the airline parties had agreed to accept whatever integrated seniority list resulted from implementation of the ALPA Merger Policy, so long as that seniority list met certain criteria. (Transition Agreement [Doc. No. 34-2], at p. 6.) The integrated seniority list mandated by the Nicolau Award satisfied the specified criteria, ALPA presented the seniority list to the post-merger US Airways in late 2007, and US Airways accepted that list on December 20, 2007. (Hemenway Decl. ¶ 4; *see also Addington*, 606 F.3d at 1178.) However, the integrated seniority list did not take effect at that time, because the Transition Agreement generally provided that the pre-merger US Airways and pre-merger America West routes and aircraft would remain separate and would be flown by the respective pilot groups pursuant to the terms of their pre-merger collective bargaining agreements (including their

respective pre-merger seniority lists) until such time as the parties had negotiated a combined collective bargaining agreement that would be applicable to the post-merger airline and because, as of December 2007, the two pilot groups (as represented by ALPA) and US Airways had not yet reached agreement on a single labor contract. (*See* Hemenway Decl. ¶ 5; Transition Agreement [Doc. No. 34-2],at pp. 2, 8.)

The East Pilots perceived the Nicolau Award to be far less favorable to them as a group than the "date-of- hire" integrated seniority list they had sought from Arbitrator Nicolau. *See Addington*, 606 F.3d at 1176-78. In response to the Nicolau Award, the East Pilots formed a new labor union, defendant US Airline Pilots Association ("USAPA"), whose constitution expressly mandates a "date-of-hire" integrated seniority list and prohibits implementation of the Nicolau Award. *Id.* at 1178. The East Pilots significantly outnumbered the West Pilots, and, following a representation election between USAPA and ALPA, the National Mediation Board ("NMB") certified USAPA as the new collective bargaining representative for both the East Pilots and West Pilots on April 18, 2008. *Addington*, 2009 WL 2169164, at *5.[2] Thereafter, USAPA and US Airways engaged in collective bargaining negotiations for a single labor contract, the predicate under the Transition Agreement for implementation of an integrated seniority list, but no agreement was (or has been) reached. (Hemenway Decl. ¶ 5.)

In June 2008, US Airways announced that it intended to furlough approximately 300 pilots, 140 of whom would be West Pilots. *See Addington*, 606 F.3d at 1178. At the time, the integrated seniority list mandated by the Nicolau Award was not in effect – if it had been in effect, none of the West Pilots would have been furloughed. (*See id; see also* Hemenway Decl. ¶ 5; Transition Agreement [Doc. No. 34-2], at pp. 2, 8.) Six (West) pilots, who also are the six named defendants in this case, filed a class-action lawsuit on September 4, 2008 against USAPA and US Airways, contending that: (i) USAPA had

[2] Previously, on January 23, 2008, the NMB had determined that the merger created a "single carrier" for Railway Labor Act ("RLA") purposes, and, as a result, both pilot groups were combined into one consolidated bargaining unit. *US Airline Pilots Ass'n*, 35 N.M.B. 65 (2008).

breached its duty of fair representation ("DFR") to the West Pilots through its insistence on a "date-of-hire" integrated seniority list and its refusal to seek implementation of the Nicolau Award in its negotiations with US Airways for a single collective bargaining agreement; and (ii) US Airways had breached its obligation under the Transition Agreement to negotiate in good faith with USAPA for a single collective bargaining agreement. *See Addington*, 2009 WL 2169164, at *7. The plaintiffs in *Addington* filed a motion for preliminary injunction against US Airways, seeking to prevent the furloughs. *See id.* That motion was denied (and all claims against US Airways were dismissed), and approximately 140 West Pilots were furloughed. *See Addington*, 606 F.3d at 1178; *Addington*, 2009 WL 2169164, at *7; *Addington v. US Airline Pilots Ass'n*, 588 F. Supp. 2d 1051, 1064 (D. Ariz. 2008). Thereafter, the *Addington* plaintiffs' claim against USAPA proceeded, and the district court certified as representatives of a plaintiff class under Rule 23(b)(2) the same six individuals that US Airways seeks to certify as representatives of a defendant class in this case.[3] (Hollinger Decl. Exh. B.)

