

1 R. Joseph Barton  
(admitted *pro hac vice*)  
2 BLOCK & LEVITON LLP  
1735 20th Street, NW  
3 Washington D.C. 20009  
Tel: (202) 734-7046  
4 Fax: (617) 507-6020  
[jbarton@blockesq.com](mailto:jbarton@blockesq.com)

5 *Attorneys for Plaintiff*

6  
7 **IN THE UNITED STATES DISTRICT COURT**  
**FOR THE EASTERN DISTRICT OF WASHINGTON**

8 CASEY CLARKSON, on behalf of  
9 himself and all other similarly situated

10 Plaintiff,

11 v.

12 ALASKA AIRLINES, INC.,  
HORIZON AIR INDUSTRIES, INC.  
13 and ALASKA AIRLINES PENSION/  
BENEFITS ADMINISTRATIVE  
14 COMMITTEE,

15 Defendants.

Case No. 2:19-cv-00005-TOR

**PLAINTIFF'S MOTION FOR  
CLASS CERTIFICATION**

**NOTED FOR HEARING:  
AUGUST 4, 2020 AT 10:00 A.M.**

WITH ORAL ARGUMENT

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3 804 F.2d 821 (3d Cir. 1986) ..... 8

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**Declaration of R. Joseph Barton with Block & Leviton LLP Firm Resume**

**Declaration of Vincent Cheng with the following attachments:<sup>1</sup>**

**Exhibit 1:** Excerpts of the Transcript of the Rule 30(b)(6) Deposition of Alaska Airlines, Inc. through its Designated Representative S. Elizabeth Ryan on May 5, 2020 (“Alaska Dep.”)

**Exhibit 2:** Excerpts of the Transcript of the Rule 30(b)(6) Deposition of Horizon Air Industries, Inc. through its Designated Representative Bernadette Davis on May 6, 2020 (“Horizon Dep.”).

**Exhibit 3:** Declaration of Elizabeth Ryan on Behalf of Alaska Airlines, Inc. in Response to Plaintiff’s Rule 30(b)(6) Deposition Notice Topic Nos. 1, 7, and 11 that was provided in lieu of testimony at a deposition.

**Exhibit 4:** Declaration of Bernadette Davis on Behalf of Horizon Air Industries, Inc. in Response to Plaintiff’s Rule 30(b)(6) Deposition Notice Topic Nos. 2, 5, 11, and 16 that was provided in lieu of testimony at a deposition.

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<sup>1</sup> Unless otherwise indicated, all references to “Ex.” in numerals in the Motion are to the Exhibits to the Declaration of Vincent Cheng.

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- Exhibit 5:** Plaintiff’s March 2, 2020 Amended Notice of Deposition of Alaska Airlines, Inc. Pursuant to Rule 30(b)(6).
- Exhibit 6:** Plaintiff’s March 2, 2020 Amended Notice of Deposition of Horizon Air Industries, Inc. Pursuant to Rule 30(b)(6).
- Exhibit 7:** Defendants’ Second Amended Responses to Plaintiff’s First Set of Interrogatories dated March 12, 2020.
- Exhibit 8:** Defendants’ Second Amended Responses to Plaintiff’s Second Set of Interrogatories dated April 10, 2020.
- Exhibit 9:** Defendants’ Objections and Responses to Plaintiff’s First Set of Requests for Production dated September 30, 2019.
- Exhibit 10:** Defendants’ Objections and Responses to Plaintiff’s Second Set of Requests for Production dated November 21, 2019.
- Exhibit 11:** Excerpts of Collective Bargaining Agreement Between Horizon Air Pilot Group as Represented by the International Brotherhood of Teamster Local 1224 and Horizon Air Industries, Inc. Effective February 1, 2016 through December 31, 2024 bates-stamped ALASKA\_CLARKSON\_0001638
- Exhibit 12:** Excerpts of the Association of Flight Attendants-CWA Horizon Air Flight Attendant Contract, May 1, 207 through January 18, 2019 (ALASKA\_CLARKSON\_0003395)

1           **Exhibit 13:** Appendix G: Credit Matrix to the Collective Bargaining  
2                           Agreement Between Horizon Air Pilot Group as Represented  
3                           by the International Brotherhood of Teamster Local 1224 and  
4                           Horizon Air Industries, Inc. Effective February 1, 2016 through  
5                           December 31, 2024 and bates-stamped ALASKA\_  
6                           CLARKSON\_0001797

7           **Exhibit 14:** Updated Credit Matrix, bates-stamped ALASKA\_  
8                           CLARKSON\_0003821-24

9           **Exhibit 15:** Excerpts of 2007 Alaska Airlines Employee Benefits Handbook  
10                           for Management Employee (ALASKA\_CLARKSON\_  
11                           0016726)

12           **Exhibit 16:** Excerpts of 2017 Alaska Airlines Employee Benefits Handbook  
13                           for Management Employees (ALASKA\_CLARKSON\_  
14                           0016244)

15           **Exhibit 17:** Summary of Comparable Forms of Leaves Provided by Alaska  
16                           Airlines to Employees – 2004 to Present

17           **Exhibit 18:** Summary of Comparable Forms of Leaves Provided by  
18                           Horizon Air to Employees – 2004 to Present

19   **Declaration of Casey Clarkson**

20           **Exhibit A:** Email Thread dated June 11, 2017, bates-stamped



1 CLARKSON\_002028

2 **Exhibit B:** Email Thread dated June 11, 2017, bates-stamped

3 ALASKA\_CLARKSON\_0004255-56

4 **Exhibit C:** October 4, 2017 Letter by Linda Jacobe Cole of the U.S.

