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14 **UNITED STATES DISTRICT COURT**
15 **DISTRICT OF ARIZONA**

16 US Airways, Inc., a Delaware
17 Corporation,

18 Plaintiff,

19 v.

20 Don Addington, an individual; John
21 Bostic, an individual; Mark Burman, an
22 individual; Afshin Iranpour, an
23 individual; Roger Velez, an individual;
24 and Steve Wargocki, an individual, on
25 behalf of themselves and all other
26 similarly-situated individuals,

24 and

25 US Airline Pilots Association, an
26 unincorporated association,

27 Defendants.
28

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

**PLAINTIFF US AIRWAYS, INC.'S
REPLY BRIEF IN SUPPORT OF
MOTION FOR CLASS
CERTIFICATION**

1 **INTRODUCTION**

2 US Airways seeks declaratory relief to determine its rights, constraints, and
3 obligations to both USAPA and the West Pilots with respect to the Nicolau Award in its
4 ongoing negotiations for a collective bargaining agreement with USAPA. In its motion
5 for class certification, US Airways has established that certification of a defendant class of
6 West Pilots is necessary to bind all West Pilots to the same declaratory judgment.
7 USAPA fails to address how this Court can grant effective declaratory relief if the West
8 Pilots class is not certified.

9 Instead, USAPA asserts that class certification is inappropriate because the West
10 Pilots class allegedly fails to satisfy some of the prerequisites of Rule 23(a). In
11 challenging the commonality and typicality of the named representatives' claims, USAPA
12 asserts defenses on the merits regarding the ripeness of the West Pilots' claims and its
13 duty to implement the Nicolau Award. But even if these contentions are relevant,
14 USAPA's defenses raise issues which can be decided as to all West Pilots and thus
15 confirm that class-wide adjudication is appropriate.

16 Moreover, in challenging the adequacy of the named representatives, USAPA
17 focuses on hypothetical differences between "junior" and "senior" West Pilots. But this
18 Court should not speculate on hypothetical conflicts of interest. Instead, the Court should
19 recognize that there are real and common interests that affect all West Pilots regardless of
20 seniority level, and, in order to effectively adjudicate these shared interests and bind all
21 West Pilots to the requested declaratory relief, the instant motion for class certification
22 should be granted.

ARGUMENT

I. THE PROPOSED WEST PILOT CLASS SATISFIES THE COMMONALITY AND TYPICALITY REQUIREMENTS OF RULE 23(A)(2) AND (3) BECAUSE A CLASSWIDE PROCEEDING WILL GENERATE COMMON ANSWERS TO COMMON QUESTIONS THAT ARE APT TO DRIVE THE RESOLUTION OF THIS LITIGATION.

USAPA’s argument that the proposed West Pilot Class fails to meet the commonality and typicality requirements of Rule 23(a)(2) and (3)¹ is based on the faulty premise that this case “has as its underlying rationale the resolution of seniority rights” *generally*, rather than the rights and obligations of the parties *specifically with regard to the Nicolau Award*. (Cf. USAPA Opp. [Doc. No. 111], at 2-3 (“this case is not about, and never was, *merely* the Nicolau proposal”) (emphasis in original).) To the contrary, as set forth in US Airways’ Complaint, this case is all about the Nicolau Award: the West Pilots contend that USAPA must implement the Nicolau Award to satisfy its duty of fair representation (“DFR”), and USAPA disagrees; the West Pilots contend that US Airways will be liable to them if it were to agree to USAPA’s proposal for a non-Nicolau seniority list, and US Airways disagrees. (Compl. [Doc No. 1], at ¶¶ [3, 32-33].) To resolve these disputes, US Airways seeks, in the alternative, three judicial declarations that are all specifically tied to the implementation or non-implementation of the Nicolau Award. (*Id.* at ¶¶ 5, 35].) And the Court’s answer to those questions – namely, whether USAPA would breach its DFR by failing to pursue the Nicolau Award (as opposed to the specific harm that would be incurred by specific West Pilots therefrom), and whether US Airways can be held liable to the West Pilots for agreeing to a non-Nicolau seniority proposal –