At trial, the jury found that USAPA had violated its DFR to the West Pilot class because it "cast aside the result of an internal seniority arbitration solely to benefit the East Pilots at the expense of the West Pilots," and "failed to prove that any legitimate union objective motivated its acts." *Addington*, 2009 WL 2169164, at *8. On appeal, the Ninth Circuit did not reach the merits of the West Pilots' DFR claim against USAPA, but instead held that their claim was not ripe. *Addington*, 606 F.3d at 1177.

After the Ninth Circuit issued its opinion, USAPA and the West Pilots each insisted that US Airways take its or their side in the seniority dispute or face dire consequences. USAPA interprets the Ninth Circuit's opinion as authorizing agreement to

[3] The West Pilot Class in *Addington* and in this case are both 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." (*Compare* Compl. ¶ 5, *with* Hollinger Decl. Exh. A at p. 2.) Although the district court's rulings in *Addington* do not carry precedential weight in light of the Ninth Circuit's subsequent ruling, this Court may refer to them to the extent it finds it helpful to do so. *See Ala. Hosp. Ass'n v. United States*, 656 F.2d 606, 610 (Ct. Cl. 1981) (cited with approval by *Orff v. U.S.*, 358 F.3d 1137, 1149-1150 (9th Cir. 2004)).

a non-Nicolau seniority list and as specifically allowing it to insist on a strict "date-of-hire" seniority list, and, in all its collective bargaining negotiations with US Airways, USAPA has proposed that US Airways agree to a non-Nicolau seniority proposal. (Hemenway Decl. ¶ 5.) Furthermore, in a signed letter to US Airways' CEO, USAPA's President declared that "[o]ur customers need to know as well that they can expect a legal work stoppage at our earliest opportunity, absent an industry standard contract" (USAPA Letter [Doc. No. 61-4]), and USAPA contends that date-of-hire principles are "standard" for seniority integration in merger situations. (*Id.*; USAPA Counterclaim [Doc. No. 88], at ¶ 73.) The West Pilots, on the other hand, interpret the Ninth Circuit's opinion as merely postponing a decision on their DFR claim and authorizing them to sue USAPA and US Airways if agreement is reached on a non-Nicolau seniority list. They have admitted in representations to this Court that they "will" assert a claim against US Airways if it agrees to USAPA's seniority demands (Addington Pilots' Response In Opposition to USAPA's Motion To Drop The Addington Defendants [Doc. No. 48] at 9:16-23), and their counsel has sent US Airways multiple letters threatening to sue US Airways under the RLA for, *inter alia*, "facilitat[ing]" or "assist[ing]" USAPA's breach of DFR if US Airways were to accept USAPA's seniority demands. (West Pilots Letters [Doc. No. 61-2].)

ARGUMENT

I. A DEFENDANT CLASS OF WEST PILOTS SHOULD BE CERTIFIED UNDER RULE 23.

Rule 23 of the Federal Rules of Civil Procedure provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members." (Emphasis added.) Accordingly, Rule 23 permits actions against a class of defendants. See, e.g., *Blake v. Arnett*, 663 F.2d 906, 913-14 (9th Cir. 1981) (affirming certification of a class of cross-defendants); *In re Ramtek Sec. Litig.*, No. C 88 20195 RPA, 1990 WL 157391, at *6-8 (N.D. Cal. Sept. 7, 1990) (certifying a defendant class). For the reasons discussed below, the proposed defendant West Pilot Class satisfies all of

the requirements of Rule 23(a) and the requirements of both Rule 23(b)(1)(A) and 23(b)(2).

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

1. **The West Pilot Class Is Sufficiently Numerous.**

A class is properly certified to the extent it is "so numerous that joinder of all members is impracticable." *East Texas Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 403 n.8 (1977). Courts have frequently certified classes containing less than a hundred individuals under Rule 23(a)(1). *See, e.g., Patrick v. Marshall*, 460 F. Supp. 23, 26 (N.D. Cal. 1978); *Wade v. Industrial Funding Corp.*, No. C 92-0343 TEH, 1993 WL 594019, at *9 (N.D. Cal. Dec. 14, 1993). Here, the West Pilot Class, as defined above, has approximately 1,900 members (*see* Compl. at ¶ 20; *Addington*, 606 F.3d at 1177), and easily satisfies the numerosity requirement.

