

1 CHRISTOPHER W. KATZENBACH
(SBN 108006)
2 Email: ckatzenbach@kkcounsel.com
KATZENBACH LAW OFFICES
3 912 Lootens Place, 2nd Floor
San Rafael, CA 94901
4 Telephone: (415) 834-1778
Fax: (415) 834-1842

5 Attorneys for Plaintiffs AMERICAN AIRLINES
6 FLOW-THRU PILOTS COALITION,
7 GREGORY R. CORDES, DRU MARQUARDT,
DOUG POULTON, STEPHAN ROBSON,
and PHILIP VALENTE III on behalf of themselves and all
8 others similarly situated

9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 AMERICAN AIRLINES FLOW-THRU)
14 PILOTS COALITION, GREGORY R.)
CORDES, DRU MARQUARDT, DOUG)
15 POULTON, STEPHAN ROBSON , and)
16 PHILIP VALENTE III, on behalf of)
themselves and all others similarly situated,)

Case No.: 3:15-cv-03125 RS

**REPLY MEMORANDUM IN SUPPORT
OF MOTION FOR CLASS
CERTIFICATION**

17 Plaintiffs,
18 vs.

) April 21, 2016
) 1:30 P.M.
) Courtroom 3, 17th Floor
) Judge Richard Seeborg

19 ALLIED PILOTS ASSOCIATION and)
20 AMERICAN AIRLINES, INC.,)

21 Defendants.)
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REPLY ARGUMENT

I. PLAINTIFFS ARE ONLY SEEKING TO REPRESENT A CLASS OF POST-9/11 FLOW-THROUGH PILOTS UNDER THE FIRST CLAIM FOR RELIEF.

Under the First Claim for Relief, the plaintiffs in this case are only seeking to represent a class of post-9/11 FTPs for LOS credits for time after September 2001. See Cordes Decl. ¶¶ 19, 20(a). The broader class of all FTPs are involved in the issues under Claim Two involving the longevity issue in the seniority list integration—namely, has APA breached its duty of fair representation by not representing the interest of FTPs in having any time at American Eagle counted for longevity if longevity is a factor for integrating the American and US Airways seniority lists. Cordes Decl. ¶¶ 19, 20(b).

A. If Pre-9/11 FTPs Have To Be Included Under The First Claim For Relief, Class Certification Would Be Proper Because Any Difference Between Pre-9/11 and Post-9/11 FTPs Is An Issue Of Damages, Not Whether The Pilots Are Similarly Situated, and Could Be Accommodated By Creating Subclasses.

District courts have broad discretion to control the class certification process. *Armstrong v. Davis*, 275 F.3d 849, 871 n.28 (9th Cir. 2001). Among other things, “where appropriate, the district court may redefine the class” (*Ibid.*, citing *Penk v. Oregon State Bd. of Higher Educ.*, 816 F.2d 458, 467 (9th Cir. 1987)). The ability to redefine the class includes the discretion to create subclasses. *American Timber & Trading Co. v. First Nat. Bank of Oregon*, 690 F.2d 781, 786-87 (9th Cir. 1982) (the creation of subclasses was “within the district court’s broad power under [Rule 23(d)] to adopt procedural innovations to facilitate management of the class action”); *Moore v. Ulta Salon, Cosmetics & Fragrance, Inc.*, 311 F.R.D. 590, 609-610 (C.D.Cal. 2015). Subclasses are appropriate to segregate factual and legal questions which are common to some members of the larger class. *Ibid.*

There are potentially three distinct losses affecting FTPs involving length of service.

- 1 • First, there is the general loss of all credit for flying time at Eagle where TWA-
2 LLC pilots, including the Staplees, received credit for flying time at TWA.¹ All
3 FTP's, both pre-9/11 and post-9/11 are affected by this issue. This issue is also
4 part of the longevity issue involved in the Second Claim for Relief.
- 5 • Second, there is the LOS credit issue of post-9/11 time when, due to the terrorist
6 attacks, American furloughed pilots and did not begin rehiring until 2007. Only
7 the post-9/11 FTP's are affected by this LOS credit issue.
- 8 • Third, there is the two-year extra LOS credit in Letter G to the 2015 CBA.
9 Because the Letter G credit is only for post-9/11 loss of service, only the post-
10 9/11 FTP's are affected by the Letter G LOS credit issue.