5 Department of Labor to Horizon Air Industries, Inc., bates-  
6 stamped CLARKSON\_001607-09

7 **Exhibit D:** October 4, 2017 Letter by Linda Jacobe Cole of the U.S.

8 Department of Labor to Casey Clarkson, bates-stamped  
9 CLARKSON\_001605-06

10 **Exhibit E:** Duties of Class Representatives Form dated January 4, 2019

11 and signed by Casey Clarkson

12 **Declaration of Matthew Crotty**

13 **Declaration of Thomas Jarrard**

14 **Declaration of Peter Romer-Friedman**

15 **Declaration of Ming Siegel**

16 **Declaration of Michael Scimone**

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**MOTION**

Pursuant to Rule 23(a) and (b)(3), Plaintiff moves the Court for an order:

1. Certifying Count IV on behalf of the Paid Leave Class and Counts I-III on behalf of the Virtual Credit Class:

Paid Leave Class: All current or former Alaska union-represented employees or Horizon employees who have taken short-term military leave from October 10, 2004 through the date of the judgment and current or former Alaska non-union employees who took short-term military leave between October 10, 2004 and December 31, 2017.

Virtual Credit Class: All current and former employees of Horizon or any subsidiary, joint venture, or division of Horizon who were subjected to Horizon’s “virtual credit” policy with respect to a period of military leave, from May 1, 2017 through the date of the judgment.<sup>2</sup>

2. Appointing Casey Clarkson as the representative for both Classes

3. Appointing R. Joseph Barton of Block & Leviton and Michael J. Scimone of Outten & Golden as Co-Lead Class Counsel and Plaintiff’s

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<sup>2</sup> Excluded from the Classes are persons who previously reached settlements with or judgments against Defendants resolving or releasing any claims arising during the Class Period under USERRA related to any of the claims in this lawsuit.

1 other counsel as additional Class Counsel.

2 **BACKGROUND**

3 Casey Clarkson worked for Horizon as a pilot from November 2013 until  
4 early November 2017 and has since worked as a pilot for Alaska. ECF No. 31  
5 (“Compl.”) & ECF No. 32 (“Answ.”) ¶ 13. From November 2013 through June 30,  
6 2018, he was a member of the Washington National Guard and took periods of  
7 military leave from Alaska and Horizon to perform his military duties. Clarkson  
8 Decl. ¶ 3; Compl. & Answ. ¶¶ 43-44, 48-49.

9 *The Paid Leave Class Claim:* Count IV alleges that by failing to provide the  
10 Paid Leave Class with paid short-term military leave while providing paid leave  
11 for other comparable forms of leave, Alaska and Horizon violated USERRA  
12 § 4316(b). Compl. ¶¶ 79-86; *Clarkson v. Alaska Airlines, Inc.*, No. 19-CV-0005,  
13 2019 WL 2503957, at \*7 (E.D. Wash. June 17, 2019). Military leave at Alaska and  
14 Horizon was unpaid for all employees. Alaska Dep. at 70:8-11 & 89:3-6; Horizon  
15 Dep. at. 47:6-48:1. But Alaska and Horizon provided paid leave for other short-  
16 term leave including jury duty. Alaska Dep. at 68:7-69:20 & 70:12-73:14; Horizon  
17 Dep. at. 48:8-49:8. This was true across all work groups. *Id.*; Exs. 17 & 18.

18 *The Virtual Credit Class Claims:* In May 2017, Horizon implemented a  
19 “Virtual Credit Policy” that credited pilots and flight attendants taking military  
20 leave with 2.30 hours per day for flight attendants and 2.45 or 2.75 hours per day

1 for pilots (depending on type of plane), despite a minimum guarantee of 4 hours  
2 per day when flying and often receiving more credit for longer trips. Horizon Dep.  
3 at 123:6-9, 123:24-124:2, 124:16-125:1, 132:19-133-15, 171:11-173:8; Ex. 4 ¶¶ 5-  
4 8; Exs. 11 at ALASKA\_CLARKSON 1673; Exs. 12, 13 & 14. If the credit  
5 differential for leave caused a servicemember to be unable to meet the monthly  
6 minimum, the policy then “forces [the servicemember] into a reserve holder status  
7 instead of the line holder status” after he returned from military leave. Clarkson  
8 Decl. Ex. C. As a result, the Department of Labor (“DOL”) found that this policy  
9 violated DOL regulations governing USERRA reemployment rights regarding  
10 seniority and status. *Id.* The Complaint alleges that this policy violated three  
11 USERRA provisions. Count I alleges that the Policy violated USERRA §§ 4312  
12 and 4313 because employees were not reemployed with the status or position that  
13 they would have held but for military service. Compl. ¶¶ 61-69. Count II alleges  
14 that the Policy violated USERRA § 4316(a) by denying the Class the seniority and  
15 related rights and benefits that they would have had if they had remained  
16 continuously employed. *Id.* ¶¶ 70-74. Count III alleges that Horizon violated  
17 USERRA § 4316(c) by applying the Policy to discharge employees from a status  
18 or position following military leave of at least 31 days without cause. *Id.* ¶¶ 75-78.

