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14 **IN THE UNITED STATES DISTRICT COURT**
15
16 **DISTRICT OF ARIZONA**

18 Don Addington, *et. al.*,

19)
20 *Plaintiffs,*)

21 v.)

22 US Airline Pilots Association, *et. al.*,)

23)
24 *Defendants.*)
25)
26)

Case No.: CV-13-00471-PHX-ROS

**US Airline Pilots Association's
Opposition to Leonidas LLC's
Motion to Quash**

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1 Defendant US Airline Pilots Association (“USAPA”) opposes Leonidas LLC’s
2 (“Leonidas”) Motion to Quash the subpoena served on August 8, 2013.

3 INTRODUCTION

4 The materials requested in the subpoena are relevant and likely to lead to the
5 discovery of admissible evidence on the questions of the representative status of the
6 Plaintiffs not only for class certification purposes but for purposes of Plaintiffs’ claims to
7 be granted “party status and the right (but not the obligation) to participate fully (with
8 counsel of their own choice) in the MOU Seniority Integration process.” Am. Compl.
9 ¶132. The materials are also discoverable with respect to USAPA’s defense that the
10 putative Plaintiff class ratified the MOU. If a group seeking to represent the entire West
11 Pilots in bargaining negotiations “will not tolerate...dilution of the Nicolau award by any
12 means”¹, questions arise as to conflict of interest, adequacy of representation and ability
13 to seek a remedy such as Plaintiffs are seeking. These questions and the claims in the
14 Amended Complaint entitle USAPA to understand the nature and extent to which this
15 litigation is being controlled and financed by a third party and its officers and members.
16 Moreover, as the Court has an obligation to assure that class representatives will
17 represent the class adequately, USAPA must be allowed to conduct discovery to create a
18 proper record with respect to this question.
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22 ¹ As set forth in the “Objectives” of Leonidas, LLC, its purpose is to “solicit
23 funds” and to use those funds “to fund the legal campaign regarding seniority
24 integration.” Section 1.3 of Operating Agreement, attached hereto as Exhibit B. *See also*
25 Doc. 5-1 (Plaintiffs’ counsel’s declaration admitting Leonidas, LLC, which has funded
26 the West Pilot litigation, was formed “for the sole purpose of collecting voluntary West
27 Pilot contributions that have been used to defend the Nicolau Award in and out of
28 litigation”). The stated “Objectives” of Leonidas, LLC provide, in part, that:
29 (5) We will not tolerate discrimination against the pilots of America West
30 in any form, including the dilution of the Nicolau Award by any means,
31 contractual or otherwise.

32 Doc. 114-1 ¶ 18.

1 The concern that a third party and not the purported class representatives controls
2 this litigation is fully justified and merits further discovery. Six of the nine named
3 Plaintiffs are either current or former Managers or Members of Leonidas LLC according
4 to the limited documents that are available on the Arizona Corporation Commission
5 website.² The motion to quash was filed by Plaintiffs’ counsel who is also counsel for
6 Leonidas and is listed as its statutory agent. The subpoena seeks documents and
7 communications relevant to Plaintiffs’ claims, including, *inter alia*, bylaws and other
8 operating guidelines and policies, communications and documents exchanged between
9 Plaintiffs and Leonidas, all documents and communications received from or sent by
10 Leonidas relevant to the MOU, documents and communications relevant to Plaintiffs’
11 breach of duty of fair representation claim, contribution records, meeting minutes and
12 records regarding attorneys’ fees for work performed in this litigation.
13

14 Contrary to Leonidas’ assertions, the documents sought by USAPA from Leonidas
15 are relevant and likely to lead to the discovery of admissible evidence. Leonidas makes
16 no showing that the requests are overly broad or burdensome. The documents do not
17 seek privileged information. Leonidas’ motion to quash should be denied.

18 **I. THE DOCUMENTS SOUGHT ARE RELEVANT**

19 Plaintiffs assert they should be permitted to represent “approximately 1600
20 members” of a class. Am. Compl. ¶ 87. Plaintiffs also seek remedies on behalf of that
21 putative class that includes, *inter alia*, “party status and the right (but not the obligation)
22 to participate fully (with counsel of their own choice)” on behalf of those 1600
23 individuals. However, there is reason to believe that the putative class members do not
24 control the litigation, but that control is at least shared with non-plaintiff members of
25 Leonidas. For example, Leonidas essentially admits that the named Plaintiffs are one and
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27 ² Each of the documents required to be filed by Leonidas LLC with the Arizona
28 Corporation Commission’s website, are attached hereto as Exhibit A.

1 the same with Leonidas. *See* Motion to Quash at p. 4 (arguing that “the individuals who
2 would be collecting such materials need to focus their efforts on preparing for the
3 September 24, 2013, trial”). Moreover, in a deposition in *Addington I*, a Plaintiff, Steven
4 Wargoki, identified a litigation “control group”, which was comprised of Plaintiffs and
5 non-plaintiff members of Leonidas. Exhibit C hereto. It is USAPA’s belief that such a
6 control group comprised of named Plaintiffs and non-plaintiff Leonidas members exists
7 with respect to this case as well.