2. **The West Pilot Class Shares Common Legal And Factual Issues.**

Under Rule 23(a)(2), a class may be certified when "there are questions of law or fact common to the class." *See also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). The commonality requirement is satisfied even if there is only one common issue among the class. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2556 (2011) ("*Dukes*") ("We quite agree that for purposes of Rule 23(a)(2) '"[e]ven a single [common] question"' will do.") (citations omitted); *Hanlon*, 150 F.3d at 1020; *Wehner v. Syntex Corp.*, 117 F.R.D. 641, 644 (N.D. Cal. 1987). As the Supreme Court recently instructed in *Dukes*: "'What matters to class certification is . . . the capacity of a classwide proceeding to generate common ***answers*** apt to drive the resolution of the litigation.'" *Dukes*, 131 S.Ct. at 2551 (emphasis in original) (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).

The commonality standard is met in the current case. Classwide litigation involving the West Pilots will generate common answers to common legal and factual questions that lie at the core of the seniority-integration dispute, such as whether: (i) USAPA's insistence on a non-Nicolau seniority list is motivated by hostility and/or

discrimination towards the West Pilots; (ii) USAPA has a legitimate union purpose for its insistence on a non-Nicolau seniority list; (iii) the correct legal standard for assessing US Airways' potential liability to the West Pilots is "collusion" or "knowing participation" in any breach of DFR by USAPA, and whether US Airways would be liable to the West Pilots under the applicable legal standard.

Notably, resolution of these common legal issues will depend on an evaluation of common facts. In rejecting the Nicolau Award and insisting on a date-of-hire seniority list, USAPA has acted in the same manner toward all West Pilots. As Judge Wake noted in the prior *Addington* litigation, "the only questions raised . . . relate to USAPA's unitary duty to represent its whole membership fairly" and whether "this duty was breached in the same manner with respect to all proposed class members." (Hollinger Decl. Exh. B, at p. 7.) Because this case will result in common answers to these and other questions, the West Pilot Class satisfies the commonality requirement.

3. The Named Addington Pilots Are Typical Of The West Pilot Class.

Rule 23(a)(3) requires that "the interest of the named representative align with the interests of the class," *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992), and "the threshold requirement[…] of typicality [is] not high." *Sorenson v. Concannon*, 893 F. Supp. 1469, 1479 (D. Or. 1994) (quotation omitted). The Ninth Circuit has recognized that "representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical."[4] *Hanlon*, 150 F.3d at 1020; *see also Morgan v. Laborers Pension Trust Fund for Northern California*, 81 F.R.D. 669, 677 (N.D. Cal. 1979). Under this standard, typicality is found where the named representatives and the class as a whole have been adversely impacted by the same allegedly wrongful course of conduct. *See Morgan*, 81 F.R.D. at 677;

[4] Although the proposed West Pilot Class is a defendant class, the typicality inquiry into their "claims" is appropriate because the roles of plaintiff and defendant are effectively reversed in a declaratory judgment action like the present case. *See County Materials Corp. v. Allan Block Corp.*, 502 F.3d 730, 734 (7th Cir. 2007).

Westways World Travel, Inc. v. AMR Corp., 218 F.R.D. 223, 235 (C.D. Cal. 2003). Accordingly, in determining whether the named representatives' claims are sufficiently typical of those of the rest of the class, courts look at "whether the claims are all based on the same legal theory." *Morgan*, 81 F.R.D. at 677.

The entire West Pilot Class has allegedly been affected by the same course of conduct – USAPA's rejection of the Nicolau Award, and, as mandated by its constitution, its insistence on a date-of-hire integrated seniority list. (USAPA Answer [Doc. No. 88], at ¶ 42.) The West Pilots' alleged claims are all derived from this uniform course of conduct and rely on the same legal theories: (i) that USAPA's insistence on, and agreement to, a non-Nicolau seniority list constitutes a breach of DFR; and (ii) that US Airways can be held liable, for "collusion" or "knowing participation with USAPA, if it agrees to a non-Nicolau seniority list. The interests of the Named Addington Pilots are, at the very least, "reasonably co-extensive" with those of all West Pilots. *Hanlon*, 150 F.3d at 1020. The West Pilot Class therefore satisfies the typicality requirement.