11 Any distinctions between these groups go to variations in relief or damages each group of
12 FTP's would receive. Variations in damages do not prevent class action relief. The amount of
13 damages is invariably an individual question and does not defeat class action treatment.” *Blackie*
14 *v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975). The common questions as to APA’s breach of
15 duty continue to be the predominant issue as to all length of service issues, both longevity in the
16 seniority integration process and the LOS credits that pilots similarly-situated to FTP's received
17 but the FTP's did not.

18 Plaintiffs are only seeking to represent a class under the First Claim for Relief for the
19 post-9/11 FTP's. To the extent, however, that the Court feels that the distinction between pre-
20 9/11 and post-9/11 FTP's requires including pre-9/11 FTP's under the First Claim for Relief and
21 separating out the FTP's in each group, the appropriate action would be to create subclasses of
22 FTP's who began flying at American before and after 9/11. Plaintiffs have no objection to
23 creating subclasses in this way.

24 If the Court creates subclasses, plaintiffs propose that the Class definition should be:

26 ¹ Although APA has attempted to justify that distinction by distinguishing loss of service arising
27 from a merger of airlines from other ways pilots (and particularly the FTP's) came to American
28 (see McDaniels Decl., dated March 16, 2016, at ¶ 34), the TWA acquisition was a purchase of
TWA’s assets, not a merger. *Id.* at ¶ 37.

1 Class: All pilots who worked at American Eagle Airlines and
 2 became employed at American Airlines (“American”) pursuant to
 3 the terms of the Flow-Through Agreement, also known as
 4 Supplement W or Letter 3.

5 For purposes of claims asserted in the First Claim For Relief
 6 arising from the failure of the Class to receive length of service
 7 (LOS) credits for time they worked at American Eagle Airlines
 8 before being assigned flying duties at American Airlines, this Class
 9 has two subclasses as follows:

10 Subclass 1. All pilots who worked at American Eagle Airlines
 11 and became employed at American Airlines (“American”)
 12 pursuant to the terms of the Flow-Through Agreement, also known
 13 as Supplement W or Letter 3 who did not receive length of service
 14 (LOS) credits for time they worked at American Eagle Airlines
 15 before being assigned flying duties at American Airlines.

16 Subclass 2. All pilots who worked at American Eagle Airlines
 17 and became employed at American Airlines (“American”)
 18 pursuant to the terms of the Flow-Through Agreement, also known
 19 as Supplement W or Letter 3, who did not receive length of service
 20 (LOS) credits for time they worked at American Eagle Airlines
 21 after September 11, 2001 before being assigned flying duties at
 22 American Airlines, including LOS credits provided for in Letter G
 23 to the collective bargaining agreement between Allied Pilots
 24 Association and American Airlines, Inc., effective January 30,
 25 2015.

26 **B. The Class Under Claim One Can Be Certified For
 27 Damages As Well As Injunctive Relief.**

28 APA argues that the Class under Claim One cannot be certified for damages because
 emotional distress damages are individual claims (APA Brf. p. 19) and damages cannot be
 shown arising from the failure to negotiate LOS credits and these are not incidental to injunctive
 relief (APA Brf. p. 18). Neither point can defeat class certification. “In this circuit, however,
 damage calculations alone cannot defeat certification.” *Yokoyama v. Midland Nat'l Life Ins. Co.*,
 594 F.3d 1087, 1094 (9th Cir. 2010). Accord: *Leyva v. Medline Industries, Inc.*, 716 F.3d 510,
 513-514 (9th Cir. 2013).

1 **1. The Second Amended Complaint does not seek
 2 emotional distress damages.**

3 The short answer to APA’s argument on emotional distress damages is that the complaint
 4 does not seek them. SAC at pp. 29-30. While plaintiffs’ initial disclosures noted the possibility

1 of emotional distress damages,² these disclosures were made in September 2015, before the
 2 Second Amended Complaint was filed in January 2016. It is the allegations of the Second
 3 Amended Complaint that would be controlling on this issue.

