IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

US Airways, Inc., Plaintiff, vs. Don Addington, et al., Defendants.	No. CV-10-1570-PHX-ROS **ORDER**

Plaintiff US Airways would like to sue a class of approximately 1,900 pilots formerly employed by America West Airlines. Those pilots, according to six of them allegedly acting on their behalf, would like to be sued. Despite this agreement, Defendant USAPA believes certifying such a class would be inappropriate. For the following reasons, a class will be certified. In addition, USAPA will be ordered to either dismiss its counterclaim against US Airways or add as an additional defendant the class of pilots formerly employed by America West Airlines.

BACKGROUND

In 2005, US Airways merged with America West Airlines, Inc. ("America West") to form a single airline. At the time of the merger, the pilots for US Airways (the "East Pilots") and America West (the "West Pilots") were represented by the Air Line Pilots Association ("ALPA"). Due to the merger, the two groups of pilots needed to be combined into a single

workforce but the two groups could not agree "as to their relative placement on an integrated pilot seniority list." (Doc. 61 at 2). The two groups eventually engaged in arbitration before arbitrator George Nicolau to resolve the seniority issue.

In May 2007, Mr. Nicolau issued his award which became known as the "Nicolau Award." The Nicolau Award did not use a strict "date of hire" rule for pilot seniority. Not surprisingly, the East Pilots–who would benefit much more from a strict "date of hire" seniority rule–were dissatisfied with the Nicolau Award. The East Pilots formed a new labor union known as USAPA. The USAPA constitution mandates seniority be determined by "date of hire." When put to a vote by all the pilots, USAPA was certified as the labor union for both the East and West Pilots. According to the West Pilots, USAPA was formed solely to evade the Nicolau Award.

In 2008, a group of six West Pilots brought suit against USAPA claiming USAPA had breached its duty of fair representation by refusing to adopt the Nicolau Award during negotiations with US Airways for a new collective bargaining agreement ("CBA"). The Court hearing that case certified a plaintiff class of all pilots on the America West seniority list as of September 20, 2005. That case was later dismissed as not presenting a ripe controversy. Shortly after that dismissal, US Airways filed the present declaratory judgment action against a group of six West Pilots as representatives of a defendant class consisting of all pilots on the America West seniority list as of September 20, 2005. US Airways also named USAPA as a defendant. US Airways seeks one of the following three determinations:

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

US Airways claims it needs this guidance in order to determine the range of permissible proposals in the CBA negotiations. According to US Airways, USAPA has promised a strike if US Airways insists on the new CBA incorporating the Nicolau Award while the West

Pilots have promised to sue US Airways if the new CBA does not incorporate the Nicolau Award. Due to the threatened litigation, US Airways believes it needs guidance from this Court and, if appropriate, protection from suit from *all* the West Pilots. Declaratory relief against only the six named West Pilots would be worthless as it would leave over 1,800 other West Pilots free to file suit against US Airways.[1] Accordingly, US Airways has moved to certify a defendant class consisting of "All pilots employed by the airline US Airways in September 2008 who were on the America West seniority list on September 20, 2005." (Doc. 106 at 9 n.3). The six West Pilots currently sued as representatives of the proposed defendant class agree the class should be certified. USAPA, however, believes class certification would be inappropriate.[2]

ANALYSIS

I. Motion for Class Certification

Defendant class actions "are a relatively rare breed." *Tilley v. TJX Companies, Inc.*, 345 F.3d 34, 37 (1st Cir. 2003). A defendant class action where a defendant class *wants* to be sued is even rarer. *See* 2 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 4:46 (4th ed. 2011) ("Newberg") (defendant class actions usually involve "an unwilling defendant class representative chosen by a litigation adversary"). Unfortunately, the Federal Rules of Civil Procedure provide no specific guidance regarding defendant class actions. And "[t]he practical and theoretical considerations and problems for maintaining a defendant

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[1] A judgment barring the six pilots from suing US Airways would not bar the other pilots from doing so. *See* 2 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 4:65 (4th ed. 2011) ("Unrelated plaintiffs are not bound by an adverse decree against any one of them. To avoid this problem, a prospective defendant may sue [a defendant class] for a declaration of rights or of nonliability.").

