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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Don ADDINGTON; *et al.*, *Plaintiffs*, vs. US AIRLINE PILOTS ASS'N, *et al.*, *Defendants.*	CASE NO. 2:13-CV-00471-PGR **Motion For Class Certification.**

Plaintiffs move this Court, pursuant to Rule 23(b)(1)(A), for class certification. Plaintiffs base this motion on the Complaint (Doc. 1), the *Memorandum of Points and Authorities* that follows, and the declaration of Marty Harper.

Dated this 25th day of March, 2013.

POLSINELLI SHUGHART, PC

/s/ Andrew S. Jacob
By _____
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

MEMORANDUM OF POINTS AND AUTHORITIES

I. Overview

In 2005, US Airways (then a bankruptcy debtor) and America West Airlines merged to form a new airline also called US Airways, one of the defendants in this action. *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1176 (9th Cir. 2010). This is the third round of litigation addressing whether the US Airlines Pilots Association ("USAPA"), the union representing US Airways pilots, is bound by its duty of fair representation ("DFR") to use a pilot seniority list ("Nicolau Award list") that was created by binding arbitration between the pilots from the old US Airways ("East Pilots") and those from American West ("West Pilots").

As soon as the Nicolau Award was issued in May 2007, the East Pilots repudiated their agreement to treat it as final and binding. *Id.* at 1177-78. Within a few months, they formed a single-airline union, USAPA, and used their majority power to have it oust the Airline Pilots Association ("ALPA"), the multi-airline union that was representing these pilots and requiring implementation of the Nicolau Award. *Id.* at 1178. The East Pilots' majority status in post-merger US Airways allows them to control USAPA because USAPA only has US Airways pilots as members. *See id.* at 1178-79. Under such East Pilot control, USAPA is firmly and unequivocally repudiating its duty to honor the Nicolau Award. *Id.*

In September 2008, the West Pilots filed a DFR action. *Addington v. US Airline Pilots Ass'n.*, 588 F. Supp. 2d 1051, 1055 (D. Ariz. 2008). The District Court ruled that the West Pilots were "entitled to a union that will not abrogate the Nicolau Award without a legitimate purpose." *Addington v. US Airline Pilots Ass'n,* No. 2:08-CV-1633-NVW, 2009 WL 2169164, at *28 (D. Ariz. Jul. 17, 2009). After a 10-day trial, a jury found

that USAPA breached the DFR because it was acting for no legitimate union purpose. *Id.* at *7. The Court then enjoined USAPA from entering into a collective bargaining agreement ("CBA") that did not implement the Nicolau Award.

USAPA appealed and the Ninth Circuit vacated the judgment on the basis of lack of ripeness. *Addington*, 606 F.3d at 1184. But in so doing, it cautioned USAPA that unless it "bargain[ed] in good faith pursuant to its DFR, with the interests of all members—both East and West—in mind," there would be "an unquestionably ripe DFR suit, once a contract is ratified." *Id.*, at 1180 n.1.

On July 27, 2010, US Airways filed a declaratory action to obtain guidance as to whether it would be liable if it entered into a CBA with USAPA that did not implement the Nicolau Award. *US Airways, Inc. v. Addington*, No. 10-CV-01570-ROS (D. Ariz. Jul. 26, 2010) (Doc. 1). The District Court held that USAPA would breach its DFR if it entered into such a CBA without "a legitimate union purpose." Amend. Judgment, 1 (Dec. 4, 2012) (Doc. 206). But, out of deference to the Ninth Circuit, the Court held, in theory, that it was possible that something might arise in future CBA negotiations that could provide a legitimate purpose.

In February 2013, four parties—(1) American Airlines, a Chapter 11 debtor; (2) the Allied Pilots Association ("APA"), the union representing the American pilots; (3) US Airways; and (4) USAPA—entered into a contract called the "Memorandum of Understanding Regarding Contingent Collective Bargaining Agreement" ("MOU"). (Doc. 5-2). The MOU fixes all material terms for the CBA that will apply to US Airways pilots if American Airlines and US Airways merge (to form a new airline, "New American"). The MOU does not implement the Nicolau award. It does not (by any means) provide a legitimate reason for USAPA to

repudiate its duty to implement the Award. Yet, USAPA has repeatedly and unquestionably (but wrongly) stated that it can and will treat the Nicolau Award as a nullity.

Plaintiffs bring this action on behalf of all West Pilots to establish that USAPA and US Airways (and their successors) must order the seniority of the US Airways pilots according to the Nicolau Award seniority list.

II. Legal Argument

The District Court has twice certified the proposed class to defend the Nicolau Award. It did so in the 2008 DFR litigation against USAPA and in the 2010 declaratory judgment action brought by US Airways. It should readily do so again here.