## 19 ARGUMENT

20 Certification of a class requires meeting the four prerequisites of Rule 23(a)

1 and a subsection of Rule 23(b). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591,  
2 613-14 (1997). While class certification issues may “entail some overlap with the  
3 merits of the plaintiff’s underlying claim,” those “[m]erits questions may be  
4 considered to the extent—but only to the extent—that they are relevant to  
5 determining whether the Rule 23 prerequisites for class certification are satisfied.”  
6 *Amgen Inc. v. Conn. Ret. Plans and Tr. Funds*, 568 U.S. 455, 466 (2013). A district  
7 court does not have discretion to deny class certification if Rule 23’s requirements  
8 are met. *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 398  
9 (2010). Both Classes satisfy all the requirements of Rules 23(a) and 23(b)(3).

#### 10 **I. The Classes are Objectively and Properly Defined**

11 A class is properly “defined by an objective criterion.” *Briseno v. ConAgra*  
12 *Foods, Inc.*, 844 F.3d 1121, 1124 (9th Cir. 2017). A class definition is based on  
13 objective criteria when the definition is “not based on class members’ feelings or  
14 beliefs.” *Wilcox v. Swapp*, 330 F.R.D. 584, 596 (E.D. Wash. 2019) (rejecting  
15 arguments a class definition needs to frame the scope of defendants’ liability or  
16 identify all members of the class). Here, the Paid Leave Class is based on objective  
17 criteria: whether the person (1) is a current or former employee of Alaska or  
18 Horizon, and (2) took short-term military leave on or after October 10, 2004.  
19 Compl. ¶ 17. The Virtual Credit Class is also based on objective criteria: whether  
20 the person (1) is a current or former Horizon employee, and (2) took military leave

1 on or after May 1, 2017 subject to the Virtual Credit Policy. *Id.* All pilots and flight  
2 attendants who took military leave were subject to the Virtual Credit Policy. Ex. 13  
3 & Ex. 14; Horizon Dep. at 148:2-5. For the Paid Leave Class, Defendants have  
4 produced the data necessary to identify the employees of Alaska and Horizon who  
5 took short-term military leave since October 10, 2004. Ex. 3 ¶¶ 5-6 & Ex. B; Ex. 4  
6 ¶¶ 11-12 & Ex. B. For the Virtual Credit Class, Horizon has data identifying the  
7 pilots and flight attendants subject to the Virtual Credit Policy since May 1, 2017.  
8 Ex. 4 ¶¶ 11-12 & Ex. B; Horizon Dep. at 140:1-143:24; 154:5-156:6, 164:1-8,  
9 202:19-203:4. Thus, both Classes are sufficiently and properly defined.

## 10 **II. The Requirements of Rule 23(a) are Satisfied**

11 Rule 23(a) requires: (1) the class is so numerous that joinder of all members  
12 is impracticable; (2) there are questions of law or fact common to the class; (3) the  
13 claims or defenses of the representative parties are typical of the claims or defenses  
14 of the class; and (4) the representative parties will fairly and adequately protect the  
15 interests of the class. Fed. R. Civ. P. 23(a). Both Classes satisfy all these criteria.

### 16 **A. The Classes are so Numerous that Joinder is Impracticable**

17 Rule 23(a) does not require any “minimum number of class members,” but  
18 “a class consisting of forty or more members is presumed to be sufficiently  
19 numerous.” *Saucedo v. NW Mgmt. & Realty Servs., Inc.*, 290 F.R.D. 671, 676  
20 (E.D. Wash. 2013) (Rice, J.). Courts have certified smaller classes based on factors

1 such as geographic dispersion, financial resources, or request for injunctive relief  
2 and judicial economy. *McCluskey v. Trs. of Red Dot Corp. Employee Stock*  
3 *Ownership Plan & Tr.*, 268 F.R.D. 670, 673-74 (W.D. Wash. 2010) (certifying  
4 class of 27). Defendants identified 278 Alaska and Horizon employees who took  
5 military leave for a period not exceeding 15 consecutive days during a portion of  
6 the Class Period. Ex 8 at No. 11.<sup>3</sup> Using Alaska’s definition of short-term leave of  
7 30 days, there are actually 189 more employees in the Paid Leave Class. *Id.*; Siegel  
8 Decl. ¶¶ 2, 4; Alaska Dep. at 121:12-20. For the Virtual Credit Class, Horizon has  
9 not yet provided data on flight attendants, Cheng Decl. ¶ 3, but 75 pilots were  
10 provided virtual credit hours for military leave between May 1, 2017 and  
11 November 30, 2019. Ex. 8 at No. 9. Of the pilots, 73 received less than 4.5 virtual  
12 credit hours for any day of military leave. *Id.* at No. 10. Even if this Class has less  
13 than 40 members, the Complaint requests declaratory relief and the class is  
14 geographically dispersed. Answ. ¶ 21; Siegel Decl. ¶¶ 3 & 7; Compl. Prayer for  
15 Relief ¶¶ A, B, D. Thus, Rule 23(a)(1) is met.

