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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.	No. CV-13-00471-PHX-ROS **REPLY IN SUPPORT OF MOTION TO QUASH (Doc. 149)**

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I. LEGAL ARGUMENT

A. USAPA failed to show that the Leonidas subpoena could lead to discovery of material relevant to the claims at issue.

USAPA does not dispute that, as the party issuing the subpoena, it "must demonstrate that the information sought is relevant and material to the allegations and claims at issue in the proceedings." *Monge v. Maya Magazines, Inc.*, No. 2:10-CV-00230-RJC-PA, 2010 WL 2776328, at *4 (D. Nev. Jul. 14, 2010) (internal quotations and citations omitted, emphasis added) (*quoting Green v. Baca*, 226 F.R.D. 624, 654 (C.D. Cal. 2005). A careful look at the allegations and claims here shows that the information sought by USAPA in the Leonidas subpoena has no such relevance.

1. Claim One

Union conduct "unrelated to legitimate union interests" is wrongful." *Robesky v. Oantas Empire Airways Ltd.*, 573 F.2d 1082, 1090 (9th Cir. 1978). "[A] union may not juggle the seniority roster for no reason other than to advance one group of employees over another." *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1537 (7th Cir. 1992). A union must "show some objective justification" when it reorders seniority. *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 800 (7th Cir. 1976). To prevail on Claim One (Doc. 134 at ¶¶ 96-100), therefore, Plaintiffs need show only the following: (1) the Transition Agreement ("TA") required use of the Nicolau Award in the merger of seniority with pilots from a third airline; (2) paragraph 10(h) of the MOU purports to eliminate that requirement; and (3) USAPA did not have an objective legitimate union purpose for putting (or allowing) paragraph 10(h) into the MOU.

No action by a majority of union members can deprive an individual worker of the right to fair representation by his or her union. *See Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 64 (1975) ("In vesting the representatives of the majority with this broad power Congress did not, of course, authorize a tyranny of the majority over minority interests."). The outcome of the MOU vote—particularly because hundreds of West Pilots had no opportunity to vote—does not support an affirmative

defense to Claim One. Moreover, USAPA must be estopped from asserting that it does because it virtually took the contrary position during the vote and failed to inform the West Pilots (to whom it owes a fiduciary duty) that it intended to do so if the West Pilots voted to ratify the MOU. *See Carrillo v. United States*, 5 F.3d 1302, 1306 (9th Cir. 1993) (elements of equitable estoppel). The only evidence, therefore, that is relevant to deciding USAPA's affirmative defense to Claim One is evidence that shows what USAPA communicated to the West Pilots during the MOU vote. Nothing that USAPA might obtain from Leonidas speaks to those facts.

Finally, USAPA cannot base an affirmative defense on evidence of a purported lack of West Pilot support for this litigation. Even if the Leonidas subpoena uncovered such evidence (which it surely would not), it would not provide an affirmative defense to Claim One. Each West Pilot has an individual right to fair representation and, therefore, each could make an individual claim for breach of that right. Lack of support by others for that individual claim would be no defense. The Court, therefore, should rule that USAPA failed to demonstrate that the material it seeks to subpoena from Leonidas has any bearing on the merits of Claim One.

2. Claim Three

To prevail on Claim Three (Doc. 134 at ¶¶ 113-119), seeking a common benefit fee award, the West Pilots need only demonstrate that "the litigation conferred a substantial benefit" on the pilots represented by USAPA. *See Southerland v. Int'l Longshoremen's & Warehousemen's Union, Loc. 8*, 845 F.2d 796, 799 (9th Cir. 1987). Nothing else it at issue.

USAPA fails to explain how *Morrison v. C.I.R.*, 565 F.3d 658 (9th Cir. 2009) bears on awarding fees pursuant to common benefit doctrine. Indeed, *Morrison* has no such bearing because it addressed 26 U.S.C. § 7430, a provision that allows fees only if they were "incurred" by the litigant. *See id.* at 660 (explaining that "Section 7430 provides: 'In any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty

under this title, the prevailing party may be awarded a judgment or a settlement for . . . reasonable litigation costs incurred in connection with such court proceeding.' *Id.* § 7430(a)(2).") (emphasis added). There is no such requirement to limit a common benefit fee award to fees "incurred." It does not matter, therefore, whether counsel's fees here have been paid in full, in part, or not at all. This Court, therefore, should rule that USAPA failed to demonstrate that the material it seeks to subpoena from Leonidas has any bearing on the merits of Claim Three.

Moreover, as West Pilot class counsel suggested to the Court during argument on August 15, 2013, it is premature to conduct any discovery related to a fee award before there is a determination of prevailing party. *See* Fed. R. Civ. P. 54(d)(2) (claim for attorneys' fees is made by motion after entry of judgment). This Court, therefore, should rule that even if the material that USAPA seeks to subpoena from Leonidas has some bearing on Claim Three, it has no bearing on the issues to be litigated on September 24 and 25, 2013.