4. **The Named Addington Pilots And Class Counsel Are Adequate Representatives Of The West Pilots' Interests.**

Under Rule 23(a)(4), adequate representation depends on the following factors: 1) "the qualifications of counsel for the representatives"; 2) "the absence of antagonism, a sharing of interests between representatives and absentees"; and 3) "the unlikelihood that the suit is collusive." *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994). Although defendant classes sometimes raise due process concerns because the named defendants might be unwilling representatives, *see Thillens, Inc. v. Community Currency Exchange Ass'n*, 97 F.R.D. 668, 674 (N.D. Ill. 1983), such concerns are not present in this case because the Named Addington Pilots have themselves moved for class certification. (Addington Defendants' Amend. Certif. Mot. [Doc. No. 91].)

In addition, the Named Addington Pilots are the very same representatives that Judge Wake certified in the prior *Addington* litigation, finding that their "*bona fides* [were] obvious." (Hollinger Decl. Exh. B, at p. 9.) All of the Named Addington Pilots

are members of the proposed West Pilot Class; they are either on active status as employees of US Airways or, in the case of Defendants Bostic and Wargocki, are on furlough status but eligible for recall. (Hemenway Decl. ¶¶ 6-12.) The fact that two of the named representatives are on furlough enhances adequacy since some absent class members are also on furlough (*id.* ¶ 13), and Defendants Bostic and Wargocki are well-situated to protect the interests of furloughed West Pilots. The Named Addington Pilots are also knowledgeable about the facts and law involved in this case, and have shown their willingness to participate in strategy sessions and communicate frequently with class counsel. (Hollinger Decl. Exh. C at 11:25-12:18, 38:5-13; Exh. D at 12:15-19, 95:2-10; & Exh. E at 68:16-19.)

As to adequacy of counsel, the class counsel chosen by the West Pilot Class is experienced in prosecuting large class actions and has specific experience in handling matters under the RLA. (*See* Harper Decl. [Doc. No. 87], ¶¶ 2-11.) Furthermore, class counsel has extensive knowledge of the law and facts involved in this case since they represented the same West Pilot Class in *Addington* – where the West Pilot Class was certified and prevailed in a jury trial. (*Id.* ¶ 6.) Thus, class counsel easily satisfies the adequacy requirement.

B. The West Pilot Class Should Be Certified Under Rule 23(b)(1)(A) And/Or (23)(b)(2).

In addition to complying with the requirements of Rule 23(a), the proposed class must also satisfy the requirements of one subdivision of Rule 23(b). S*ee In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000). Here, the West Pilot Class satisfies the requirements of both Rule 23(b)(1)(A) and Rule 23(b)(2).

1. The West Pilot Class Should Be Certified Under Rule 23(b)(1)(A).

Certification under Rule 23(b)(1)(A) is appropriate where "inconsistent or varying adjudications […] would establish incompatible standards of conduct" that would prejudice the party opposing the class (i.e., US Airways). Fed. R. Civ. P. 23(b)(1)(A). The risk of inconsistent adjudications is most acute in cases, like this one, "where the

party [opposing the class] is obliged by law to treat the members of the class alike." *Amchem Products Inc. v. Windsor*, 521 U.S. 591, 614 (1997); *see also In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1545 (11th Cir. 1987).

Here, US Airways would obviously be prejudiced if individual suits resulted in inconsistent adjudications. If, in two separate actions brought by two separate West Pilots, one court finds that US Airways will be liable if it agrees with USAPA to a non-Nicolau seniority list but the other court finds that US Airways would not be liable, such inconsistent rulings would create incompatible standards of conduct for US Airways. Further, if such actions also were brought against USAPA (which they undoubtedly would), it would face the same risk of inconsistent adjudications. Indeed, although the West Pilots moved for class certification in the prior *Addington* litigation only under Rule 23(b)(2), Judge Wake noted that the potential for independent actions and incompatible standards of conduct under Rule 23(b)(1) was also present. (Hollinger Decl. Exh. B, at p. 4 n.2.)

2. **The West Pilot Class Should Be Certified Under Rule 23(b)(2).**

Class action treatment is warranted under Rule 23(b)(2) where "the party opposing the class has acted or refused to act on grounds that apply generally to the class," such that "final injunctive relief or corresponding declaratory relief is appropriate." Fed. R. Civ. P. 23(b)(2). Courts in the Ninth Circuit have certified defendant classes under Rule 23(b)(2). *See, e.g., Blake*, 663 F.2d at 913-14 (affirming certification of a class of cross-defendants); *Coalition for Economic Equity v. Wilson*, No. C 96-4024 TEH, 1996 WL 788376, at *3 (N.D. Cal. Dec. 16, 1996).