16 **B. There are Common Questions of Law and Fact**

17 “To satisfy Rule 23(a)(2) ..., ‘[e]ven a single [common] question’ will do.”  
18 *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1133 (9th Cir. 2016). Not “every  
19 question in the case, or even a preponderance of questions,” need be “capable of

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20 <sup>3</sup> Defendants inexplicably provided responses for only a portion of the class period.

1 classwide resolution.” *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 544 (9th  
2 Cir. 2013). A common question does not have to be one that “will be answered, on  
3 the merits, in favor of the class.” *Amgen*, 568 U.S. at 459. Commonality “means  
4 that the class members’ claims ‘must depend upon a common contention’ and that  
5 the ‘common contention, moreover, must be of such a nature that it is capable of  
6 classwide resolution – which means that determination of its truth or falsity will  
7 resolve an issue that is central to the validity of each one of the claims in one  
8 stroke.’” *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1153 (9th Cir.  
9 2016) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). The  
10 existence of a policy satisfies Rule 23(a)(2). *Stockwell v. City and County of San*  
11 *Francisco*, 749 F.3d 1107, 1116 (9th Cir. 2014) (reversing denial of certification  
12 where plaintiffs “challeng[ed] a single policy” that “adversely affected them”).

13       The claim for the Paid Leave Class rests on two common issues: (1) is paid  
14 leave one of the “rights and benefits” that must be provided equally to employees  
15 on military leave under USERRA § 4316(b) when other comparable forms of leave  
16 are paid; (2) do Defendants provide other short-term paid leave that is comparable  
17 to short-term military leave. *Clarkson*, 2019 WL 2503957, at \*7. The first issue is  
18 a legal one which will have a common answer. The second issue will assess the  
19 factors in the DOL regulations addressing whether two leaves are comparable:  
20 duration, purpose, and voluntariness of the leave. *Id.* at \*7 (citing 20 C.F.R.



1 § 1002.150(b)). As Defendants' own corporate representatives conceded, those  
2 factors do not vary between groups. Alaska Dep. at 102:22-103:2, 105:9-16, 106:4-  
3 109:9, 121:16-20; Horizon Dep. at 58:1-16, 62:12-63:3, 65:12-67:17. Thus, the  
4 relevant facts are not unique to specific employees or groups but on common  
5 policies, and are subject to common proof.

6 The Paid Leave Class was subjected to materially the same policies. Short-  
7 term military leave for *all* employees at Alaska and Horizon is and has been unpaid  
8 since at least 2004. Alaska Dep. at 70:8-11 & 89:3-6; Horizon Dep. at 47:6-48:1;  
9 Exs. 17 & 18. Yet, at the same time, Alaska and Horizon provided their employees  
10 with various types of paid leave that courts have determined are comparable:<sup>4</sup>  
11 Alaska employees in the Paid Leave Class were provided paid leave for jury duty,  
12 sick leave, vacation, and bereavement. Alaska Dep. 68:7-69:20 & 70:12-73:14.  
13 Horizon employees in the Paid Leave Class received pay for the same leaves.  
14 Horizon Dep. at 48:8-49:8.

15 The Virtual Credit Policy claims (Counts I-III) rest on two common issues.

16 *First*, whether the Virtual Credit Class members had to be credited or work a

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17 <sup>4</sup> *E.g., Waltermyer v. Aluminum Corp. of Am.*, 804 F.2d 821, 825 (3d Cir. 1986)

18 (finding military leave comparable to jury duty); *Duffer v. United Cont'l Holdings,*

19 *Inc.*, 173 F. Supp. 3d 689, 704 (N.D. Ill. 2016) (finding military leave comparable

20 to jury duty and sick leave).

1 certain number of hours to keep their Regular Line Holder status. *Second*, whether  
2 the Virtual Credit Policy failed to credit these employees with the same amount of  
3 hours if they been employed at Horizon instead of on military leave. Pilots must  
4 work for at least 70-73 hours during a bid period to maintain their minimum pay  
5 guarantee for Regular Line Holders. Horizon Dep. at 136:4-14. Flight attendants  
6 must work for or be credited at least 69.5 hours to maintain their minimum pay  
7 guarantee for Regular Line Holders. *Id.* at 212:7-10. While Horizon credited pilots  
8 and flight attendants with a *minimum of four hours per flight*, when they were on  
9 military leave, Horizon only credited pilots with 2.45-2.75 hours for each day  
10 (between May 2017 and Jan. 2018) or 2:36-4:45 hours each day (after Jan. 2018)  
11 and credited flight attendants with 2.3 hours per day (after from May 2017). *Id.* at  
12 132:19-133:15, 161:11-163:1, 171:11-173:8; Exs. 11, 12, 13 & 14. As the facts  
13 necessary to answer the central questions for the Virtual Credit Class will be based  
14 on common policies governing number of virtual credit hours that Horizon  
15 provided for military leave, these questions will be subject to common proof.

16 The Paid Leave claim depends primarily on two sources of evidence: First,  
17 written policies, consisting of collective bargaining agreements (“CBAs”), which  
18 are the only source of rules governing the relevant leaves for union employees, or  
19 employee handbooks (*e.g.*, Exs. 15 & 16).<sup>5</sup> Alaska Dep. at 38:18-24; Horizon Dep.