[2] USAPA would not be a member of the defendant class and certification would have no direct impact on USAPA's rights. Thus, it is unclear whether USAPA's objections should be considered. *See Tilley v. TJX Companies, Inc.*, 345 F.3d 34, 36 (1st Cir. 2003) (finding defendant who would not be member of class lacked standing to appeal class certification order). But out of an abundance of caution, the Court will address USAPA's contentions regarding certification.

class action are fundamentally unique from those governing plaintiff class suits." *Id.* This case presents a number of troublesome issues because the proposed class members are not alleged to have committed any legal wrong against US Airways nor has US Airways subjected them to any legal wrong. Instead, US Airways only wishes to certify the class to ensure that judgment in this case is binding on all the class members in the event the Court rules the West Pilots cannot sue US Airways. Thus, the majority of class members might not have as strong an interest in this case compared to a more traditional case meant to redress harm inflicted on them. But as set forth below, while this case is unusual, it is an appropriate use of a defendant class.

As in standard class actions, a party seeking to certify a defendant class must satisfy the four requirements contained in Federal Rule of Civil Procedure 23(a) and one of the three requirements listed in Rule 23(b). Newberg § 4:46; *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548 (2011) (party seeking class certification must satisfy 23(a) and 23(b)). US Airways claims the 23(a) criteria are satisfied and that a class is appropriate under either Rule 23(b)(1)(A) or Rule 23(b)(2). Based on the circumstances of this case, US Airways is correct that the Rule 23(a) requirements are met and that a class is appropriate under Rule 23(b)(1)(A). The Court need not address certification under Rule 23(b)(2).

A. Rule 23(a)

Rule 23(a) requires the proposed class satisfy four requirements:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

Each of these requirements is addressed below.

i. Numerosity

The first requirement is that the proposed class be so numerous that joinder is impracticable. There is no bright line test for determining whether this requirement is met.

But classes with more than forty members are usually sufficiently numerous to satisfy the requirement. *See EEOC v. Kovacevich "5" Farms*, 2007 WL 1174444, at *21 (E.D. Cal.) ("Courts have routinely found the numerosity requirement satisfied when the class comprises 40 or more members."). Here, the proposed class consists of approximately 1,900 West Pilots. This easily satisfies the numerosity requirement.

ii. Commonality

The second requirement is that the proposed class have questions of law or fact in common. Fed. R. Civ. P. 23(a)(2). But this language is misleading in that the relevant inquiry is not whether the proposed class shares common *questions* but on the "capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 131 S. Ct. 1221 (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). This is because a sufficiently large proposed class might present any number of common questions if those questions are sufficiently general. *See Dukes*, 131 S. Ct. 2551 (observing general question regarding violation of Title VII is insufficient considering Title VII can be violated in many ways). Only when the proposed class share claims based upon a sufficiently discrete "common contention" is the commonality requirement met. *Id.*

Here, US Airways filed suit seeking a determination regarding the legal effect of various positions it may adopt during the CBA negotiations. US Airways also sought a declaration that, regardless of the position it adopts, the West Pilots may not sue US Airways. Based on this latter request, this litigation will generate a common answer to the question of whether the West Pilots can sue US Airways based on US Airways' position during negotiations. This answer will impact *all* the West Pilots and undoubtedly will drive resolution of the litigation. The commonality requirement is met.

iii. Typicality

The third requirement, typicality, "is fulfilled if 'the claims or defenses of the representative parties are typical of the claims or defenses of the class.'" *Hanlon v. Chyrsler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) (quoting Fed. R. Civ. P. 23(a)(3)). This requires

only that representative claims or defenses be "reasonably co-extensive with those of absent class members; they need not be substantially identical." *Id.* As is often the case, the typicality and commonality requirements in this case are very closely related. *See Dukes*, 131 S. Ct. 2551 n.5 (noting "commonality and typicality requirement of Rule 23(a) tend to merge").

