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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

AMERICAN AIRLINES FLOW-THRU PILOTS COALITION, *et al.*, Plaintiffs, v. ALLIED PILOTS ASSOCIATION, *et al.*, Defendants.	Case No. 3:15-cv-03125-RS **DEFENDANT ALLIED PILOTS ASSOCIATION'S RESPONSE TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** Fed. R. Civ. P. 23 Date: April 21, 2016 Time: 1:30 p.m. Courtroom: 3 - 17th Floor Judge: Hon. Richard Seeborg

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INTRODUCTION AND SUMMARY OF ARGUMENT

Defendant Allied Pilots Association ("APA") hereby responds to the Motion for Class Certification ("Motion") filed by Plaintiffs in the above-captioned action on March 17, 2016, Docket No. 50. The Court should consider the Motion at the same time it considers APA's pending Motion for Summary Judgment or, in the Alternative, for Partial Summary Judgment ("MSJ"), Docket No. 44. For the reasons discussed below, the Court should grant Plaintiffs' Motion and certify two different classes, one on each of Plaintiffs' two claims, for purposes of liability and equitable relief only, and should deny class certification for the purpose of damages. Next, for the reasons discussed in APA's MSJ, the Court should grant summary judgment on both claims in favor of APA and against Plaintiffs.

As we discuss in greater detail below, the Court should revise Plaintiffs' requested class definition, with regard to Plaintiffs' first claim only, to exclude a group of class members who by definition incurred no injury from the conduct challenged in the first claim, and therefore should not be included in the class. The Court should also deny certifying either claim for damages purposes because Plaintiffs have not satisfied their burden of setting forth a damages calculation methodology that corresponds to their theory of liability and that excludes losses arising from other causes.

PLAINTIFFS' CLAIMS AND CLASS DEFINITION

Plaintiffs' Second Amended Complaint, ECF No. 38 ("Complaint"), comprises two claims for breach of the duty of fair representation. In their Motion for Class Certification, Plaintiffs formulate their first claim as follows: "Whether APA acted arbitrarily, discriminatorily or in bad faith by failing or refusing to negotiate for or otherwise seek Length of Service (LOS) credits for time FTPs [Flow-Through Pilots] were working as jet captains at American Eagle during the period when FTPs were unable [to] work at American after September 2001 because American stopped hiring pilots until the FTPs were hired by American after June 2010." Motion at 3:10-15; P&A in Support of Motion for Class Certification ("P&A"), Docket No. 50, at 2:23 – 3:2, 20:20-24.

Plaintiffs formulate their second claim as follows: "Whether APA has acted arbitrarily, discriminatorily or in bad faith as to representing the interests of FTPs in including the FTPs' years of service at American Eagle as a part of any longevity factor used in placing pilots on the integrated

seniority list arising from the seniority merger of pilots of American Airlines and US Airways." Motion at 3:16-20; P&A at 20:25 – 21:2.

Plaintiffs request the Court to define, in its Order granting their class certification motion, the specific claims and issues to be litigated as class claims in precisely the same language as just quoted above. *See* [Proposed] Order Granting Certification as Class Action ("Proposed Order"), Docket No. 50-7, at 2:18 – 3:5.

Finally, Plaintiffs define the sole class they request the Court to certify as follows: "All pilots who worked at American Eagle Airlines and became employed at American Airlines ("American") pursuant to the terms of the Flow-Through Agreement, also known as Supplement W or Letter 3." Motion at 2:27 – 3:2; P&A at 2:4-6, 20:12-15; Proposed Order at 2:2-4.

APA'S PENDING MOTION FOR SUMMARY JUDGMENT

APA's pending MSJ demonstrates that Plaintiffs' first claim should be dismissed because (1) most of it is barred by the statute of limitations; (2) most of the alleged incidents on which it is based occurred at a time when APA owed no duty of fair representation to the Plaintiffs or the members of the class they purport to represent who were affected thereby; and (3) the remaining portion of the claim, which concerns the negotiation of a single-page agreement titled "Letter G," executed in January 2015 (*see* Cordes Decl. at 6:22 – 7:2 & Exh. 1), is meritless because no reasonable jury could conclude that APA acted arbitrarily, discriminatorily, or in bad faith in negotiating the agreement, or that there is a causal connection between APA's alleged breach of the duty of fair representation and Plaintiffs' alleged harm. MSJ at 6:23 – 17:10. The MSJ also demonstrates that Plaintiffs' second claim should be dismissed because (1) the first portion of the claim is moot because it is based on Plaintiffs' objection to the terms of a stipulation and a proposal in the American-US Air Seniority List Integration ("SLI") arbitration proceeding, both of which were abrogated before they had any effect on Plaintiffs or the class they purport to represent and were replaced by a new stipulation and proposal to which Plaintiffs do not object; (2) the second portion of the claim is unripe because it is based on Plaintiffs' objection to strategy decisions in the ongoing SLI arbitration proceeding, and because no arbitration decision – which may or may not impact Plaintiffs in the manner they allege – has yet

issued; and (3) the second portion of Plaintiffs' second claim also fails because no reasonable jury could conclude that APA acted arbitrarily, discriminatorily, or in bad faith in the SLI arbitration process. MSJ at 17:11 – 25:18.

ARGUMENT

I. ON CLAIM ONE, THE FTPs WHO COMMENCED THEIR EMPLOYMENT WITH AMERICAN BEFORE SEPTEMBER 11, 2001 SHOULD BE EXCLUDED FROM ANY CERTIFIED CLASS

A. The Requested Class Actually Comprises Two Different Groups That Are Not Similarly Situated: Pre-9/11 FTPs And Post 9/11 FTPs.