20 <sup>5</sup> “[T]here is one [leave] policy for nonrepresented work groups at Horizon.”

1 at 46:23-47:3. Second, Defendants’ data identifies the dates and duration of the  
2 leaves taken by class members. Ex. 3 at Ex. B; Ex. 4 at Ex. B. The material  
3 similarity of the relevant provisions of the CBAs across the work groups make  
4 these issues resolvable using common evidence. Exs. 17 & 18. Likewise, the  
5 Virtual Credit claims rely on: (1) two CBAs setting out the Virtual Credit Policy,  
6 and (2) Defendants’ data regarding the virtual credit hours class members received  
7 during military leave and the employees’ status. Exs. 13 & 14; Ex. 4 ¶¶ 5-8 & *id.* at  
8 Ex. B. The commonality requirement of Rule 23(a)(b) is met.

9 **C. The Typicality Requirement of Rule 23(a) is Met**

10 Rule 23(a)(3) requires that “the claims or defenses of the representative  
11 parties are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3).  
12 “Typicality refers to the nature of the claim or defense of the class representative,  
13 and not to the specific facts from which it arose or the relief sought.” *Wilcox*, 330  
14 F.R.D. at 591. “Under the rule’s permissive standards,” claims “are ‘typical’ if they  
15 are reasonably coextensive with those of absent class members; they need not be  
16 substantially identical.” *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014).

17 **1. Plaintiff’s Claims are Typical of the Classes**

18 “The Ninth Circuit is clear that when a policy or practice is at issue that  
19 Horizon Dep. at 43:7-16. Horizon has not yet produced this document. *See id.* at  
20 45:17-52:4; Cheng Decl. ¶ 2.

1 affects all class members, typicality exists.” *Torres v. Mercer Canyons, Inc.*, No.  
2 14 CV 03032, 2015 WL 1641519, at \*5 (E.D. Wash. Apr. 8, 2015) (citing *Parsons*,  
3 754 F.3d at 685 and *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001)). “[I]t  
4 is sufficient for typicality if the plaintiff endured a course of conduct directed  
5 against the class.” *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1118 (9th Cir. 2017)  
6 (“[T]ypicality is not primarily concerned with whether each person in a proposed  
7 class suffers the same type of damages”). For both Classes, Plaintiff’s claims  
8 challenge policies and a course of conduct based on the same legal theories.  
9 For the Paid Leave Class, Count IV alleges that “both Horizon and Alaska apply a  
10 uniform policy and practice of refusing to pay servicemember-employees their  
11 regular wages or salaries during periods of short-term military leave, while paying  
12 the regular wages or salaries of its employees who take comparable forms of non-  
13 military leave” in violation of USERRA § 4316(b). *Clarkson*, 2019 WL 2503957,  
14 at \*2. This claim requires determining whether short-term military leave is  
15 comparable to other forms of leave. *Id.* at \*7. Alaska and Horizon provide unpaid  
16 leave for military leave to all members of the Paid Leave Class, but provide paid  
17 leave for comparable leaves across workgroups. Alaska Dep. at 68:7-69:20, 70:8-  
18 73:14 & 89:306; Horizon Dep. at 47:6-49:8; Exs. 17 & 18.

19 Counts I-III challenge Horizon’s Virtual Credit Policy to servicemembers.

20 *Clarkson*, 2019 WL 2503957 at \*4-6; Compl. ¶¶ 61-78. Horizon provided pilots

1 with virtual credit hours of either 2.45 or 2.75 hours (between May 1, 2017 and  
2 Feb. 2018) and between 2:36 and 4:45 hours (after Feb. 2018) and flight attendants  
3 2.3 hours for each day of their military leave – i.e., all less than their daily flying  
4 minimum credit of 4 hours. Exs. 11, 12, 13, & 14; Horizon Dep. at 171:11-172:4.  
5 While the policy for flight attendants and pilots were in two different CBAs, they  
6 only differed in the amount of credit provided. Horizon Dep. at 148:18-149:2.  
7 After February 2018, the policies were the same and the only change was an  
8 increased credit for pilots (the credit for flight attendants remained the same). *Id.* at  
9 162:23-163:1. While the amount of credit differed, the claims depend on the  
10 legality of the Policy applied to servicemembers who took military leave. *See*  
11 *Clarkson*, 2019 WL 2503957, at \*4-6. As the legal theories for underlying the  
12 claims of each of the two Classes are substantively identical, and the relevant  
13 factual circumstances and practices are materially the same, typicality is met.

## 14 **2. Defendants Assert No Unique Defenses Against Plaintiff**

15 “Defenses unique to a class representative counsel against class certification  
16 only where they ‘threaten to become the focus of the litigation.’” *Rodriguez v.*  
17 *Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010). Defendants have admitted that no  
18 facts support their Second, Third, Eighth, and Ninth Affirmative Defenses. Ex. 7 at  
19 Nos. 3, 4, 6 & 7. Their remaining “Affirmative Defenses” are not affirmative  
20 defenses, and in any event, would apply equally to claims of all members of the

1 Classes and are none of them are unique to Clarkson. *Id.*; Answ. at 19-21. Thus,  
2 none of those “defenses” would defeat class certification. Ex. 7 at No. 5.