8
9 The extent to which the named Plaintiffs are members of Leonidas or that
10 members of a separate group are controlling the litigation is relevant to the adequacy of
11 the named Plaintiffs to represent an entire class of West Pilots.³ Fed. R. Civ. P. 23(a)(4).
12 The information sought is also relevant to the merits of the claims and relief Plaintiffs are
13 requesting in the Duty of Fair Representation claim (Claim One) and in Claim Four,
14 including the assertion that Plaintiffs somehow have the “right (but not the obligation)” to
15 participate in the McCaskill-Bond proceedings on behalf of a class.

16 Under Arizona law, if the named Plaintiffs are officers or directors of Leonidas as
17 the publicly available records suggest many are,⁴ they owe a fiduciary duty and duty of
18 loyalty to **that corporation**. This fact alone raises significant questions of adequacy of
19 representation in that, as class representatives, the named plaintiffs will owe a fiduciary
20 duty to the class. At the very least, USAPA is entitled to discovery to see if those
21 obligations conflict with Plaintiffs’ obligations to represent the class or even certain
22 members of the putative class of former America West pilots. Under Arizona law, a
23

24 ³ Even if the class certification order had already issued, the requirements of class
25 certification must continue to be met and discovery would still be appropriate. *See* 4
26 Herbert Newberg & Alba Conte, *Newberg on Class Actions* sec. 13:20 (4th ed. 2002)
(continuing duty to monitor appropriateness of class).

27 ⁴Corporation commission records show that Plaintiffs Bostic, Addington, Iranpour,
28 Burman, Velez and Wargocki have all been or are members or Managers of Leonidas.
Exhibit A hereto.

1 fiduciary includes a “partner, agent, officer of a corporation, public or private..., or any
2 other person acting in a fiduciary capacity for any person, trust or estate.” Ariz. Rev. Stat.
3 Ann. § 14-7501. The fiduciary duty owed by an officer or director to a corporation “is in
4 the nature of a trust relationship requiring a high degree of care on the part of the
5 director.” *Atkinson v. Marquart*, 541 P.2d 556, 558 (Ariz. 1975). USAPA is entitled to
6 discovery on the duties owed by the named Plaintiffs to Leonidas particularly because the
7 limited documents on Leonidas that are available suggest that the “Nic or nothing”
8 position of Leonidas may create conflicts with the Plaintiffs’ duties to fairly and
9 adequately represent the entirety of the 1600 member putative class and/or may impede
10 their ability to represent the minority group at a McCaskill-Bond proceeding. *See, e.g.*,
11 *Dechert v. Cadle Co.*, 333 F.3d 801, 803 (7th Cir. 2003) (“When the named plaintiff is a
12 fiduciary, however, he cannot just “go along” with the class lawyer. He has a duty to seek
13 to maximize the value of his claim, and this duty may collide with his fiduciary duty as
14 class representative (if he is permitted to be the class representative) to represent all
15 members of the class equally.”). Discovery into Leonidas is relevant to the Plaintiffs’
16 ability to represent the class both in this litigation and to “fully participate” in a
17 McCaskill-Bond proceeding (their desired outcome) on behalf of a group of former
18 America West pilots.

19
20 In addition, the subpoena seeks highly relevant information from the group that
21 appears to be controlling and funding this litigation. The source of the funding used by
22 named Plaintiffs for this lawsuit and conditions tied to that funding are highly relevant
23 inquiries regarding adequacy. *See, e.g., In re ML-Lee Acquisition Fund II, L.P. & ML-*
24 *Lee Acquisition Fund (Ret. Accounts) II, L.P. Sec. Litig.*, 149 F.R.D. 506, 509 (D. Del.
25 1993) (“At a minimum, a Court must be satisfied that a Plaintiff’s resources are sufficient
26 to preclude the possibility that a Plaintiff could be coerced into complying with an
27 attorneys’ advice with regard to different options that may be available on legal issues in
28

1 a class action because of the potential threat of funding revocation.”). The amount
2 Leonidas has funneled to the pay for the *Addington* claims, including this iteration, is also
3 relevant to the amount of fees that may be awarded under Claim Three, the claim asserted
4 by Plaintiffs that they are entitled to attorneys’ fees for this litigation as well as prior
5 litigation. Plaintiffs cannot have it both ways: seek to charge USAPA fees that may have
6 been paid by a third party and at the same time – acting in the guise of Leonidas -- seek to
7 foreclose discovery on this claim. USAPA would be severely prejudiced in its ability to
8 defend this claim if the Court upholds this egregious position.