As noted above, Plaintiffs request certification of a class comprising "[a]ll pilots who worked at American Eagle Airlines and became employed at American Airlines ("American") pursuant to the terms of the Flow-Through Agreement, also known as Supplement W or Letter 3." Motion at 2:27 – 3:2; P&A at 2:4-6, 20:12-15; Proposed Order at 2:2-4. We will refer to members of this proposed class as "Flow-Through Pilots" (or "FTPs"), i.e., those pilots who had been employed by American Eagle Airlines ("Eagle") and "flowed up" to work for American pursuant to the terms of the Flow-Through Agreement.

Plaintiffs' proposed class can be divided into two subgroups, based on the date that the pilots began work at American. The first group is made up of the FTPs who commenced work for American prior to the terrorist attacks of September 11, 2001 (the "Pre-9/11 FTPs"). Plaintiffs admit that there are 124 FTPs in this first group. Cordes Decl. at ¶ 12 ("Of these initial FTPs, 124 pilots (i.e., the first 125 less one who did not move to American) transitioned to American before September 11, 2001. The last of this group got to American about June 18, 2001 (according to the hire date indicated on the American pilot seniority list).") American's hiring of FTPs ceased for several years after September 11, 2001: "After September 11, 2001, American stopped hiring new pilots, began furloughing pilots and did not start new hire classes until about May 2007." *Id*. at ¶ 13. However, the Pre-9/11 FTPs continued to work for American during that period, as noted below.

The second group is made up of the FTPs who commenced work for American after the terrorist attacks of September 11, 2001 and the subsequent lengthy hiring freeze (the "Post-9/11

FTPs"). They started work for American much later: "After the first 124 pilots, none of the remaining FTPs – all of whom were on the American pilot seniority list but subject to a two year training freeze – were able to transfer to American until 2010 or later . . . . There were about 388 FTPs in this latter group as of the time the Flow-Through Agreement expired in May 2008." *Id*. at ¶ 12.

The difference between the two groups is crucial in analyzing Plaintiffs' first claim for relief as Plaintiffs themselves have articulated that claim in their Motion. Plaintiffs' first claim seeks to litigate "[w]hether APA acted arbitrarily, discriminatorily or in bad faith by failing or refusing to negotiate for or otherwise seek Length of Service (LOS) credits for time FTPs were working as jet captains at American Eagle *during the period when FTPs were unable [to] work at American after September 2001* because American stopped hiring pilots until the FTPs were hired by American after June 2010." Motion at 3:10-15; P&A at 2:23 – 3:2, 20:20-24 (emphasis added). But, by definition, the Pre-9/11 FTPs were *not* "working as jet captains at American Eagle during the period when [Post-9/11] FTPs were unable [to] work at American after September 2001 because American stopped hiring pilots until the [Post-9/11] FTPs were hired by American after June 2010." *Id*. Rather, by definition, they *were* working at American by September 2001 and were no longer working at Eagle. And, indeed, they continued to work for American "during the period when [Post-9/11] FTPs were unable [to] work at American after September 2001 because American stopped hiring pilots until the [Post-9/11] FTPs were hired by American after June 2010." *Id*. None of the Pre-9/11 FTPs were furloughed by American during the post-9/11 layoffs, *see* McDaniels MSJ Decl., Docket No. 48, at ¶ 44, and Plaintiffs have never made any allegation, or provided any evidence, that any of the Pre-9/11 FTPs were unable to work at American during that period.

Thus, only the Post-9/11 FTPs incurred the injury alleged by Plaintiffs in their first claim, and for that reason only the second group should be included in any class certified as to that claim. To the extent that a class is certified on the first claim, the class definition should be revised to exclude the Pre-9/11 FTPs.

A review of Plaintiffs' specific allegations confirms this conclusion. The sole timely allegation within Count I of Plaintiffs' Complaint, and the only allegation for which they appear to be seeking

class certification, is that APA violated its duty of fair representation by negotiating Letter G with American, an agreement that provided up to two years of LOS credit to pilots who had been furloughed from American or U.S. Airways during that post-9/11 period. Indeed, Letter G is the focus of the only "Common Issue[] of Fact" set forth in Plaintiffs' Motion that relates to their first claim for relief. *See infra* at 6-7.

Plaintiffs claim, specifically, that the FTPs who were held back at Eagle after the 9/11 attacks and were unable to "flow up" to American due to the hiring freeze at American are similarly situated to the pilots who were furloughed from American during that same post-9/11 period and who therefore received up to two years of LOS credit under Letter G. Plaintiffs assert that the same LOS credit should have been extended to them, and the other FTPs who were held back at Eagle after the 9/11 attacks, notwithstanding that they had not yet worked for American, were never furloughed by American, and remained employed throughout that period by Eagle. APA has shown in its summary judgment motion that the Post-9/11 FTPs are not similarly situated to the American furloughees who benefited from Letter G, and therefore that Plaintiffs' claim that APA breached its duty of fair representation by negotiating Letter G is meritless as a matter of law. *See* MSJ at 12:7 – 17:10. But even if Plaintiffs had a viable claim regarding Letter G, it would not apply to the *Pre*-9/11 FTPs, who were never furloughed from American, remained employed by American throughout the post-9/11 period, were not held back at Eagle, and *by definition* never incurred any of the injury of which Plaintiffs complain in their first claim. Put simply, even if APA had negotiated the agreement Plaintiffs desire instead of Letter G, an agreement that would have provided up to two years of LOS credit to all current American pilots who had either (1) been furloughed during the post-9/11 period, or (2) been held back at Eagle during the post-9/11 period, the pre-9/11 FTPs would not have received any LOS credit from that agreement because they did not fall into either category (1) or category (2).