3 **D. Plaintiff and his Counsel Will Adequately Represent the Classes**

4 Determining whether a class representative will fairly and adequately protect  
5 the interest of the class under Rule 23(a)(4) involves resolving two questions: “(1)  
6 Do the representative plaintiffs and their counsel have any conflicts of interest with  
7 other class members, and (2) will the representative plaintiffs and their counsel  
8 prosecute the action vigorously on behalf of the class?” *Staton v. Boeing Co.*, 327  
9 F.3d 938, 957 (9th Cir. 2003). Plaintiff and his counsel meet both requirements.

10 **1. There is no Evidence of Conflict**

11 “Only conflicts that are fundamental to the suit and that go to the heart of  
12 the litigation prevent a plaintiff from meeting the Rule 23(a)(4) adequacy  
13 requirement.” *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 942 (9th  
14 Cir. 2015) (quoting 1 William B. Rubenstein et al., *Newberg on Class Actions* §  
15 3.58 (5th ed. 2011)). Denial of class certification is not appropriate based on trivial  
16 or “speculative conflicts.” *Id.* There is no conflict where the class is “not divided  
17 into conflicting discrete categories” and where “each potential plaintiff has the  
18 same problem.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998).  
19 Here, there is no conflict.

20 For both the Paid Leave claim and the Virtual Credit Claims, Plaintiff was

1 subject to substantially the same policies at Alaska and Horizon as the rest of the  
2 Classes. *Supra* I.B & I.C. As Count IV seeks to pay employees for what has been  
3 unpaid military leave, no member of the Paid Leave Class would be economically  
4 harmed by the relief sought. Compl. at Prayer for Relief ¶ E. The Virtual Credit  
5 claims challenges a policy that credits servicemembers with fewer hours than the  
6 amount they would have worked had they not been on military leave. Horizon Dep.  
7 at 138:13-139:18. Both pilots and flight attendants who worked were credited with  
8 a *minimum of four hours* (and could be credited more), but far less if they took  
9 military leave. *Compare id.* at 171:11-173:8 *with id.* at 132:19-133:11 & 162:13-  
10 163:1. That difference could result in a servicemember having their status reduced.  
11 *Id.* at 139:19-25, 164:1-8. Thus, both Classes share Plaintiff’s interest in ensuring  
12 that Defendants comply with USERRA’s requirements.

## 13 2. Plaintiff will Vigorously Prosecute the Claims

14 In this Circuit, “[t]he threshold of knowledge required to qualify a class  
15 representative is low; a party must be familiar with the basic elements of her  
16 claim.” *McGuire v. Dendreon Corp.*, 267 F.R.D. 690, 697 (W.D. Wash. 2010). It is  
17 enough if plaintiff has read the complaint, “understands he has a fiduciary duty to  
18 represent the class,” has participated in discovery and “is willing to spend as much  
19 time as necessary to see the litigation through.” *Id.* at 696. *Allen v. Hyland's Inc.*,  
20 300 F.R.D. 643, 663 (C.D. Cal. 2014) (finding plaintiffs adequate who “made

1 themselves available for depositions and demonstrated familiarity with the case.”)).  
2 Before this litigation began, Mr. Clarkson filed an administrative complaint with  
3 the DOL and sought documents pursuant to ERISA § 104(b). Clarkson Decl. ¶ 9.  
4 He provided documents to counsel and assisted with the filing of the Complaint,  
5 reviewed the initial and Amended Complaint, assisted counsel, and participated in  
6 discovery, including responding to Defendants’ interrogatories and document  
7 requests. *Id.* ¶¶ 12-13, 16. He understands and is prepared to fulfill his duties as  
8 class representatives to vigorously pursue the claims on behalf of the Classes. *Id.*  
9 ¶ 15. Therefore, Mr. Clarkson is more than meets the requirement of Rule 23(a)(4).

### 10 3. Plaintiff’s Counsel are More Than Adequate

11 “[A]dequacy of counsel is considered under Rule 23(a)(4) and Rule 23(g).”  
12 *Allen*, 300 F.R.D. at 664 (citing *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d  
13 1117, 1122–23 (9th Cir. 2014)); *Wilcox*, 330 F.R.D. at 599. Rule 23(g) assesses  
14 “(i) the work counsel has done in identifying or investigating potential claims in  
15 the action; (ii) counsel's experience in handling class actions, other complex  
16 litigation, and the types of claims asserted in the action; (iii) counsel's knowledge  
17 of the applicable law; and (iv) the resources that counsel will commit to  
18 representing the class.” Fed. R. Civ. P. 23(g)(1)(A).

