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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; Steve WARGOCKI; Michael J. SOHA; Rodney Albert BRACKIN; and George MALIGA, on behalf of themselves and all similarly situated former America West pilots, *Plaintiffs*, vs. US AIRLINE PILOTS ASS'N, an unincorporated association; and US AIRWAYS, INC., a Delaware corporation, *Defendants.*	CASE NO. 2:13-CV-00471-ROS **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION (DOC. 11)**

Plaintiffs Don Addington, John Bostic, Mark Burman, Afshin Iranpour, Roger Velez, Steve Wargocki, Michael J. Soha, Rodney Albert Brackin, and George Maliga (the "West Pilots") reply in support of their *Motion for Class Certification* (Doc. 11).

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I. Introduction

In its July 19, 2013, Order, this Court tried to discourage USAPA from opposing the West Pilots' *Motion for Class Certification* (Doc. 11) unless it had "substantially better arguments" than the "not well-reasoned" arguments that USAPA made in the two prior litigations. (Doc. 122 at 7:2 to 7:11.) In light of that advice, it is truly amazing to see what USAPA advances as a "substantially better argument."

During the weeks leading up to the ratification vote on the Memorandum of Understanding ("MOU"), USAPA went to lengths to explain that this vote would not be a referendum on the Nicolau Award. But, after the vote was completed, USAPA quickly pivoted and began to use the West Pilot vote tally in ways that are directly inconsistent with those pre-ratification assurances. Contrary to those assurances, and contrary to its duty to treat the West Pilots fairly, East Pilot dominated USAPA is trying to use the MOU ratification vote to deprive the West Pilots of means to defend the Nicolau Award.

Without explanation or notice, USAPA broke from its usual standard practice and tracked the MOU ratification vote by domicile—a procedure that distinguishes West Pilot votes. Had USAPA disclosed that it would do so prior to the vote, and had it disclosed that it would use the results of the vote in an effort to deny class certification, those results would surely have been quite different.

But USAPA does not stop there. In both its *Motion to Dismiss* (Doc. 44) and its *Answer* (Doc. 123), USAPA asserts ratification as an affirmative defense. Apparently, USAPA intends to argue that all West Pilots (including hundreds of non-member West Pilots who had no opportunity to vote) lost both their individual and collective rights to pursue a DFR claim against USAPA simply because a majority of USAPA's West Pilot members voted to ratify the MOU.

That's right. USAPA's "substantially better argument" against class certification is that a vote that was not intended to reflect a pilot's position on the Nicolau Award defeats a motion to certify a class to pursue a claim to enforce the Nicolau Award. If that

argument fails, USAPA then intends to argue that this vote provides an affirmative defense to that claim. Is this really how a bargaining agent with a duty to represent all pilots fairly should treat a minority group of its members? The answer is clearly no and the time has come to put an end to such wrongdoing.

II. Legal Argument

A. The Court has ample discretion to certify the class without discovery.

This Court has ample discretion to certify this class without allowing USAPA to conduct harassing, irrelevant discovery. In *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205 (9th Cir. 1975), for example, the Ninth Circuit recognized that "[w]hether or not discovery will be permitted [prior to class certification] lies within the sound discretion of the trial court." *Id.* at 209 (*citing Berland v. Mack*, 48 F.R.D. 121, 126 (S.D.N.Y. 1969)); *see also Artis v. Deere & Co.*, 276 F.R.D. 348, 351 (N.D. Cal. 2011) ("Prior to class certification under Rule 23, discovery lies entirely within the discretion of the Court.") (*citing Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 942 (9th Cir. 2009)). "In determining whether to grant discovery [prior to class certification] the court must consider its need, the time required, and the probability of discovery resolving any factual issue necessary for the determination" of whether a class action is maintainable. *Kamm*, 509 F.2d at 210. "Where the necessary factual issues may be resolved without discovery, it is not required." *Id.* Indeed, this Court has discretion to certify a class without discovery unless "the record before the court is so incomplete as to the presence or absence of the requisite factors that a conditional certification would irreparably harm the plaintiffs or defendants." *In Re No. Dist. of Calif. "Dalkon Shield" IUD Prod. Liability Litig.*, 526 F. Supp. 887, 917 (N.D. Cal. 1981).