4 **(a) Individualized questions of emotional damages would**
 5 **not preclude certification for common questions**
 6 **including economic damages.**

7 Even if emotional distress damages were being sought, that would not preclude class
 8 certification. *Yokoyama v. Midland Nat'l Life Ins. Co.*, supra, 594 F.3d at 1094; *Leyva v.*
 9 *Medline Industries, Inc.*, supra, 716 F.3d at 513-514. Even if some individualized
 10 determinations were needed, the class action is still a better way of adjudicating the common
 11 issues of liability. “[I]t makes good sense, especially when the class is large, to resolve those
 12 issues in one fell swoop while leaving the remaining, claimant-specific issues to individual
 13 follow-on proceedings.” *Mejdrech v. Met-Coil Sys Corp.*, 319 F.3d 910, 911 (7th Cir. 2003).

14 The damage claims in this case are predominately claims for lost income because FTPs
 15 were denied the LOS credits other similarly-situated pilots received and this caused a reduction
 16 in their pay. The amount of past damages are easily determined by simply adding the length of
 17 service credits to the length of service held by a FTP and calculating what the FTP would have
 18 been paid for the position and equipment the FTP flew had he had these length of service credits.

19 **2. Damages for lost LOS credits are not uncertain and**
 20 **arise as incidental damages from appropriate**
 21 **declaratory or injunctive relief for purposes of**
 22 **certification under Rule 23(b)(2).**

23 APA asserts that it cannot be ordered to obtain LOS credits for FTPs, therefore damages
 24 under Claim One are not incidental to equitable relief. APA Mem. p. 18.

25 Rule 23(b)(2) applies to both injunctive and declaratory relief. A declaration that APA
 26 breached its duty of fair representation in not attempting to require APA to negotiate LOS credits

27 ² Plaintiffs’ Initial Disclosures stated at p. 6: “Non-economic damages. Plaintiffs are entitled to
 28 damages for emotional distress resulting from the discrimination against them. These damages
 are not subject to precise calculation. Plaintiffs believe that non-economic damages equal to
 20% of economic damages would be a fair estimate of these damages.”

1 for FTPs successfully does not require APA to negotiate or obtain these credits. Rather, it would
 2 declare APA's breach of duty. An order directing APA to make FTPs whole for the loss of LOS
 3 credits until such time as those are negotiated for FTPs—or at least until APA can establish that
 4 FTPs cannot obtain LOS credits for reasons independent of its breach of duty—would not
 5 require APA to negotiate LOS credits successfully, but only put the burden on APA to show that
 6 the FTPs loss of LOS credits was due to factors unrelated to APA's breach of duty. It is well
 7 settled that “the burden of any uncertainty in the amount of damages should be borne by
 8 the wrongdoer.” *Adray v. Adry-Mart, Inc.*, 76 F.3d 984, 989 (9th Cir. 1995). A make-whole
 9 order of this kind is incidental to the primary relief of declaratory and injunctive relief against
 10 APA's breach of duty in failing to attempt to negotiate LOS credits for FTPs when it was asked
 11 to do so and when it negotiated LOS credits for all other pilot groups that were similarly situated
 12 to the FTPs. An issue of damages like this would not defeat class certification. *Leyva v. Medline*
 13 *Industries, Inc.*, supra, 716 F.3d at 513-514.

14 **3. Certification under Rule 23(b)(3) is appropriate even if**
 15 **individualized damage calculations would be necessary.**

16 But even if not incidental for purposes of Rule 23(b)(2), the class can be certified for
 17 damages under Rule 23(b)(3). As showing plaintiffs' opening memorandum, pp. 17-19,
 18 certification under Rule 23(b)(3) is appropriate because the common issues predominate. As
 19 stated previously, any inevitable need for individualized damage determinations will not
 20 preclude certification. *Leyva v. Medline Industries, Inc.*, supra, 716 F.3d at 513-514; *Blackie v.*
 21 *Barrack*, supra, 524 F.2d at 905.