19 Plaintiff’s proposed Co-Lead Counsel readily meet these factors: Block &  
20 Leviton LLP partner R. Joseph Barton has litigated complex employee benefits



1 class actions for more than 18 years and USERRA class actions for more than 8  
2 years. Barton Decl. ¶¶ 4-9. Outten & Golden LLP partner Michael J. Scimone has  
3 extensive experience litigating employment and USERRA class actions. Scimone  
4 Decl. ¶ 7. Both firms have been previously appointed class counsel by Courts in  
5 this District. *See Swapp*, 330 F.R.D. at 599 (recognizing Block & Leviton’s  
6 “extensive class action experience”); *Hall v. L-3 Commc'ns Corp.*, No. 15 CV  
7 00231, 2019 WL 3845460, at \*3 (E.D. Wash. Aug. 2, 2019) (appointing Outten &  
8 Golden as class counsel). Plaintiff’s other counsel also have significant relevant  
9 experience. Romer-Friedman Decl. ¶ 8; Jarrard Decl. ¶¶ 5, 10; Crotty Decl. ¶¶ 4-6.  
10 Thus, Plaintiffs’ counsel readily satisfy Rule 23(a)(4) and Rule 23(g).

### 11 **III. The Claims Meet the Requirements of Rule 23(b)(3)**

12 Rule 23(b)(3) applies when (1) “common questions predominate over any  
13 questions affecting only individual members,” and (2) “a class action is superior to  
14 other available methods for the fairly and efficiently adjudicating the controversy.”  
15 Fed. R. Civ. P. 23(b)(3). Here, the claims meet Rule 23(b)(3).

#### 16 **A. The Predominance Requirement is Met**

17 Predominance “asks whether the common, aggregation-enabling, issues in  
18 the case are more prevalent or important than the non-common, aggregation-  
19 defeating, individual issues.” *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036,  
20 1045 (2016). Predominance exists when common questions “present a significant

1 *aspect of the case* and . . . can be resolved for all members of the class in a single  
2 adjudication.” *Walker v. Life Ins. Co. of the Sw.*, 953 F.3d 624, 630 (9th Cir. 2020)  
3 (affirming Rule 23(b)(3) certification); *Just Film, Inc.*, 847 F.3d at 1120 (finding  
4 predominance where claims “arise from a course of conduct that impacted the  
5 class”). “[A]ssessment of predominance “begins... with the elements of the  
6 underlying cause of action.” *Walker*, 953 F.3d at 630. Predominance “does  
7 *not* require a plaintiff seeking class certification to prove that each ‘elemen[t] of  
8 [her] claim [is] susceptible to classwide proof.’” *Amgen*, 568 U.S. at 469. The “text  
9 of Rule 23(b)(3) itself contemplates that [] individual questions will be present.”  
10 *Messner v. Northshore U. HealthSystem*, 669 F.3d 802, 815 (7th Cir. 2012); *Tyson*  
11 *Foods*, 136 S. Ct. at 1045 (explaining other “important” individual issues “will  
12 have to be tried separately”). And it is “well settled” that “damage calculations  
13 alone cannot defeat certification.” *Vaquero*, 824 F.3d at 1155.

14 Here, the central questions for the Paid Leave Class are whether paid leave  
15 are among the “rights and benefits” protected by USERRA § 4316(b) and whether  
16 short-term military leave is comparable to jury duty or bereavement leave. *Supra*  
17 I.B. Determining whether “two types of leave are comparable” considers “the  
18 duration of the leave [as] the most significant factor” and “other factors such as the  
19 purpose of the leave and the ability of the employee to choose when to take the  
20 leave.” 20 C.F.R. § 1002.150(b). These factors do not require individualized

1 determinations as to specific class members. The first and most significant factor  
2 of duration can be analyzed based on leave data produced by Defendants. Alaska  
3 Dep. at 121:16-20; Horizon Dep. at 59:8-13; Ex. 3 at Ex. B; Ex. 4 at Ex. B. The  
4 second factor, purpose, will turn on the overall purpose of each type of leave,  
5 which does not differ based on the person who takes the leave. Alaska Dep. at  
6 106:4-109:9; Horizon Dep. at 62:12:63:3. The third factor, ability to choose to take  
7 leave, will turn on the policies setting forth the terms of leave. Alaska Dep. at  
8 102:22-103:2; *id.* at 105:9-16; Horizon Dep. at 65:23-67:17; Ex. 7 at No. 1. These  
9 claims challenge the same conduct that harmed all Class Members in the same  
10 way: none was paid for periods of short-term military leave. Alaska Dep. at 70:8-  
11 11 & 89:3-6; Horizon Dep. at. 47:6-48:1; Exs. 17 & 18. The common conduct,  
12 harm, and sources of proof ensure that common issues will predominate over any  
13 individual liability or damages issues.

14 For the Virtual Credit Class, the central questions concern whether Class  
15 members must work a certain number of hours (70-73 for pilots and 69.5 for flight  
16 attendants) a month to keep their minimum pay guarantees and whether Horizon's  
17 Virtual Credit Policy failed to provide them with adequate virtual credit hours  
18 during a period of military leave so that they are not relegated to a reduced status.  
19 *Supra* I.B; Horizon Dep. at 84:23-85:7, 85:25-86:3 & 138:12-142:1. The answers  
20 to these questions will turn on Horizon's polices governing the number of hours

1 pilots and flight attendants need, the minimum pay guarantees and the number of  
2 virtual credit hours awarded Class. *Supra* I.B; *see* Horizon Dep. at 140:1-143:24,  
3 155:6-156:6; Exs. 11, 12, 13, & 14. These questions do not require individualized  
4 liability determinations as to specific Class Members.

5 Accordingly, the important issues of law and fact common to all members of  
6 the Classes predominate over any individual issues.