This case exemplifies proper Rule 23(b)(2) class treatment. Here, the party "opposing the class," i.e., US Airways, will have acted or not acted on grounds applicable to all West Pilots – it will have either agreed or not agreed to USAPA's demands for a non-Nicolau seniority list that would be applicable to the entire workforce of US Airways pilots. USAPA, another party opposing the West Pilot Class, has also acted towards all West Pilots in a uniform manner by rejecting the Nicolau Award and insisting on a date-

of-hire seniority list. (*See* Hollinger Decl. Exh. B, at p. 7 ("the only questions raised . . . relate to USAPA's unitary duty to represent its whole membership fairly" and whether "this duty was breached in the same manner with respect to all proposed class members.").) A class-wide judicial declaration is necessary and proper because US Airways' potential acceptance of a non-Nicolau seniority list, as well as USAPA's constitutionally-mandated insistence on such a list, are common acts that either give rise to potential liability to all West Pilots or to none of them. Indeed, in the prior *Addington* litigation, Judge Wake noted that "Rule 23(b)(2) was made for cases like this one," because the class shares both a common injury and a common remedy in connection with USAPA's decision to "abandon the Nicolau Award solely for the benefit of the East Pilots." (Hollinger Decl. Exh. B, at p. 4.) *See also Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 162 (2d Cir. 2001) (recognizing that certification under Rule 23(b)(2) is particularly appropriate "where broad, class-wide injunctive or declaratory relief is necessary to redress a group-wide injury").

II. USAPA'S ARGUMENTS AGAINST CERTIFICATION OF A WEST PILOT CLASS SHOULD BE REJECTED.

USAPA's primary arguments against certification, at least as set forth in its opposition to the West Pilots' motion, appear to be that: (i) alleged individual differences in the effect of a non-Nicolau seniority list on West Pilots defeat commonality and typicality; and (ii) certification under Rule 23(b)(1)(A) is unwarranted because individual West Pilots will lack standing to sue US Airways. (*See* USAPA Opp. [Doc. No. 92], at pp. 7-10, 16.) Neither of these arguments is persuasive – the first is wrong on the law, and the second ignores this Court's prior rulings and the legal theory asserted by the West Pilots to seek to hold US Airways liable if it were to agree to a non-Nicolau seniority list.

A. USAPA's Arguments Regarding Commonality And Typicality Are Based On An Incorrect Understanding Of The Requirements Of Rule 23(a) And Should Therefore Be Rejected.

The factual premise for USAPA's commonality and typicality arguments is that, depending on the nature of the integrated seniority list that is ultimately agreed to, not all

West Pilots will be adversely affected (relative to the Nicolau Award) to the same degree as the Named Addington Pilots because of variations in their seniority. However, even the exhibit which USAPA created for purposes of this argument demonstrates that the Named Addington Pilots represent a broad spectrum of seniority, ranging from the bottom ten percent to the top forty percent (Doc. No. 92 at p. 8), and therefore the claims of the Named Addington Pilots are indeed typical of and common to the claims of the West Pilot Class.

Moreover, even if USAPA's factual premise were correct, courts have held that the presence of "divergent factual predicates" and "disparate legal ***remedies*** within the class" are not enough to defeat commonality where, as here, all class members share other common legal and factual questions for which the litigation can generate common answers. *Hanlon*, 150 F.3d at 1019 (emphasis added); *see also Dukes*, 131 S.Ct. at 2551 (finding class certification appropriate where a classwide proceeding has the capacity "to generate common answers apt to drive the resolution of the litigation") (internal citations omitted). Differences (if any) in the degree to which West Pilots are affected do not defeat typicality either, because typicality only requires that the claims of the Named Addington Pilots be "reasonably co-extensive" – not identical – with the class. *Hanlon*, 150 F.3d at 1020; *see also Murray v. Local 2620, Dist. Council 57, Am. Fed'n of State, Cnty. and Mun. Emps.*, 192 F.R.D. 629, 635 (N.D. Cal. 2000); *Thomas & Thomas Rodmakers Inc. v. Newport Adhesives & Composites, Inc.*, 209 F.R.D. 159, 164 (C.D. Cal. 2002); (Hollinger Decl. Exh. B, at p. 8 (finding typicality because "the claim that USAPA's policies are not detrimental to some or all West Pilots […] is contested and relates closely to the merits of the case").)