3. Claim Four

In Claim Four, Plaintiffs seek a ruling that the West Pilots are entitled to full party status and representatives of their choosing. (Doc. 134 at ¶ 132.) "Sections 3 and 13 [of the LPP's, which are incorporated by McCaskill-Bond,] impose upon the carrier a duty to integrate seniority listings fairly and equitably and a duty to submit certain disputes between it and its employees to arbitration." *Great No. Pilots Ass'n*, 91 C.A.B. 795, 799-800 (1981). Without question, fair and equitable procedures require unconflicted representation. To prevail on Claim Four (Doc. 134 at ¶¶ 120-132), therefore, the West Pilots need only demonstrate that USAPA and the East Pilot majority have a material conflict of interest with the West Pilots' interests in seniority integration. Nothing that USAPA might obtain from the Leonidas subpoena could show that it does not have a conflict of interest.

USAPA jumps the gun by arguing it needs to conduct discovery to ascertain whether Plaintiffs and their counsel should represent the West Pilots in the McCaskill-

Bond process. Count Four does not ask the Court to make that determination. Indeed, there is no reason that the West Pilots cannot make that determination without the intervention of the Court. USAPA, which is plainly conflicted, has no standing or right to question whether they can do so.

This Court, therefore, should rule that USAPA failed to demonstrate that any of the material is seeks in its subpoena of Leonidas is relevant to the merits of Claim Four.

4. Class Certification

Plaintiffs have already addressed USAPA's argument that they are unsuited to be class representatives. (Doc. 136.) Here, USAPA asserts it would use the Leonidas subpoena to pursue that argument. In effect, USAPA wants to discover whether Plaintiffs are inadequate representatives because Leonidas controls them as if they are puppets on strings. That is just ridiculous.

USAPA also makes far too much of the fact that Plaintiffs interact with other West Pilots in the performance of their representative duties. Class representatives need not be insulated from absent class members. USAPA offers no authority that holds otherwise.

It would also make no difference if the Leonidas subpoena produced evidence that some West Pilots disagree with Plaintiffs' litigation strategy. There need not be (and probably never is) unanimous consensus in such matters. *See Srail v. Village of Lisle*, 249 F.R.D. 544, 552 (N.D. Ill. 2008) (finding the class representative adequate despite the fact that only 162 out of 403 potential class members demonstrated an "'interest in injunctive relief, because the potential class members' 'lack of interest in injunctive relief would . . . not [be] relevant . . . because a judge may not refuse to certify a class simply because some class members may prefer to leave the violation of their rights unremedied.'") (internal quotation marks omitted).

Here, nine West Pilots serve as named plaintiffs and many more West Pilots assist them in those efforts and also assist them by collecting contributions to fund the litigation. It is absolutely absurd—after these Plaintiffs litigated a class action to a verdict in a jury trial, litigated an appeal of that verdict to the Ninth Circuit, and litigated the US

Airways declaratory judgment class action to final judgment—to even suggest that they are not adequate representatives. This Court, therefore, should rule that USAPA failed to demonstrate that any of the material is seeks in its subpoena of Leonidas is relevant to the merits of class certification. Indeed, the Court should consider certifying the class on the current record, which is fully briefs this issue.

B. The Leonidas subpoena is unduly burdensome.

1. A subpoena is unduly burdensome if it seeks only irrelevant material.

"An evaluation of undue burden requires the court to weigh the burden to the subpoenaed party against the value of the information to the serving party[,]" and mandates the court's consideration of such factors as relevance, the serving party's need for the requested documents, the breadth of the discovery request, the particularity with which the documents are described, and the burden imposed. *See Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 636 (C.D.Cal.2005); *see also Compaq Computer Corp. v. Packard Bell Elecs.*, 163 F.R.D. 329, 335-36 (N.D. Cal. 1995) ("Obviously, if the sought after documents are not relevant nor calculated to lead to the discovery of admissible evidence, then any burden whatsoever imposed . . . would be by definition undue."). Because, the material that USAPA seeks from Leonidas has no relevance to the merits of the claims, the Leonidas subpoena is overly burdensome and must be quashed.

2. Moreover, USAPA fails to refute that the Leonidas subpoena would put an extraordinary burden on Plaintiffs and their counsel at a most inopportune time.

The Leonidas subpoena seeks virtually every paper document and electronic file that has any link whatsoever to Leonidas. It defines terms such as "document," "Leonidas" and "pertaining" as broadly as possible. (Doc. 149-1 at 5-6.) It demands productions of all corporate documents and minutes, all communications to and from the class representatives, all communications to and from anyone concerning the seniority

dispute, and all materials related to collecting or expending financial contributions. (*Id.* at 8-9.) Whew!

If ever a subpoena was overly burdensome this one is. USAPA might as well have asked Leonidas to produce every paper and electronic file in its possession or control. USAPA makes such demands knowing full well that the individuals and counsel who would have to comply with the subpoena are focused on preparing for trial on September 24 and 25, 2013.

Courts have broad discretion to determine whether a subpoena is unduly burdensome. *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 779 (9th Cir.1994). This is surely a case where the Court should exercise such discretion.

II. CONCLUSION

Leonidas, LLC, respectfully asks this Court to quash the Subpoena served on it by USAPA on August 7, 2013.

Dated this 22nd day of August, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd 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.

/s/ Andrew S. Jacob

By _____