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B. As To Claim One, Plaintiffs Have Failed To Show The Existence Of Any Questions Of Law Or Fact "Common" To Both The Pre-9/11 FTPs And The Post 9/11 FTPs.

As Plaintiffs admit, Federal Rule of Civil Procedure 23(a)(2) requires the existence of at least one question of law or fact that is common to the class, and which can be resolved with a common answer, for that class to be certified. P&A at 4:17 – 5:8. There is no question of law or fact that is common to both the Pre-9/11 FTPs and the Post-9/11 FTPs on Plaintiffs' first claim because, as just noted, the sole issue raised by that claim is whether APA violated its duty of fair representation by not negotiating for FTPs to receive "Length of Service (LOS) credits for time FTPs were working as jet captains at American Eagle during the period when FTPs were unable [to] work at American after September 2001." Motion at 3:10-15; P&A at 2:23 – 3:2, 20:20-24. As further shown above, the Pre-9/11 FTPs were not "unable [to] work at American after September 2001," and were therefore unaffected by any alleged breach by APA, so that question is not "common" to both the Pre-9/11 FTPs and Post-9/11 FTPs.

Although Plaintiffs purport to list a series of "Common Issues of Fact" that would arguably be common to both the Pre-9/11 FTPs and Post-9/11 FTPs, P&A at 7:14 – 9:25, the *only one* that is encompassed by the sole issue they have represented to the Court that they seek to litigate under their first claim is "(5)": "Did APA act arbitrarily, discriminatorily or in bad faith towards the FTPs, and did American join or participate in, aid or abet APA's breach of duty, by negotiating and agreeing to give two additional years of LOS credit for pilots because of lack of work at American after September 11, 2001 for all pilots other than the FTPs, including TWA-LLC pilots who had never been active pilots at American and who worked at American Eagle as flow-down pilots?" P&A at 9:5-10. This is the Letter G issue discussed above. The other asserted "Common Issues of Fact" enumerated by Plaintiffs at pages 7-9 of their class certification brief focus on such issues as whether APA unlawfully agreed to permit TWA-LLC pilots to "flow down" to Eagle during the period of the American furloughs, whether APA unlawfully failed to submit agreements for ratification by the FTPs still working for Eagle (whom Plaintiffs admit were represented by a different union), whether APA acted unlawfully by hiring TWA-LLC pilots for American new hire classes after the arbitration award in

FLO-0903 (which issue makes no sense), and whether APA unlawfully engaged in off-the-record discussions with the arbitrator in FLO-0108, etc. Those issues are irrelevant to their first claim *as characterized by Plaintiffs themselves in their class certification motion*, which focuses instead on the negotiation and effect of Letter G.[1] Moreover, the alleged conduct underlying those asserted "Common Issues of Fact" had no effect on the Pre-9/11 FTPs, who were already working for American at the time of that conduct, but instead could only have affected the FTPs still working for Eagle (i.e., the Post-9/11 FTPs). Thus, those issues – including the issue enumerated by Plaintiffs as (5) – are *not* common to the Pre-9/11 FTPs.[2]

For the same reasons, Plaintiffs fail to identify any issue of law that is "common" to both the Pre-9/11 FTPs and the Post-9/11 FTPs relating to their first claim. *See* P&A at 5:20 – 6:8. The issues they identify as (a) and (c) relate to their second claim.[3] The issue they identify as (b) relates to American's potential liability as a joint participant or aider and abettor of APA's alleged breach at issue in their first claim, i.e., the negotiation and effect of Letter G. However, as we have just shown, the Pre-9/11 FTPs were not affected in any way by Letter G. Moreover, the question of American's potential liability on the first claim will not be an issue in the case if the Court grants American's pending Motion to Dismiss Count One of the Second Amended Complaint. *See* Docket No. 43 (minute order submitting that motion on the papers and vacating hearing thereon). Because Plaintiffs

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[1] As we have shown in our summary judgment motion, the allegations underlying the issues set forth by Plaintiffs at pages 7-9 of their class certification brief are time-barred, MSJ at 7:5 – 10:11, and occurred at a time when APA owed no duty of fair representation to Plaintiffs or the members of their purported class who were affected thereby, MSJ at 10:12 – 12:6. Indeed, because of the latter consideration, Plaintiffs cannot use those alleged incidents to attempt to prove APA's hostility toward the FTPs, since APA's conduct during a time when it did not represent the FTPs was undertaken in fulfillment of the duty of fair representation it owed to the American pilots. MSJ at 15:15 – 16:15.

[2] Plaintiffs' "Common Issues of Fact" denominated as (b), P&A at 7:22 – 8:1, and (7), P&A at 9:16-25, relate to Plaintiffs' second claim, regarding the ongoing SLI arbitration process, which we discuss below at Section II.

[3] To the extent that any portion of (a) relates to Plaintiffs' first claim, that portion is either (1) based on alleged events that are time-barred and/or occurred at a time when APA did not owe the FTPs any duty of fair representation, e.g., all of the factual allegations of the Complaint predating the negotiation of Letter G, or (2) based on alleged events that did not affect the Pre-9/11 FTPs, e.g., the negotiation and terms of Letter G.

have not identified any issue of fact or law "common" to the Pre-9/11 FTPs and the Post-9/11 FTPs, they have not carried their burden of demonstrating that a class containing both groups can and should be certified.