Finally, even if, as USAPA contends, implementation of a non-Nicolau seniority list might not negatively affect every West Pilot,[5] this too is irrelevant because the issue of

[5] USAPA's argument regarding how individual West Pilots may be affected by a non-Nicolau seniority list, and the possibility that some West Pilots might not be harmed at all even though it was previously found that USAPA "cast aside the result of an internal seniority arbitration solely to benefit the East Pilots at the expense of the West Pilots" (*Addington*, 2009 WL 2169164, at *8), is entirely speculative. The Ninth Circuit

DFR breach is not dependent on where a given West Pilot winds up on a seniority list – it is only dependent on whether USAPA's rejection of the Nicolau Award, alleged to be "final and binding" by the West Pilots, and its insistence on a date-of-hire seniority list is motivated by hostility and/or discrimination towards the West Pilots as a whole and whether USAPA has a legitimate union purpose for its insistence on a non-Nicolau seniority list. (Hollinger Decl. Exh. F at pp. 16, 36-37.) Judge Wake recognized this when he rejected USAPA's identical arguments in the prior *Addington* litigation, stating that "USAPA's breach or non-breach of its duty . . . runs to the West Pilot membership as a whole," and that certification was therefore appropriate notwithstanding the fact that different West Pilots would hold "different ranks on any hierarchical seniority list." (Hollinger Decl. Exh. B, at p. 8.)

B. A Rule 23(B)(1)(A) Class Is Appropriate Given This Court's Prior Rulings And The Legal Theory Asserted By The West Pilots.

USAPA has also argued that there is no need to certify a Rule 23(b)(1)(A) class of West Pilots to effectuate the relief that US Airways seeks in Count III of its Complaint, because "no individual pilot, or group of individual pilots, will have standing to sue [under the RLA] – whether for a collusive-DFR, or for a failure to bargain in good faith in violation of the RLA." (USAPA Opp. [Doc. No. 92], at p. 16.) But this Court has already rejected USAPA's argument in ruling that the West Pilots are necessary parties to this action: "if the West Pilots were dropped [from this suit] they would not be bound by the outcome here and ***would be free to file their suit against US Airways***." (Order [Doc. No. 85], at p. 9 (emphasis added).)

In any event, USAPA's argument that certification under Rule 23(b)(1)(A) is unwarranted because individual pilots cannot sue an employer for bad-faith bargaining, and individual union officers cannot be sued for breach of DFR, is beside the point. The West Pilots assert that individual pilots can sue their employer under a "knowing

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disfavors denial of certification based on hypothetical future developments. *See Social Servs. Union, Local 535 v. County of Santa Clara*, 609 F.2d 944, 948 (9th Cir. 1979).

participation," or "collusion," theory where the employer has facilitated or assisted the union in a breach of DFR. (*See* Addington Pilots Opp. [Doc No. 48], at p. 2) (citing *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 207 (1944) (carrier was joined as defendant in DFR action)); *see also Price v. S. Pac. Transp. Co.*, 586 F.2d 750, 752 (9th Cir. 1978) ("Joinder of the employer is permissible when, as in this case, the employee alleges that the employer is implicated in the union's breach of its duty of fair representation."). The West Pilots have unequivocally threatened to sue US Airways under such a theory if it agrees to a non-Nicolau seniority list. (Compl. ¶ 33; Addington Pilots Answer [Doc. No. 34], ¶ 33; Addington Pilots Opp. [Doc. No. 48], at p. 4.) There is simply no guarantee that every court will see things USAPA's way and rule that individual West Pilots do not have "standing" to sue US Airways for participating in a DFR breach by USAPA. Given the undisputed evidence of the West Pilots' threat to sue US Airways, this Court should certify the proposed West Pilot class under Rule 23(b)(1)(A) to avoid the risk of inconsistent adjudications on this and other issues.

CONCLUSION

Certification of the West Pilot Class, as requested herein, will provide an efficient and consistent adjudication of common issues and a means to obtain class-wide declaratory relief. Accordingly, US Airways respectfully requests that this Court certify the defendant West Pilot Class.

Dated: August 15, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2011, the foregoing document was electronically transmitted to the United States District Court Clerk's Office using the CM/ECF System for filing and transmittal.

/s/ Robert A. Siegel
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