The six named West Pilots' claim or defense is that US Airways can be sued if it adopts certain positions during CBA negotiations. This claim or defense is not just typical, it is *identical* to the claim or defense of the proposed class members. This easily satisfies the requirement that the claims or defenses of the class representatives be "reasonably co-extensive" with the claims or defenses of the proposed class members. *Hanlon*, 150 F.3d at 1020.

iv. Adequacy

The final requirement of Rule 23(a) is that the representative parties will fairly and adequately protect the interests of the class. This requirement depends on answering two questions: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). USAPA does not dispute that the named plaintiffs and their counsel will vigorously prosecute claims on behalf of the West Pilots. Thus, the second question is satisfied. USAPA argues, however, that the six named West Pilots have a conflict of interest with the absent class members. USAPA's argument is not convincing.

According to USAPA, the interests of the junior and senior West Pilots are markedly different. USAPA believes junior pilots will benefit from adoption of the Nicolau Award while senior pilots would suffer negative consequences if the Nicolau Award were adopted.[3]

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[3] USAPA also argues a conflict of interest exists based on the relationship between the six named West Pilots and Leonidas, LLC. (Doc. 111 at 8 n.4). According to USAPA, Leonidas "is an Arizona Company that finances and controls the litigation decisions of the [six named West] pilots." (Doc. 111 at 8). USAPA presents no evidence of such control nor

USAPA did not present any evidence in support of this supposed conflict and the Court would have to speculate whether this conflict actually exists. Mere "speculation" that a "potential conflict" exists is not sufficient to defeat class certification.[4] *Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir. 2003) (quoting cases). The adequacy requirement is met.

B. Certification is Appropriate Pursuant to Rule 23(b)(1)(A)

Having satisfied the four requirements of Rule 23(a), the West Pilots must also satisfy one of the requirements of 23(b). Because certification is appropriate under Rule 23(b)(1)(A) the Court need not address the alternative grounds of certification under Rule 23(b)(2).

Rule 23(b)(1)(A) allows for a class action when "prosecuting separate actions by or against individual class members would create a risk of . . . inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." In this case, requiring US Airways to obtain declaratory relief against each member of the West Pilot class undoubtedly creates a risk of incompatible standards of conduct. If US Airways were to bring separate suits against the West Pilots, some cases could result in judgment requiring US Airways adopt one position in CBA negotiations while other cases could result in a judgment requiring adoption of a different position. Absent certification, it is possible US Airways would be required to engage in mutually exclusive types of conduct. In addition, separate suits raises the possibility that one court might rule the West Pilots do not have a viable legal claim while another court rules they do. This would create the undesirable situation of some proposed class members having different legal rights than other proposed class members. Based on these considerations, certification under Rule 23(b)(1)(A) will be ordered.

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does it explain how, assuming some relationship between the six named pilots and Leonidas, that relationship presents a disabling conflict.

[4] Of course, as the case progresses the Court may have to revisit the certification issue if evidence of conflicts amongst the West Pilots is presented.

C. Class Counsel

The proposed class counsel has substantial experience regarding the precise issues presented in this case and were successful in the prior jury trial. USAPA offered no basis for the Court to reject the proposed class counsel and there is none. The Court will appoint Marty Harper, Kelly J. Flood, Andrew S. Jacob, and Katherine V. Brown as class counsel.

D. Notice

Notice is not required when a class is certified under Rule 23(b)(1). Fed. R. Civ. P. 23(c)(2). But given the circumstances of this case, notice to the class is appropriate. *See* Newberg § 8:5 ("Notice is frequently advisable in (b)(1) and (b)(2) classes to assist in identifying conflicting interests, class antagonism, or other diverse problems of which the court was unaware at the certification hearing . . . ."). US Airways and the West Pilots will be instructed to submit a proposed notice containing a brief overview of the case, the relief US Airways seeks, the impact that relief might have on the West Pilots' legal rights, and any potential conflict that exists amongst class members. US Airways and the West Pilots must also indicate their preferred method for delivering the notice.