C. Plaintiffs Have Failed to Show That Their First Claim Is "Typical" Of Any Claim Possessed By The Pre-9/11 FTPs.

As Plaintiffs admit, Federal Rule of Civil Procedure 23(a)(3) requires their claims to be "typical" of those of the class for that class to be certified, *see* P&A at 10:1-16, and that "typicality" requires that "'the unnamed class members have injuries similar to those of the named plaintiffs and that the injuries result from the same, injurious course of conduct,'" *id*. at 10:10-11 (quoting *Armstrong v. Davis*, 275 F.3d 849, 869 (9th Cir. 2001)). For the reasons discussed in the previous section as to why the Pre-9/11 FTPs share no common issues with the Post-9/11 FTPs with regard to Plaintiffs' first claim, that claim is also not "typical" of any claim possessed by the Pre-9/11 FTPs. As discussed above, the Pre-9/11 FTPs were not affected in any way by the subject of the first claim, the negotiation and terms of Letter G, and incurred no injury therefrom. The Pre-9/11 FTPs therefore have *no* "injuries similar to those of the named plaintiffs," much less such "injuries result[ing] from the same injurious course of conduct," *Armstrong*, 275 F.3d at 869, as required for "typicality." Because Plaintiffs have not demonstrated that their first claim is "typical" of any claim shared by the Pre-9/11 FTPs, they have not carried their burden of demonstrating that a class containing Pre-9/11 FTPs can and should be certified.

D. The Court Should Revise The Class Definition With Regard To Plaintiffs' First Claim To Exclude The Pre-9/11 FTPs.

As we have just shown, Plaintiffs have failed to carry their burden of demonstrating the "commonality" and "typicality" elements required by Federal Rules 23(a)(2) and (3) as to the class they request the Court to certify, with regard to their first claim. APA does not dispute, however, that a class excluding the Pre-9/11 FTPs can properly be certified for purposes of liability and equitable relief. (We discuss why such a class cannot be properly certified for damages below in Section III.) The Court should therefore revise the class definition with regard to the first claim to exclude the Pre-

9/11 FTPs from that class, as follows (with the new language underlined): "All pilots who worked at American Eagle Airlines and became employed at American Airlines ("American") after September 11, 2001, pursuant to the terms of the Flow-Through Agreement, also known as Supplement W or Letter 3." So revised, the Court should certify that class as to the first claim, for purposes of liability and equitable relief only.

II. NO DAMAGES CLASS SHOULD BE CERTIFIED ON CLAIM TWO

A. Plaintiffs' Second Claim.

Plaintiffs' second claim concerns the ongoing SLI arbitration process. As noted above, Plaintiffs formulate their second claim as follows: "Whether APA has acted arbitrarily, discriminatorily or in bad faith as to representing the interests of FTPs in including the FTPs' years of service at American Eagle as a part of any longevity factor used in placing pilots on the integrated seniority list arising from the seniority merger of pilots of American Airlines and US Airways." Motion at 3:16-20; P&A at 20:25 – 21:2; *see also* P&A at 3:3-6.[4]

The background to this claim is that, on September 19, 2015, the committee of pilots representing the entire pre-merger American pilot group in the SLI arbitration proceedings, the American Airlines Pilot Seniority Integration Committee ("AAPSIC"), presented a proposal in that proceeding that argues for pilots' longevity *not* to be a factor in the SLI decision, as Plaintiffs admit. *See* Complaint ¶ 69 ("The other participants [in the SLI arbitration] urged that longevity should be a factor in the resulting seniority list; APA took the position that longevity should not be a factor").[5] This proposal favors Plaintiffs and the putative class members by preventing their status as relative newcomers to American from being held against them in the seniority integration. Nowhere in the Complaint do Plaintiffs object to any aspect of AAPSIC's September 19, 2015 proposal. Indeed, they

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[4] In the SLI arbitration context, "longevity" simply means the period of time for which a pilot has flown for a carrier. In this brief, we follow the Complaint in using the term "longevity" as a potential factor in integrating the seniority lists to distinguish it from "length of service," which (as noted above) is used as a factor in determining the different issue of a pilot's pay.

[5] Plaintiffs incorrectly attribute AAPSIC's actions to APA itself; in fact, APA is bound through an agreement with the participants not to interfere with any of the committees, including AAPSIC. Duncan MSJ Decl., Docket No. 47, at ¶¶ 26-27 & MSJ Exh. 18, Docket No. 49-18, at ¶ 8(a).

have informed AAPSIC by letter that they "agree on [AAPSIC's] approach." Duncan MSJ Decl., Docket No. 47, at ¶¶ 43, 71; MSJ Exh. 41, Docket No. 49-41. Rather, Plaintiffs' argument is that, in addition to that approach, AAPSIC should have introduced in the arbitration "evidence in support of including service at American Eagle as part of any longevity factor used for an integrated seniority list," Complaint ¶ 86, just in case the arbitrators reject AAPSIC's position and decide to use longevity as a factor in the SLI decision. In essence, they contend that AAPSIC has breached its duty of fair representation by declining to introduce evidence in the SLI arbitration to support a "fallback" position that could undermine its principal position. *See* Cordes Decl. at 7:5 – 8:7. [6]