22 **II. THE POSSIBILITY THAT DAMAGES MAY ACCRUE UNDER THE SECOND**
 23 **CLAIM IF AN UNFAIR SENIORITY LIST IS CREATED DOES NOT**
 24 **PRECLUDE CERTIFICATION.**

25 APA claims that damage calculations under the Second Claim would be uncertain (APA
 26 Mem. pp. 11-18) and involving numerous individualized factors (*id.* at 12-13). Once again,
 27 however, the common question is APA's breach of its duty of fair representation by
 28 discriminating against FTPs. Once again, an injunction against an unfair list would provide

1 class-wide relief. Problems of damage calculations arising from the use of an unfair integrated
 2 seniority list would not preclude an injunction against the use of an unfair integrated seniority
 3 list. Once again, issues of damages do not preclude class certification. *Yokoyama v. Midland*
 4 *Nat'l Life Ins. Co.*, supra, 594 F.3d at 1094; *Leyva v. Medline Industries, Inc.*, supra, 716 F.3d at
 5 513-514.

6 APA also overstates the difficulties APA of calculating damages in the event an unfair
 7 integrated seniority list was applied to future employment opportunities. While there may be
 8 factual issues in some cases, the established rule is that, once discrimination is shown, the
 9 defendant would need to show that the employee did not suffer damages because they were
 10 denied an employment opportunity. See *Day v. Mathews*, 530 F.2d 1083, 1085-1085 (D.C.Cir.
 11 1976) (“We reach this holding on the strength of numerous cases in the private sector which have
 12 dealt with the issue. They establish unequivocally that a *prima facie* showing of discrimination
 13 shifts the burden to the employer to prove that the employee (or applicant) would not have gotten
 14 the post in any event, even absent discrimination.”). See also *Marotta v. Usery*, 629 F.2d 615,
 15 617-18 (9th Cir. 1980). But even these issues would not prevent class certification and would be
 16 subject to a damage or remedy phase of this case should damages be necessary to remedy any
 17 use of an unfair seniority list that occurred.

18 .

19 CONCLUSION

20 APA’s concerns about class definition for pre-9/11 FTPs involve issues of damages and
 21 do not preclude class certification. If necessary, the distinction between pre-9/11 and post-9/11
 22 FTPs can be addressed by creating subclasses. If the Court creates subclasses, the Class
 23 definition should be:

24 Class: All pilots who worked at American Eagle Airlines and
 25 became employed at American Airlines (“American”) pursuant to
 26 the terms of the Flow-Through Agreement, also known as
 Supplement W or Letter 3.

27 For purposes of claims asserted in the First Claim For Relief
 28 arising from the failure of the Class to receive length of service
 (LOS) credits for time they worked at American Eagle Airlines

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before being assigned flying duties at American Airlines, this Class has two subclasses as follows:

Subclass 1. 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 who did not receive length of service (LOS) credits for time they worked at American Eagle Airlines before being assigned flying duties at American Airlines.

Subclass 2. 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, who did not receive length of service (LOS) credits for time they worked at American Eagle Airlines after September 11, 2001 before being assigned flying duties at American Airlines, including LOS credits provided for in Letter G to the collective bargaining agreement between Allied Pilots Association and American Airlines, Inc., effective January 30, 2015.

APA’s concerns about damages do not preclude class certification where the predominant issue is whether APA breached its duty of fair representation by arbitrary, discriminatory or bad faith actions directed against FTPs as a class. The Class can be certified under both Rule 23(b)(2) and Rule 23(b)(3).

Dated: April 7, 2016.

KATZENBACH LAW OFFICES

By s/ Christopher W. Katzenbach
Christopher W. Katzenbach
Attorneys for Plaintiffs AMERICAN AIRLINES
FLOW-THRU PILOTS COALITION, GREGORY R.
CORDES, DRU MARQUARDT, DOUG POULTON,
STEPHAN ROBSON, and PHILIP VALENTE III on
behalf of themselves and all others similarly situated