9
10 Finally on this point, USAPA is entitled to discovery on the question of whether
11 attorneys’ fees have already been paid (by Leonidas) such that no award should be made
12 to Plaintiffs. Again, Plaintiffs and Leonidas cannot have it both ways. If Leonidas is
13 wholly unrelated to Plaintiffs and has paid or advanced money for fees and/or expenses
14 for the *Addington* claims, then Plaintiffs have no right to seek attorneys’ fees against
15 USAPA. Those fees have already been paid – albeit by a third party – but that third party
16 has no claim against USAPA for fees or for anything else. *See, e.g., Morrison v. C.I.R.*,
17 565 F.3d 658, 666 (9th Cir. 2009) (discussing when fees may be awarded where third
18 party pays litigation fees). The bottom line though, is that USAPA must be allowed
19 discovery with respect to Plaintiffs’ claims and the nature of the financial dealings
20 between Plaintiffs and Leonidas with respect to the attorneys’ fees and expenses.

21 Plaintiffs’ allegations place Leonidas communications, documents and
22 membership in Leonidas and the funding of this litigation squarely at issue and relevant
23 to the claims and defenses. The documents sought by the subpoena are relevant and
24 discoverable.

25 **II. LEONIDAS MAKES NO SHOWING OF BURDEN**

26 Leonidas makes no showing that the request is burdensome. “The burden of showing
27 that a subpoena is unreasonable and oppressive is upon the party to whom it is directed.”
28

1 *Goodman v. United States*, 369 F.2d 166, 169 (9th Cir. 1966). Leonidas’ recitation of the
2 fact that Leonidas and Plaintiffs are one and the same (*see* Motion to Quash at p. 4,
3 arguing that “the individuals who would be collecting such materials need to focus their
4 efforts on preparing for the September 24, 2013, trial”), does not establish that the
5 requests are burdensome; it merely bolsters USAPA’s position that the material sought by
6 the subpoena is highly relevant in the first place. This claim shows there is an
7 irreconcilable conflict between the purported class representatives and the parties that
8 actually control this litigation who are not and will not be answerable to the Court.
9 Moreover, the fact that the same individuals would have to collect the material for trial
10 while preparing for trial would seem to make the request less burdensome as such
11 individuals already have an obligation to respond to discovery requests propounded by
12 USAPA. *See* Doc. 145 (Notice of Service of USAPA discovery requests on named
13 Plaintiffs). The assertion that the material requested may encompass a period of time that
14 is more than five years is insufficient to meet a burden of establishing that the subpoena
15 should be quashed on the basis of burden and in any event, is the direct result of the claim
16 for attorneys’ fees going back to that time. *See, e.g., Fairview Dev. Corp. v. Aztex*
17 *Custom Homebuilders, LLC*, CV-07-0337-PHX-SMM, 2008 WL 2113492 (D. Ariz. May
18 16, 2008) (assertion that it would take three to five days that would effectively require
19 one-person operation to cease all operations in the interim and that provided “no indicia,
20 beyond the assertion itself, as to why locating and reviewing the file for the Subject
21 Property would take three to five days” insufficient to establish claim of undue burden).
22 If the demand, which tracks the claim of damages, encompasses too large a time frame
23 for Leonidas to be bothered with, the solution lies in their hands: as Leonidas controls
24 this litigation, it can simply narrow (or drop altogether) the claim for damages.

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26
27 Defendants’ claim of privilege is likewise completely unsubstantiated.

28 Defendants’ oblique reference to a request for documents showing fee agreements and

1 amount of fees paid by Leonidas does not establish that any privilege applies. Similarly,
2 an unsubstantiated claim that much of the materials are “work product” also fails to
3 establish that there is blanket work product protection. Defendants’ claim of work
4 product merely confirms that Leonidas is actively involved in this litigation and with the
5 named Plaintiffs and is likely to have relevant information. It is insufficient to show that
6 the subpoena should be quashed on that basis. *See S. Union Co. v. Sw. Gas Corp.*, 205
7 F.R.D. 542, 550 (D. Ariz. 2002) (“the burden to establish the applicability of any
8 privilege is on the proponent, and that burden begins with providing an adequate
9 identification of the reasons why the privilege is warranted with respect to each and every
10 communication and each and every document claimed to be protected”) (citing
11 Fed.R.Civ.P. 26(b)(5) & 45(d)(2)); *Fairview*, 2008 WL 2113492, at *2 (“A witness who
12 withholds information on a claim of privilege or other protection must state the claim
13 expressly and support it with sufficient documentation to enable the demanding party to
14 contest the claim.”) (citing Fed. R. Civ. P. 45 (d)(2)(A)(ii)). *See In re Osterhoudt*, 722
15 F.2d 591, 593 (9th Cir. 1983) (“Fee arrangements usually fall outside the scope of the
16 privilege simply because such information ordinarily reveals no confidential professional
17 communication between attorney and client...”).

19 CONCLUSION

20 For the foregoing reasons, USAPA respectfully requests that the motion to quash
21 be denied and that Leonidas be ordered to comply with the subpoena by producing the
22 documents to the offices of Martin & Bonnett, PLLC at a date certain set by the Court.

23 Respectfully submitted this 20th day of August 2013.

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25 **Martin & Bonnett, P.L.L.C.**

26 By: s/Susan Martin
27 Susan Martin
28 Jennifer L. Kroll
Martin & Bonnett

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CERTIFICATE OF SERVICE

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I hereby certify that on August 20, 2013, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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