Plaintiffs contend that if the SLI arbitrators reject AAPSIC's approach that pilots' longevity should *not* be a factor in the SLI decision, and instead include pilots' longevity as a factor in that decision, the arbitrators will treat the FTPs' longevity as beginning when each FTP "flowed up" to American, excluding their prior longevity at Eagle, whereas the arbitrators will treat the other pilots' longevity as beginning when those other pilots began work with one of the carriers that previously merged into American or US Airways, or is now being merged into American. Plaintiffs contend that if AAPSIC had advocated not only its principal position but also Plaintiffs' "fallback" position that the FTPs' longevity with Eagle should be taken into account, the SLI arbitrators would then treat the FTPs' longevity as beginning when they first became employed by Eagle (to the extent that they take longevity into account at all), with the result that the FTPs' positions on the resulting integrated seniority list established by the arbitration decision would be higher than they would be absent

[6] Plaintiffs' second claim also includes a challenge to aspects of a stipulation among the parties to the SLI arbitration (including AAPSIC) and an earlier AAPSIC proposal. As we have shown in our summary judgment motion, both the stipulation and the earlier proposal were withdrawn from the SLI proceeding and replaced by a new stipulation and the September 19, 2015 AAPSIC proposal that do not include the challenged terms. As we also showed, Plaintiffs were not adversely impacted in any way from the original stipulation or proposal, since no action was taken on either before they were withdrawn, and neither has had any force or effect thereafter. As such, to the extent that Plaintiffs' second claim is predicated on their allegations regarding the original stipulation or proposal, that claim is moot. *See* MSJ at 5:6 – 6:12, 17:11 – 20:11. Accordingly, we need only discuss in this section the portion of Plaintiffs' second claim that relates to AAPSIC's September 19, 2015 SLI proposal. The points we make in this section, however, would apply equally to the portion of Plaintiffs' second claim that concerns the original stipulation and proposal.

advocacy of Plaintiffs' "fallback" position. *See* P&A at 16:12-24.[7] Plaintiffs seek damages resulting from the comparatively lower seniority positions on the resulting integrated seniority list established by the arbitration decision they contend they may occupy (to the extent that the SLI arbitrators decide to take longevity into account and award FTPs longevity only back to when they began flying for American) due to AAPSIC's failure to present their "fallback" position. *See* P&A at 16:4-6 ("Plaintiffs also seek damages against APA for reduced employment opportunities, wages and benefits arising from the adverse effect of the FTPs' placement on the integrated seniority list.").

B. A Class Cannot Be Certified For Damages Purposes On Plaintiffs' Second Claim Because They Have Failed To Present A Damages Computation Methodology That Isolates Losses Arising As A Consequence Of APA's Alleged Breach From Those Arising As A Consequence Of Other Potential Causes.

APA does not object to the certification of the class requested by Plaintiffs on their second claim, for purposes of liability and injunctive relief only. However, that claim should not be certified for class treatment for damages purposes because they have failed to satisfy an essential element of their burden: presenting a damages computation methodology that corresponds to their theory of liability and isolates the damages arising as a consequence thereof from those arising from other potential causes. *See, e g., Comcast Corp. v. Behrend,* 133 S. Ct. 1426, 1432-33 (2013); *Lilly v. Jamba Juice Co.*, 308 F.R.D. 231, 242-44 (N.D. Cal. 2014) (noting that the defendant's argument that "certification should be denied because Plaintiffs have failed to submit any evidence establishing that damages can be feasibly and efficiently calculated . . . . has considerable force," and certifying class for liability only, not damages); *Saavedra v. Eli Lilly and Co.*, 2014 WL 7338930 *3-*7 (C.D. Cal. Dec. 18, 2014) (denying class certification in a product mislabeling case where plaintiffs' damages theory was based solely on measures of the consumers' subjective valuation, which takes into account

[7] Obviously, if the SLI arbitrators accept AAPSIC's position that longevity should not be counted in the SLI decision, the FTPs will not have been disadvantaged in any manner. This need to speculate as to whether the FTPs will or will not be disadvantaged in the ongoing SLI arbitration process, which has not yet resulted in an arbitration decision, demonstrates that Plaintiffs' challenge to AAPSIC's September 19, 2015 SLI proposal is not yet ripe, as we have shown in our summary judgment motion. *See* MSJ at 20:12 – 23:8.

only the demand component of market pricing, rather than market valuation, which also takes into account the supply component of market pricing); *In re NJOY, Inc. Consumer Class Action Litigation*, ___ F. Supp. 3d ___, 2015 WL 4881091 *41-*44 (C.D. Cal. Aug. 14, 2015) (same).

Preliminarily, we note that, as of now, neither Plaintiffs nor any of the FTPs have actually incurred any damages contemplated by their second claim for relief, as no SLI arbitration decision has yet issued. Indeed, Plaintiffs were quite candid about this in their Initial Disclosures, which stated simply, "Damages arising from loss of seniority position arising from the SLI process are not included as that process has not concluded." Plaintiffs' Initial Disclosures Under Rule 26(A), previously submitted as SJ Exh. 50, Docket No. 49-50, at 6:13-15.

But beyond that, Plaintiffs have presented no real damages computation methodology for their second claim, to the extent that any damages are ever actually incurred, much less one that isolates monetary losses incurred as a result of holding a lower position on the seniority list from those incurred from other causes. Plaintiffs simply assert as follows:

> Placement on the seniority list will affect all FTPs equally, particularly as the inclusion/exclusion of service at American Eagle is an unquestionably common factor for every FTP who, by definition, all had service at American Eagle before flowing-up to American. Again, as in *Johnson* [*v. Meritor Health Servs. Emp. Ret. Plan*, 702 F.3d 364 (7th Cir. 2012)], damages will flow by formula simply by comparing the FTPs position on the existing seniority list with their placement on the integrated list. Damages flow naturally if another pilot received a benefit by being ahead of the FTP on the integrated list where the FTP would have been entitled to the benefit on the existing list. See *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 262-263 (5th Cir. 1974) (discussing use of comparable employees to determine damages for class members who were discriminated against).