A. Class Definition

The proposed "West Pilot Class" is comprised of approximately 1,600 individuals. (Doc. 1 ¶ 87). It is defined as: "All pilots who are on the America West seniority list currently incorporated into the West Pilot's collective bargaining agreement." (*Id.* ¶ 86). All class members: (1) have a right to implementation of the Nicolau Award (*id.* ¶¶ 39-48); (2) are owed a DFR by USAPA to implement the Nicolau Award (*id.* ¶ 62); and (3) suffer from breach of that duty (*id.* ¶¶ 97-99).

B. Class-Wide Remedies / Issues

Plaintiffs seek the following declaratory relief on behalf of the West Pilot Class:

(1) USAPA must have a legitimate union purpose to enter into a CBA that does not order the seniority of the US Airways pilots according to the Nicolau Award;

(2) The MOU is a CBA that does not order the seniority of the US Airways pilots;

(3) USAPA breached its DFR because it entered into the MOU without having a legitimate union purpose;

(4) USAPA has unequivocally repudiated its duty to order the seniority of the US Airways pilots according to the Nicolau Award in the process of creating a integrated pilot seniority list for New American;

(5) USAPA breached its DFR because it unequivocally repudiated that duty without having a legitimate union purpose; and

(6) US Airways is jointly liable under hybrid claim doctrine for entering into the MOU.

C. Legal Standards

1. There is a strong presumption in favor of class certification.

On a motion for class certification, courts accept the moving party's factual allegations as true. *Blackie v. Barack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975); *Shelter Realty Corp. v. Allied Maint. Corp.*, 574 F.2d 656, 661 n.15 (2d Cir. 1978). Courts also apply a presumption "in favor and not against the maintenance of the class action." *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968). In so doing, if the court has doubts about the merits of class action treatment, those doubts "should be resolved in favor of class certification." *Brown v. Cameron-Brown Co.*, 92 F.R.D. 32, 49 (E.D. Va. 1981).

2. The West Pilot Class satisfies Rules 23(a) and 23(b)(1)(A).

Pursuant to Rule 23(a), a party seeking class certification must satisfy four conditions: (1) class size makes joinder of all members impracticable; (2) substantial questions of law or fact are common to the class; (3) the representative plaintiffs' claims are typical of class-wide

claims; and (4) the representative plaintiffs and their counsel will fairly and adequately protect the interests of the class. *In re Mego Financial Corp. Securities Litig.*, 213 F.3d 454, 462 (9th Cir. 2000). The proposed class must also satisfy the requirements of one subdivision of Rule 23(b). *Id.*

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

The proposed West Pilot Class, class representatives, and class counsel satisfy all four elements of Rule 23(a).

1. Numerosity

Rule 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." *East Texas Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 405 (1977). One court found numerosity satisfied by as few as 39 class members. *Patrick v. Marshall*, 460 F. Supp. 23, 26 (N.D. Cal. 1978). The West Pilot Class readily satisfies numerosity because it has about 1600 members. (Doc. 1 ¶ 87.)

2. Commonality

The Supreme Court refined its standards for commonality in *Wal-Mart Stores, Inc. v. Dukes*, 2011 WL 2437013 (June 20, 2011). The Court explained:

> 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.

Id. at *7 (*quoting* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N. Y. U. L. Rev. 97, 132 (2009)).

The class in *Dukes* lacked commonality because Wal-Mart provided "local managers[ ] discretion over pay and promotions." *Id.* at *4; *see also id.* at *8 ("The whole point of [Wal-Mart] permitting discretionary

decisionmaking is to avoid evaluating employees under a common standard."). Wal-Mart, in other words, had no "uniform employment practice" that could be evaluated class-wide in a single determination:

> The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's "policy" of allowing discretion by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy against having uniform employment practices.

Id. at *9.

The proof for members of the proposed Dukes class who worked at one store, therefore, would not be the same proof as that for class members who worked at different stores. *See Gen. Telephone Co. of S.W. v. Falcon*, 457 U.S. 147, 159 (1982) (reversing class certification because the class representative offered different proof for his personal claim than what was offered for the class). At a minimum, there had to be subclasses for each store.

Dukes does not negate certification here. The West Pilots are challenging a single course of action that results from a centralized decision to disregard the Nicolau award. This decision affects all class members. Whether that decision and the actions that flow from it is a DFR breach is susceptible to a single answer that would be applicable to all West Pilot Class members. The answer (and the proof to get that answer) would be the same for any class member. The West Pilot Class, therefore, readily satisfies commonality.

3. Typicality

"The question of typicality in Rule 23(a)(3) is closely related to the preceding question of commonality." *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). The difference is that typicality considers whether,

in regard to material issues, "the interest of the named representative aligns with the interests of the class." *Hannon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Typicality does not apply to all aspects of a plaintiff's "interest." Hence, it is not necessary that all class members share the named plaintiffs' enthusiasm for the litigation. *See Abrams v. Communications Workers of Am.*, 59 F.3d 1373, 1378 (D.C. Cir. 1995) (typicality is satisfied regardless that it is not established that all class members favor the litigation). It is important, however, that the representatives personally have the claim that is common to the class members.