B. USAPA does not need discovery.

USAPA seeks to delay a decision on class certification on the basis that it must have the opportunity for discovery. (Doc. 135 at 2:21 to 2:28.) USAPA does not say, however, exactly what discovery it would take. But, it indicates in the recently filed proposed Rule 16 Scheduling Order that, if given the opportunity, it would depose each

of the nine named Plaintiffs. (Doc. 132-1 at 3, ¶ I.) As demonstrated below, USAPA has conducted discovery into the adequacy of six of these named Plaintiffs. USAPA has also conducted discovery to ascertain whether the Leonidas funding mechanism creates a conflict of interest. USAPA fails to explain why any of this must be repeated. USAPA also questions the extent of West Pilot support for this litigation. (Doc. 135 at 9:23 to 9:28.) But it can readily ascertain the extent of West Pilot support by means far better than discovery. For these reasons, the Court should summarily reject USAPA's argument that a decision on class certification should be delayed to allow for discovery.

1. USAPA has had ample opportunity to conduct discovery.

Twice before, these Plaintiffs have litigated class claims in the District of Arizona to defend the West Pilots' rights to implementation of the Nicolau Award. On the first occasion, *Addington v. USAPA*, 08-cv-01633-PHX-NVW ("*Addington I*"), USAPA took the "[d]epositions of all six of the named Plaintiffs." (Jacob Decl. at ¶ 3 [*Addington I*, Doc. 196 at ¶ 2].) After reviewing that evidence, Judge Wake found that it was unnecessary to hold an evidentiary hearing to certify the West Pilot Class:

> 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.

(*Id.* at ¶ 4 [*Addington I*, Doc. 223 at 2:1 to 2:5].)

On the second occasion, *US Airways v. Addington*, 10-cv-01570-PHX-ROS ("*Addington II*"), USAPA again argued that it needed to conduct discovery into issues such as the adequacy of the class representatives. (*Addington II*, Doc. 92 at 12:2 to 14:12.) The West Pilots argued to the contrary. (*Addington II*, Doc. 95.) The Court agreed with the West Pilots and certified the class without discovery. (*Addington II*, Doc. 115.) That litigation (as did *Addington I*) proceeded without any problems arising from class action treatment. The same outcome should be ordered here.

Then in June 2011, during the pendency of *Addington II*, USAPA obtained an order in Texas state court compelling West Pilot Eric Ferguson to submit to an investigatory deposition wherein USAPA inquired into sources of funding for Leonidas, LLC, the entity that collects contributions to pay expenses incurred defending the Nicolau Award.[1] (Jacob Decl. at ¶ 5) In the course of that deposition, Mr. Ferguson answered a series of questions concerning the sources of such funds. (*Id.* at ¶ 6 [Ferguson Depo. at 77:18 to 79:24; 173:10 to 174:9].)

2. USAPA can ascertain West Pilot support without discovery.

West Pilot support for this litigation cannot be seriously questioned. Surely, if after nearly five years of litigation one or more West Pilots seriously objected to litigating the DFR claim on a class wide basis, they would have voiced an objection to certification or would have intervened to make their position known. That has not happened. No West Pilot did so in *Addington I* or *Addington II*. No West Pilot is doing so here. Indeed, USAPA has never identified a single West Pilot who objects to these efforts. USAPA, therefore, cannot seriously doubt that the members of the putative West Pilot class support the actions taken by the named Plaintiffs.

Moreover, if USAPA truly wanted to ascertain the extent of West Pilot support for this litigation, it has far better ways to do so than to conduct discovery against the named Plaintiffs. For example, USAPA could use the same voting procedures it uses to elect officers and ratify contracts to poll its West Pilot members. That it has never done so demonstrates that it does not seriously question whether the West Pilots support the named Plaintiffs.

But USAPA actually has no need to conduct such a poll. That is because the April 2012 election of union president was essentially a referendum on the Nicolau Award. In

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[1] Mr. Ferguson is one of the founders of Leonidas, LLC, and has played a pivotal role in representing and defending West Pilot interests both within the governance of USAPA and by supporting the named Plaintiffs in their litigation efforts.

that election, candidate West Pilot Eric Ferguson took a clear position that, "any list other than the Nicolau is legally impossible." (George Maliga Decl. at ¶ 3 [E. Ferguson & J. Koontz "Making the Nicolau Doug's Problem," at 1 (Feb. 8, 2012)].)

> [T]he Nicolau is not going to disappear. The reason is that the (perceived) fairness of the Nicolau will never be a legal issue. What is at issue is USAPA's Duty to Fairly Represent. That analysis centers around USAPA's founding principle–to use the East's majority voting advantage to nullify the Nicolau, and replace it with another seniority list that clearly benefits the East over the West. This . . . . will never work.