P&A at 16:25 – 17:6.

Contrary to Plaintiffs' assertion, differences in pilots' relative positions on a seniority list do not translate easily, much less "naturally" or "by formula," into dollars. Rather, the impact of seniority position on earnings is a complex inquiry, involving the interplay of seniority with numerous independent factors and individual subjective choices, which renders any simplistic notion of mechanically translating relative seniority positions to dollars a fantasy, as explained in detail in the

accompanying Declaration of Arthur McDaniels in Support of APA's Response to Plaintiffs' Motion for Class Certification ("McDaniels Class Cert. Decl.").

First, each pilot is placed on a pay scale depending on the pilot's aircraft "group" (between Group I, the smallest aircraft, and Group V, the largest aircraft), and the pilot's position (Captain or First Officer, the two positions in the cockpit crew). Then, for each group/position cohort, there is a 12-step pay scale based on a pilot's length of service. So, a 737 First Officer with 12 years length of service would be at the top of the pay scale for Group II First Officers, while a 737 First Officer with 1 year length of service would be at the bottom of that same pay scale. McDaniels Class Cert. Decl. at ¶ 6. The pay scale sets an hourly rate of pay for group/position cohort. *Id.* at ¶ 7. In general, pilots' actual earnings are calculated by multiplying that rate of pay by the number of hours a pilot is credited with flying each month. *Id.*

Second, each pilot bids within a particular "four-part bid status" chosen by the pilot, with the four parts being: (1) aircraft, (2) position (captain/first officer), (3) home base (i.e., the airport that the pilot will fly from and return to), and (4) division (international flights, which give the pilot premium pay, or domestic flights). For example, a pilot could choose to bid on the following bid status: "737/CA/MIA/DOM." This means that the pilot will fly on the 737 aircraft, as a captain, out of Miami, on domestic flights. *Id.* at ¶ 14.

Third, pilots also bid on a "line of flying," which is essentially a set of trips that the pilot will fly for the month, and which determines the number of credited hours the pilot will fly that month. Pilots can then, through various means, choose to add or drop trips from the "line" they have been awarded. Based on a pilot's choices in bidding and picking up or dropping trips, a pilot's credited hours of flying can vary widely. In most months, a pilot who actively flies on a "line" of flying as described above will accrue credited hours of flying that range somewhere between 65 hours and 95 hours, the latter figure nearly 150% of the former. A pilot can also bid to fly as a "reserve" pilot. This means that the pilot does not enter the month with a predetermined "line," but instead receives trips throughout the month as needed by the airline. Pilots on reserve are paid for a minimum of 73 or 76 credited hours per month, but may accrue greater credit depending on the trips they fly. *Id.* at ¶ 11.

Fourth, all of that bidding is determined on the basis of the pilot's position on the American pilots seniority list. *Id*. at ¶¶ 9, 15-16. But one cannot simply assume that any given pilot will bid on whatever will give him or her the highest position on the pay scale and the greatest number of hours per month, because the factors on which each pilot bids determine other "quality of life" considerations that may be more important to the pilot than earnings. As Mr. McDaniels explains, a pilot with sufficient seniority will have multiple options in terms of bid status to choose between. Perhaps most fundamental, a pilot often has to choose whether to bid into a four-part bid status in which the pilot will be relatively senior to the other pilots in that bid status, or a different bid status which is more desirable for some reason (e.g., higher paying), but in which the pilot will be relatively junior. *Id*. at ¶ 15.

For example, a pilot who chooses to fly domestic routes as a First Officer on the 737 out of Dallas may have accrued sufficient seniority to be relatively senior among the group of pilots who fly in that bid status. Within the bid status, the pilot's relative seniority allows him or her to outbid other pilots for lines of flying he or she considers desirable, e.g., to bid on, and receive, a line consisting mostly of one-day trips, with most weekends off, so that the pilot can spend nights and weekends at home with his or her family. On the other hand, the same pilot may be able to increase his or her pay rate by becoming a Captain on the 737, a process known as "upgrading" to Captain. But although the pilot's pay rate will increase through "upgrading," the downside is that the pilot may be relatively junior among the pilots in that new bid status, and therefore may not be able to outbid other pilots for a line consisting of one-day trips and weekends off. Indeed, the pilot may be forced to fly on reserve, making his or her schedule extremely unpredictable. *Id*. at ¶ 16. Needless to say, chosing between such options is inherently individualized, depending on how each pilot subjectively prioritizes such factors as earnings, time off, predictability of schedule, and equipment preference. Additionally, other personal considerations will affect whether and when pilots decide to upgrade to a higher-paying or otherwise more desirable bid status, such as whether upgrading will require the pilot to fly out of a different home base (e.g., Los Angeles instead of Miami), which would require the pilot to relocate his

or her residence or endure a much longer commute between his or her home and home base. *Id*. at ¶ 17.