Like other West Pilots, Plaintiffs were on the America West seniority list in 2005 and 2008. (Doc. 34 at ¶¶ 3-8). Like other West Pilots, they are aggrieved by USAPA's repudiation of its duty to implement the Nicolau Award list and by USAPA's entrance into a CBA (the MOU) that does not implement the Nicolau Award. Like other West Pilots, they have an interest in ensuring that the pilot seniority integration in the New American merger orders the US Airways pilots according to the Nicolau Award. Like all US Airways pilots (East and West), they have an interest in seeing that USAPA adheres to its DFR. Plaintiffs, therefore, are typical of the class they seek to represent.

4. Adequacy

The question of adequacy considers the qualifications of class counsel and of the proposed class representatives. The analysis depends on 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); *see also Wetzel* v. *Liberty Mut. Ins. Co.*, 508 F.2d 239, 247 (3d Cir. 1975) ("Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class.").

"Although questions concerning the adequacy of class counsel were traditionally analyzed under the aegis of the adequate representation requirement of Rule 23(a)(4) . . . those questions have, since 2003, been governed by Rule 23(g)." *Sheinberg v. Sorensen*, 606 F.3d 130, 132 (3d Cir. 2010). Rule 23(g) provides, in relevant part, as follows:

> In appointing class counsel, the court … must consider: (i) the work counsel has done in identifying or investigating potential claims in the action, (ii) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action, (iii) counsel's knowledge of the applicable law, and (iv) the resources counsel will commit to representing the class.

Rule 23(g)(1)(C). Rule 23(g) also provides that a court "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class. . ." Rule 23(g)(1)(B).

The litigation history here provides the Court ample evidence that all elements of adequacy are well satisfied. The Court has the evidence of the performance of Plaintiffs as class representatives in the two prior class action litigations against USAPA. It likewise has evidence of the performance of this class counsel in both of those litigations. That evidence of adequacy of both class representatives and counsel speaks for itself in the reported decisions cited above. Additional evidence is addressed below.

a. Counsel readily satisfies adequacy.

Class counsel is experienced in prosecuting large class actions. *See* Marty Harper, *Decl.* (Mar. 22, 2013). Class counsel is also experienced in prosecuting complex Railway Labor Act matters. *See, e.g.*, *Addington*, 606 F.3d 1174; *Airline Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65 (1991); *Rachford v. Air Line Pilots Ass'n., Int'l*, C-03-3618-PJH, 2006 WL 927742 (N.D. Cal. 2006). The Court should readily find that counsel readily satisfies the adequacy standards of Rule 23(g), and on that basis satisfies adequacy.

b. Plaintiffs readily satisfy adequacy.

In regard to the adequacy of representative plaintiffs, "[t]he court is bound to take the substantive allegations of the complaint as true." *Blackie*, 524 F.2d at 901, n.17. The allegations here establish that Plaintiffs "have moral and financial support from many West Pilots" and that "[t]hey each have a good understanding of the issues underlying this litigation and have demonstrated a willingness to invest the necessary time and efforts to fulfill their duties as representative parties." (Doc. 1 at ¶ 90.) This demonstrates that Plaintiffs share the interests of the class and have the confidence and support of the class. The Court, therefore, should find that Plaintiffs also satisfy adequacy.

E. The West Pilot Class Satisfies Rule 23(b)(1)(A).

Rule 23(b)(1)(A) applies where "individual adjudication of the controversy would prejudice . . . the party opposing the class." *United Broth. of Carpenters & Joiners of America, Loc. 899 v. Phoenix Assoc., Inc.*, 152 F.R.D. 518, 521 (S.D.W. Va. 1994). The potential for such prejudice is most acute where that party "is obliged by law to treat the members of the class alike (a utility acting toward customers; a government imposing a tax), or where the party must treat all alike as a matter of practical

necessity (a riparian owner using water as against downriver owners)." *Amchem Products Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

USAPA and US Airways are parties "opposing the class" (but not necessarily opposing class certification) for whom "inconsistent or varying adjudications . . . would establish incompatible standards of conduct." Rule 23(b)(1)(A). This is so because the goal of an airline merger is to eventually operate using a single CBA and a single "system for promotions and furloughs." *Bernard v. Air Line Pilots Ass'n, Int'l*, 873 F.2d 213, 218 (9th Cir. 1989). This means, as a practical necessity, that USAPA and US Airways (and their successors) must have a single seniority list for the US Airways pilots. Because there will be one list it will necessarily be the same list for all pilots.

In short, because there can only be one scheme of seniority integration, there can only be one outcome on this DFR claim. That requires class action treatment pursuant to Rule 23(b)(1)(A).

III. Conclusion

Plaintiffs respectfully ask the Court to certify the proposed West Pilot Class pursuant to Rule 23(b)(1)(A).

Dated this 25th day of March, 2013.

POLSINELLI SHUGHART, PC

/s/ Andrew S. Jacob

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March 2013, 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 _____