¹ USAPA does not question that class certification would be appropriate under Rule 23(b)(1)(A) to avoid the possibility of incompatible standards of conduct resulting from inconsistent judgments obtained by the individual West Pilots in separate proceedings. In terms of certification under Rule 23(b)(2), USAPA summarily, and incorrectly, claims that defendant classes cannot be certified under that rule. (USAPA Opp. [Doc. No. 111], at 1 n.1.) In fact, district courts in the Ninth Circuit have certified defendant classes under Rule 23(b)(2) and the Ninth Circuit has affirmed certification of defendant classes under this Rule 23. *See, e.g., Coalition for Economic Equity v. Wilson*, No. C 96-4024 TEH, 1996 WL 788376 (N.D. Cal. Dec. 16, 1996) (certifying a defendant class under Rule 23(b)(2)); *Blake v. Arnett*, 663 F.2d 906, 913 (9th Cir. 1981) (affirming district court’s certification of a class of cross-defendants under Rule 23(b)(2)).

1 will apply equally to “junior” and “senior” West Pilots. Because US Airways’ entitlement
2 to the declaratory relief sought in this proceeding is substantially dependent on answers to
3 questions that can be provided on a class-wide basis, commonality is satisfied. *See Wal-*
4 *Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

5 Instead of explaining how the declaratory relief sought by US Airways is
6 dependent on the resolution of legal/factual questions for which there are different
7 answers for individual members of the proposed West Pilots class, which is the germane
8 inquiry for commonality purposes, USAPA makes various arguments relating to the
9 merits of the West Pilots’ claims and its defenses thereto. But even if relevant, USAPA’s
10 contentions that “there is no binding precedent finding that USAPA has a *duty* to
11 implement the ALPA-generated Nicolau proposal” (USAPA Opp. at 3 (emphasis in
12 original)), that some of the common questions raised in US Airways’ Complaint
13 (including the presence of a common injury across the entire West Pilots class) are the
14 same as those the Ninth Circuit held unripe in *Addington* (*see id.* at 4-5),² provide no
15 reason for denying class certification. Whether or not USAPA’s contentions are correct,
16 which is not something to be decided by the Court on a motion for class certification, it is
17 indisputable that those questions can also be answered in a common manner for all of the
18 West Pilots.

19 Contrary to USAPA’s argument, this suit seeks to resolve disputed questions
20 regarding the parties’ rights and obligations specifically with respect to the Nicolau
21 Award. And, however those questions are ultimately resolved, they are most efficiently
22 and effectively resolved in a class action proceeding because the answers to those
23 questions will apply equally to all of the West Pilots regardless of any differences in their
24 relative seniority.

26 ² This Court already has ruled that the questions raised by US Airways’ Complaint
27 are ripe for adjudication because, *inter alia*, “US Airways seeks guidance on what
28 positions regarding the Nicolau Award are legally permissible *at the present time*” in
order to avoid “*some* injury.” (Order [Doc No. 85], at 8 (emphasis in original).)

1 **II. THE PROPOSED CLASS REPRESENTATIVES WILL ADEQUATELY**
2 **PROTECT THE SHARED INTERESTS OF THE WEST PILOTS AS**
3 **REQUIRED BY RULE 23(A)(4).**

4 Despite the fact that the six proposed class representatives have zealously
5 represented the West Pilots class in related litigation over the past several years and are
6 intimately familiar with the relevant factual and legal issues, USAPA continues to argue
7 that these individuals are inadequate class representatives. USAPA's arguments should be
8 rejected.

9 USAPA's assertion that the individual named defendants are inadequate
10 representatives because of their involvement with Leonidas LLC, the "Company that
11 finances and controls the litigation decisions of the Addington pilots," has been rejected
12 before and should be rejected again. (*See* USAPA Opp. at 7 n.4.)³ In the first *Addington*
13 trial, Judge Wake dismissed USAPA's similar argument that these proposed class
14 representatives did not sufficiently participate in the litigation because Leonidas acted as a
15 "control group." (*See Addington* Certification Order, attached as Exh. B to Hollinger
16 Decl. i/s/o Certification [Doc No. 107-1], at 23 (finding named plaintiffs adequate, and
17 noting that "[t]he establishment and use of Leonidas LLC to fund the litigation and
18 communicate with the proposed West Pilot Class, is, if anything a prudent discharge of
19 Plaintiffs' representative function".) Here, the six named individual defendants are the
20 same representatives who were previously certified in *Addington*, notwithstanding their
21 involvement with Leonidas. The result should be the same here.