Given these considerations, pilots make different choices about whether and when to upgrade to higher-paying bid statuses. Some pilots maximize their earnings by upgrading as soon as possible, i.e., as soon as their relative seniority will permit them to do so. Others prefer to remain indefinitely in a lower-paying bid status, in which their relative seniority allows them maximum flexibility in bidding for desirable trips. As a consequence, there is not necessarily any strong correlation between a pilot's seniority and the pilot's pay. *Id*. at ¶¶ 18-22. To extrapolate from seniority to pay, one would have to know which choices the pilot will make about when to upgrade, how many hours to fly, which equipment and position to fly, and which home base to select, among other factors.

This is illustrated by an example that Mr. McDaniels provides, in which he compares four pilots with consecutive seniority numbers on the American pilots seniority list, all of whom have flown actively for American over the past five years. Notwithstanding their consecutive positions on the seniority list, they have substantial differences in estimated earnings, the lowest-earning pilot having earned approximately $119,470 per year over the past five years, the highest-earning pilot having earned approximately 170% of that figure, or $202,906 per year, with the pilots between them on the seniority list having earned approximately $186,856 per year and $175,819 per year. *Id*. at ¶ 21.

Moreover, any extrapolation from seniority number to earnings for FTPs on Plaintiffs' second claim will be further complicated by the fact that the FTPs would be "bidding" against each other and against other pilots, so that an FTP may not be able to obtain his or her preferred bid status and line of flying because his or her seniority may not be superior to that of another pilot who has the same preferences, and may only obtain his second or even lower choice of bid status and line of flying. This would make any attempt to extrapolate wages lost from differences in seniority position infinitely more complex, when one is attempting to perform that calculation for multiple pilots at one time. *Id*. at ¶ 23.

Plaintiffs have provided no methodology for making these calculations, and certainly not one that separates out any diminished earnings attributable to a breach of the duty of fair representation in the SLI process from those resulting from the personal bidding choices as to equipment, position,

home base, division, and line of flying that a pilot might make based on non-economic factors. And, contrary to Plaintiffs' claim, there is certainly no "formula" by which lost earnings will flow "naturally" from changes in seniority position. As Mr. McDaniels concludes:

> [O]ne cannot merely use a mathematical "formula" to estimate the difference in earnings resulting from changing a pilot's position on the American pilots seniority list. Nor could one merely "match" the pilot with a second pilot who has a seniority number consecutive with the new seniority number given to the first pilot, and assume that the first pilot would have had the same earnings history as the second pilot. Rather, one would have to question carefully each individual pilot given a new seniority number to determine what bidding choices that pilot would have made if he or she had possessed that seniority number previously, and what bidding choices that pilot will make in the future with that bidding number. And even with that approach, translating a bidding number to earnings would require substantial guess-work, as one would have to make numerous assumptions regarding factors such as the composition of the Company's aircraft fleet (which affects flying opportunities and therefore earnings) and the trips made available by the company.

Id. at ¶ 22.

The courts do not hesitate to deny class certification for damages purposes where, as here, the plaintiffs' class certification motion fails to present a damage calculation methodology tailored to their theory of liability or that does not exclude economic effects from other causes. *See, e.g.*, *Lilly*, 308 F.R.D. at 242-44; *Saavedra*, 2014 WL 7338930 at *3-*7; *In re NJOY, Inc.*, 2015 WL 4881091 at *41-*44; *see also Loritz v. Exide Technologies*, 2015 WL 6790247 *23-*23 (C.D. Cal. July 21, 2015) (denying damages class certification where plaintiffs presented no damages model with their opening class certification papers and subsequently presented only an expert rebuttal report discussing three damages models used in similar types of cases without tying them to the facts of the case); *Rahman v. Mott's LLP*, 2014 WL 15779 *8 (N.D. Cal. Dec. 3, 2014) (denying class certification in mislabeling case where plaintiff presented no evidence showing that damages could be calculated based on the price premium attributable to the alleged mislabeling; declining even to certify a class for liability, given the advanced state of the proceedings); *cf. Werdebaugh v. Blue Diamond Growers*, 2014 WL 7148923 *4-*5, *8-*14 (N.D. Cal. Dec. 14, 2014) (decertifying previously-certified class where plaintiff substituted for his original damages computation methodology, upon which class certification was originally granted, a different methodology that failed to isolate and measure only those damages attributable to defendant's alleged mislabeling of product).

Moreover, class certification for damages purposes is also denied where plaintiffs fail to demonstrate that damages can feasibly and efficiently be calculated. As the *Lilly* court stated, "[P]laintiffs must establish at the certification stage that damages can feasibly and efficiently be calculated once the common liability questions are adjudicated. . . . [W]here defendants can make at least a *prima facie* showing that damage calculations are likely to be more complex, expert reports or at least some evidentiary foundation may have to be laid to establish the feasibility and fairness of damage assessments." 308 F.R.D. at 244 (quotations, citations, ellipses, and substitutions omitted). Plaintiffs have not introduced any expert reports or any other evidentiary foundation showing that damages on their second claim "can feasibly and efficiently be calculated once the common liability questions are adjudicated." *Id*.