Id.

In contrast, candidate East Pilot Gary Hummel stated in regard to seniority that he "has always been and remains for date of hire." (*Id.* at ¶ 4 [G. Hummel, Campaign Material, at 4 (Jan. 30, 2012)].) The runoff vote between Mr. Ferguson and Mr. Hummel, therefore, could be viewed as a referendum on the Nicolau Award.

Mr. Ferguson received 1269 votes in the runoff against Mr. Hummel's 2165 votes. (*Id.* at ¶ 5 [USAPA Nat'l Officer Runoff Election Results, at 2 (Mar. 22, 2012)].) Presumably, these were nearly all West Pilot votes. If not, USAPA can show that by reporting the results by domicile as it did with the MOU ratification vote.[2] That USAPA has not done so strongly suggests that such an analysis would show solid West Pilot support for efforts by Mr. Ferguson and the named Plaintiffs to enforce the Nicolau Award.

In sum, USAPA offers no credible basis to show that it needs discovery to prove failure to satisfy adequacy or any other Rule 23(a) factor. Fed. R. Civ. P. 23(a). All that class discovery would accomplish now is distraction from the task of preparing for the

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[2] USAPA has four domiciles. All West Pilots and only West Pilots are in the Phoenix domicile. At the time of the April 2012 election, 1103 West Pilots had voting privileges as USAPA members. (Decl. of David Braid at ¶ 3.) Mr. Ferguson's candidacy, therefore, was supported by at least 163 East Pilots.

trial on the merits that is scheduled for September 24, 2013. "[W]eighing need, the time required, and the probability of discovery resolving any factual issue necessary for the determination" of whether a class action is maintainable, *Kamm*, 509 F.2d at 210, this Court should: (1) reject USAPA's argument that discovery must be obtained prior to class certification; (2) rule that the elements of Rules 23(a) and 23(b)(1)(A) are satisfied; and (3) grant Plaintiffs' *Motion for Class Certification* (Doc. 11).

C. The MOU vote did not reflect support for, or opposition to, this litigation.

USAPA's argument that the MOU ratification vote shows that most West Pilots take a different position than the named Plaintiffs on the Nicolau Award is fundamentally flawed. That is because USAPA conducted that vote with an express instruction that pilots should vote without regard to their position on the Nicolau Award. For one example, in a January 23, 2013, message to its members, USAPA stated that "no East pilot should vote against the MOU because they fear that ratifying the MOU will implement the Nicolau Award, and no West pilot should vote for the MOU because they believe the MOU will implement the Nicolau Award." (Doc. 14 at ¶ 88; Doc. 14-3 at App. 389-90.) For another example, on February 7, 2013, USAPA stated that "West pilots should not vote in favor of the MOU because they believe it will revive the Nicolau Award, and the East pilots should not vote against it because they are concerned it will cause the Nicolau Award to be implemented." (Doc. 14 at ¶ 90; Doc. 14-3 at App. 391.) It truly defies belief that USAPA now argues that the results of that vote reflect the West Pilots' position on pursuing this litigation.

D. USAPA accepted the adequacy of the named Plaintiffs as representatives of the West Pilots when it sought to negotiate a settlement.

At the May 14, 2013 hearing, USAPA voiced no objection to negotiating a class-wide settlement with the named Plaintiffs. (Jacob Decl. at ¶ 7 [RT at 78:20 to 78:23 (Mr. Szymanski: "What would be helpful to get this process going on [sic] is for them to understand that they are supposed to sit down and talk with us about this rather than just simply insist on this one Nicolau Award. . . .")].) Representatives chosen by the named

Plaintiffs met with representatives chosen by USAPA but failed to reach a settlement. (Docs. 101, 103, 105.) By participating in that process, by accepting the named Plaintiffs as adequate representatives for purposes of settlement discussions, USAPA essentially waived objecting to their adequacy for purposes of this litigation.

III. Conclusion

This Court has ample discretion to certify the class on the current record before it. It, therefore, should reject USAPA efforts to delay class certification for the evident purpose of delaying the pending trial on the merits. Plaintiffs respectfully ask the Court to certify the class and, in so doing, to order that USAPA cannot conduct discovery into the adequacy of class representatives prior to the September 24, 2013, trial date.

Dated this 5th day of August, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August 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.

By */s/ Andrew S. Jacob*