22 USAPA's reliance on *United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*
23 ("*UIFO*") is misplaced. (*Cf.* USAPA Opp. at 7 n.4.) In *UIFO*, the named plaintiffs were
24 inadequate class representatives because they were members of an organization that was
25 antagonistic to some of the putative class members. *See* 572 F. Supp. 1494, 1500

26 ³ USAPA argues that confidential East Pilots Social Security Numbers ("SSN") maintained
27 by the Company were disclosed to Leonidas in connection with mailings by three West Pilots,
28 two of whom are members of Leonidas. (*See id.*) Nothing has been proved with regard to these
three pilots' mailings or the disclosure of SSN. In any event, none of the three West Pilots
allegedly involved are named defendants here. Thus, USAPA's arguments are irrelevant to
whether the proposed class representatives are adequate.

1 (N.D. Ill. 1983). Here, USAPA offers no evidence to suggest that Leonidas is
2 antagonistic to the *West Pilots* (i.e., the putative class members). While Leonidas may
3 well be antagonistic to USAPA, *UIFO* does not hold that proposed class representatives
4 cannot be antagonistic to the union they are suing, and to argue otherwise would mean
5 that USAPA could never be sued on a classwide basis by an organization of pilots hostile
6 to it.

7 USAPA's argument that the proposed class representatives are inadequate because
8 they supposedly represent only "the *junior*-most West pilots" is also unavailing. As an
9 initial matter, USAPA's hypothetical discussion regarding who would and would not
10 allegedly benefit from the implementation of a non-Nicolau seniority list, (USAPA Opp.
11 at 7-8, 12), is the exact type of speculative argument that the Ninth Circuit has held is
12 insufficient to defeat certification. *See Social Servs. Union, Local 535 v. County of Santa*
13 *Clara*, 609 F.2d 944, 948 (9th Cir. 1979) ("Mere speculation as to conflicts that may
14 develop at the remedy stage is insufficient to support denial of initial class certification.");
15 *see also Lee v. ITT Corp.*, No. C10-0618-JCC, 2011 WL 2516367, at *3 (W.D. Wash.
16 June 24, 2011) (denial of class certification should not be based on speculation that certain
17 provisions in some of the class members' contracts might create divergent interests). In
18 addition, the issue here is whether USAPA may lawfully reject the Nicolau seniority list
19 under the circumstances of this case, including the final and binding nature of the
20 arbitration procedure under the ALPA Merger Policy and whether West Pilots would have
21 a cause of action against US Airways for acceptance of a non-Nicolau seniority list as
22 asserted in correspondence from the West Pilots' counsel. As discussed in US Airways'
23 Memorandum in Support of Class Certification, these questions involve USAPA's

1 uniform course of conduct and are subject to common resolution. (US Airways Mem.
2 [Doc. No. 106], at 7-9.)⁴

3 **CONCLUSION**

4 For all of the foregoing reasons, and for the reasons set forth in its motion for class
5 certification, US Airways respectfully requests that the Court grant its motion for
6 certification of a defendant West Pilots class.

7
8 Dated: September 12, 2011.

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⁴ USAPA also asserts that this Court should consider the furlough status of two of the
24 named representatives in assessing their adequacy to represent the West Pilots class. They note
25 that proposed class representatives must be members of the class, not ex-members, and cite cases
26 for the proposition that former employees are inadequate representatives of a class of current
27 employees. (*See* USAPA Opp. at 9, n.5.) Named defendants John Bostic and Steve Wargocki are
28 currently furloughed employees of US Airways, who are eligible for recall. (Hemenway Decl.
[Doc. No. 108], at ¶¶ 10-12.) Regardless, they are both members of the West Pilots class as
defined in US Airways' Complaint and motion for class certification motion and can adequately
represent the class as a whole, particularly where some of the class members are themselves also
on furlough. (*See id.* at ¶ 13.)

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 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

Robert A. Siegel

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