II. Motion to Dismiss

When responding to US Airways' complaint, USAPA asserted a counterclaim seeking a "a declaratory judgment declaring that in the event that US Airways and USAPA enter into a collective bargaining agreement that does not implement the Nicolau Award, that US Airways would not be liable to USAPA or any pilot employed by US Airways, under the Railway Labor Act or otherwise." (Doc. 88 at 20). This counterclaim is identical to one type of declaratory relief requested by US Airways. That is, both US Airways and USAPA seek a declaration that US Airways cannot be held liable to any pilot regardless of which seniority provision is adopted during the CBA negotiations. It is unclear why USAPA believes this counterclaim is necessary.[5] But regardless of its motivation, USAPA will be ordered to

[5] USAPA concedes its counterclaim is "virtually identical" to one form of relief requested by US Airways. Courts routinely dismiss or strike counterclaims when they are

either dismiss its claim or join the class of West Pilots as defendants.

The Court previously ruled the West Pilots were necessary parties to US Airways' complaint. (Doc. 85 at 8-9). That was due to US Airways seeking to extinguish the West Pilots' alleged right to sue US Airways. As the Court explained, if the West Pilots were not a party to US Airways' complaint, they "would be free to file their suit against US Airways" and a "core goal of US Airways seeking declaratory relief" would be frustrated. (Doc. 85 at 9). Despite USAPA's counterclaim presenting a "virtually identical" question as that presented in US Airways' complaint, USAPA chose not to name the West Pilots as a counterclaim-defendant. (Doc. 99 at 2). But just as the West Pilots were necessary for resolution of US Airways' claims, they are also necessary for resolution of USAPA's counterclaim. USAPA cannot seek to extinguish the West Pilots' legal rights without even naming the West Pilots as an adverse party. This result is required under the most basic pleading requirements applicable to a claim for declaratory judgment.

A claim for declaratory judgment requires the existence of a "substantial controversy between parties having *adverse legal interests*." *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 (9th Cir. 1990) (emphasis added). USAPA's counterclaim names only US Airways as a defendant and seeks a declaratory judgment that US Airways will "not be liable to USAPA or any pilot employed by US Airways, under the Railway Labor Act or otherwise." (Doc. 88 at 20). Of course, US Airways would happily stipulate to this relief. That is, the sole defendant on USAPA's counterclaim would consent to judgment being entered on that counterclaim immediately. There simply is no defendant named in the

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the "mirror image of claims in the complaint." *Stickrath v. Globalstar, Inc.*, 2008 WL 2050990, at *3 (N.D. Cal.) (citing cases). *See also* Wright, Miller & Kane, 6 Federal Practice & Procedure 2d § 1406 ("When the request for declaratory relief brings into question issues that already have been presented in plaintiff's complaint and defendant's answer to the original claim, however, a party might challenge the counterclaim on the ground that it is redundant and the court should exercise its discretion to dismiss it."). But the relief requested by US Airways is presented as three alternative forms of relief. Thus, it is not certain the Court will resolve all the issues presented in US Airways' claim and the counterclaim may not qualify as redundant.

counterclaim with an "adverse legal interest" to USAPA. *Hal Roach Studios*, 896 F.2d at 1555. Thus, the declaratory counterclaim is fundamentally lacking. To remedy this defect, USAPA must either join the *class* of West Pilots as a defendant to its counterclaim or file a notice of dismissal of the counterclaim.[6]

Accordingly,

IT IS ORDERED the Motion for Class Certification (Doc. 105) is **GRANTED**. The following group is certified as a defendant class: All pilots employed by the airline US Airways in September 2008 who were on the America West seniority list on September 20, 2005.

IT IS FURTHER ORDERED no later than November 18, 2011, US Airways and the West Pilots shall file a proposed notice to class members.

IT IS FURTHER ORDERED the Motion for Class Certification (Doc. 91) and the Motions to Expedite (Doc. 103, 113) are **DENIED AS MOOT**.

IT IS FURTHER ORDERED the Motion to Dismiss (Doc. 98) is **GRANTED IN PART**. No later than November 18, 2011, USAPA shall either file an amended answer and counterclaim naming the class of West Pilots as a defendant or file a notice of dismissal of its counterclaim.

Dated this 2nd day of November, 2011.

Roslyn O. Silver
Chief United States District Judge

[6] USAPA apparently is willing to name the six named West Pilots as defendants but does not want to name the class of West Pilots as a defendant. USAPA does not explain why it is making this distinction and it is improper for USAPA to name only six of the pilots while attempting to obtain declaratory judgment regarding the rights of *all* the West Pilots.