7 **B. The Superiority Requirement is Met**

8 Superiority “requires the court to determine whether maintenance of this  
9 litigation as a class action is efficient and whether it is fair.” *Wolin v. Jaguar Land*  
10 *Rover N.A., LLC*, 617 F.3d 1168, 1175–76 (9th Cir. 2010). Rule 23(b)(3) identifies  
11 the following factors: (A) class members’ interest in individually controlling the  
12 prosecution or defense of separate actions; (B) the extent and nature of any other  
13 litigation concerning the controversy already begun by class members; (C) the  
14 desirability of concentrating the litigation of the claims in the particular forum; and  
15 (D) the likely difficulties in managing of a class action. Fed. R. Civ. P. 23(b)(3).

16 The first factor is met “[w]here recovery on an individual basis would be  
17 dwarfed by the cost of litigating on an individual basis.” *Wolin*, 617 F.3d at 1175–  
18 76.<sup>6</sup> Here, an individual Class member’s recovery on either set of claims is likely

19 <sup>6</sup> Defendants have not produced data regarding the compensation of the members  
20 of the Classes. Ex. 9 at No. 1; Ex. 10 at No. 7. Defendants have not produced data

1 relatively small, as the claims are only for short-term military leave or loss of pay  
2 and benefits due to temporary demotions from Regular Line Holder status. Second,  
3 there is no other pending litigation. Cheng Decl. ¶ 7. Third, concentrating the  
4 claims in this District is desirable as both Alaska and Horizon conduct business in  
5 this District and are headquartered in Washington, Horizon is a Washington  
6 corporation, and many class members, including Plaintiff, are located here. Am.  
7 Compl. & Answ. ¶¶ 11, 12, 14 & 15. Finally, there is a “well-settled presumption  
8 that courts should not refuse to certify a class merely on the basis of manageability  
9 concerns.” *Briseno*, 844 F.3d at 1128 (citing *Mullins v. Direct Dig., LLC*, 795 F.3d  
10 654, 663 (7th Cir. 2015) and *In re Visa Check/MasterMoney Antitrust Litig.*, 280  
11 F.3d 124, 140 (2d Cir. 2001) (Sotomayor, J.) (listing management tools)). Nothing  
12 in this case is so complex that it would be unmanageable as a class action at trial.  
13 Thus, a class action is a superior method of resolving the Classes’ claims.

#### 14 CONCLUSION

15 For the foregoing reasons, Plaintiff’s motion should be granted.  
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19 sufficient to determine whether pilots or flight attendants were harmed by the  
20 Virtual Credit Policy although such data existed. Horizon Dep. at 202:18-203:4.

1 Dated: May 20, 2020

Respectfully submitted,

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3 R. Joseph Barton  
4 (admitted *pro hac vice*)  
5 BLOCK & LEVITON LLP  
6 1735 20th Street, NW  
7 Washington D.C. 20009  
8 Tel: (202) 734-7046  
9 Fax: (617) 507-6020  
10 [jbarton@blockesq.com](mailto:jbarton@blockesq.com)

11 Vincent Cheng  
12 (admitted *pro hac vice*)  
13 BLOCK & LEVITON LLP  
14 100 Pine Street, Suite 1250  
15 San Francisco, CA 94111  
16 Tel: (415) 968-8999  
17 Fax: (617) 507-6020  
18 [vincent@blockesq.com](mailto:vincent@blockesq.com)

19 Peter Romer-Friedman  
20 (admitted *pro hac vice*)  
GUPTA WESSLER PLLC  
1900 L Street, NW, Suite 312  
Washington, DC 20036  
Tel: (202) 888-1741  
[peter@guptawessler.com](mailto:peter@guptawessler.com)

Hannah Cole-Chu  
(admitted *pro hac vice*)  
OUTTEN & GOLDEN LLP  
601 Massachusetts Avenue, NW  
Second Floor West  
Washington, DC 20001  
Tel: (202) 847-4400  
[hcolechu@outtengolden.com](mailto:hcolechu@outtengolden.com)

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Michael J. Scimone  
(admitted *pro hac vice*)  
OUTTEN & GOLDEN LLP  
685 Third Avenue  
25th Floor  
New York, NY 10017  
Tel: (212) 245-1000  
[mscimone@outtengolden.com](mailto:mscimone@outtengolden.com)

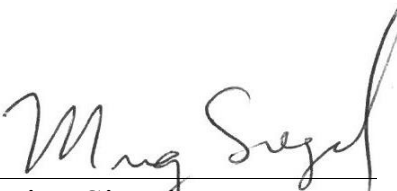
Matthew Z. Crotty  
CROTTY & SON LAW FIRM, PLLC  
905 W. Riverside Ave.  
Suite 404  
Spokane, WA 99201  
Tel: (509) 850-7011  
[matt@crottyandson.com](mailto:matt@crottyandson.com)

Thomas G. Jarrard  
LAW OFFICE OF THOMAS G.  
JARRARD  
LLC  
1020 N. Washington St.  
Spokane, WA 99201  
Tel: (425) 239-7290  
Fax: (509) 326-2932  
[Tjarrard@att.net](mailto:Tjarrard@att.net)

*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I certify that on May 20, 2020, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

  
Ming Siegel