The *Johnson* case on which Plaintiffs rely is not to the contrary. There, since the case involved the rules of a defined benefit pension plan, "the award of monetary relief w[ould] just be a matter of laying each class member's pension-related employment records alongside the text of the reformed plan and computing the employee's entitlement by subtracting the benefit already credited to him from the benefit to which the reformed plan document entitles him"; as such, "the monetary relief w[ould] truly be merely 'incidental' to the declaratory and (if necessary) injunctive relief (necessary only if Meritor ignores the declaration)." *Johnson*, 702 F.3d at 371. For the reasons set forth in the accompanying McDaniels Declaration and discussed above, Plaintiffs' second claim does not present a situation in which "the calculation of monetary relief will be mechanical, formulaic, a task not for a trier of fact but for a computer program," as in *Johnson*, 702 F.3d at 372. For that reason, Plaintiffs' assertion that damages on their second claim will be "incidental" to declaratory and/or injunctive relief, and thus their damages claim on Count Two can properly be certified under Federal Rule 23(b)(2), *see* P&A at 15:22 – 17:9, is erroneous even if Rule 23(b)(2) certification of claims for truly "incidental" money damages survived the Supreme Court's decision in *Wal–Mart Stores, Inc. v.*

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Dukes, ___ U.S. ___, 131 S. Ct. 2541, 2557 (2011), which the Ninth Circuit has suggested it may not have, *see Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 986 (9th Cir. 2011).[8]

Further, while Plaintiffs are correct that, in the Ninth Circuit, the need to undertake individualized damages calculations will not defeat a showing of commonality, *see* P&A at 5:9-12, that rule does not relieve them of their obligation to set forth a methodology for calculating damages that is tied to their theory of liability, that excludes losses from other causes (which, as we have discussed above, are legion), and that allows damages to be calculated feasibly and efficiently after liability is established. This they have not done as to their second claim and, for that reason, class certification of that claim should be denied for damages purposes.

III. NO DAMAGES CLASS SHOULD BE CERTIFIED ON CLAIM ONE

For reasons similar to those we have just discussed, no class should be certified on Plaintiffs' first claim for damages purposes. First, certification of damages claims for Plaintiffs' first claim would be inappropriate under Federal Rule 23(b)(2) because such damage claims would not be "incidental" to injunctive relief (to the extent that such an "incidental damages" doctrine even continues to exist after *Wal-Mart*, as noted above) because Plaintiffs assert no real claim for injunctive relief under their first claim. As discussed above, Plaintiffs' first claim concerns APA's negotiation of Letter G with American and accuses APA of not having negotiated the particular terms of agreement that Plaintiffs would have preferred. But, with all respect to this Court's authority, it cannot enjoin APA to negotiate an agreement because APA cannot force American to agree on any particular terms. Thus, the only injunction Plaintiffs seek is "an injunction directing APA to make up any monetary loss suffered by FTPs in the future arising from APA's breach of duty, including losses arising from the FTPs' failure to receive LOS credits." P&A at 15:17-19. But that is not properly "injunctive relief" at

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[8] Plaintiffs' reliance on *Pettway*, 494 F.2d at 262-263, *see* P&A at 17:4-6, is misplaced. *Pettway*, a challenge to racially discriminatory promotion and job assignment practices under the civil rights laws, held that a class of African-American employees could be certified under Federal Rule 23(b)(2), notwithstanding the need for individualized damages determinations for each class member. As such, it cannot survive the subsequent Supreme Court decisions in *Wal–Mart Stores, Inc.*, 131 S. Ct. 2541, and *Comcast Corp.*, 133 S. Ct. 1426, holding that due process concerns preclude such certification.

all; it is damages for future losses (barely) disguised as injunctive relief. In actuality, the main relief Plaintiffs are seeking on their first claim is money damages and thus that claim cannot properly be certified for damages purposes under Rule 23(b)(2).

Second, nor can that claim properly be certified for damages purposes under Rule 23(b)(3), either. Plaintiffs request "damages for emotional distress resulting from the discrimination against them," and admit that "[t]hese damages are not subject to precise calculation." Plaintiffs' Initial Disclosures Under Rule 26(A), Docket 49-50, at 6:16-18. As with their first claim, Plaintiffs have failed to carry their burden to "establish at the certification stage that damages can feasibly and efficiently be calculated once the common liability questions are adjudicated." *Lilly*, 308 F.R.D. at 244. Emotional distress damages are the quintessential individualized relief, precluding class certification. *See Curtis v. Extra Space Storage, Inc.*, 2013 WL 6073448 *4 (N.D. Cal. Nov. 18, 2013) (declining to certify class where plaintiff failed to present a damages calculation methodology restricted to her theory of liability, which would exclude other causes, short of individual damage determinations for each class member, including "potentially even emotional distress suffered by each [class member] as a result of [the challenged conduct].")[9]

CONCLUSION

For the foregoing reasons, the Court should grant in part and deny in part Plaintiffs' class certification motion as follows: It should grant Plaintiffs' motion as to the first claim, certifying the following class for purposes of liability and equitable relief only: "All pilots who worked at American Eagle Airlines and became employed at American Airlines ("American") after September 11, 2001, pursuant to the terms of the Flow-Through Agreement, also known as Supplement W or Letter 3." It should also grant Plaintiffs' motion as to the second claim, certifying the following class for purposes of liability and equitable relief only: "All pilots who worked at American Eagle Airlines and became employed at American Airlines ("American") pursuant to the terms of the Flow-Through Agreement,

[9] To the extent that Plaintiffs seek emotional distress damages on their second claim, in addition to their first, this provides yet another reason why no damages class can be certified as to the second claim.

also known as Supplement W or Letter 3." It should deny Plaintiffs' motion and decline to certify any class for damages purposes with regard to either claim. It should appoint the named Plaintiffs as class representatives and Mr. Katzenbach as class counsel. Finally, it should grant APA's pending motion for summary judgment, and should enter final judgment in favor of APA and against Plaintiffs and the class they represent.

Dated: March 31, 2016.

Respectfully submitted,

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