No. 13-73215

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

US AIRLINE PILOTS ASSOCIATION,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,

Respondent,

DON ADDINGTON; JOHN BOSTIC; MARK BURMAN, AFSHIN IRANPOUR; ROGER VELEZ; STEVE WARGOCKI; MICHAEL J. SOHA; RODNEY ALBERT BRACKIN; AND GEORGE MALIGA,

Real Parties in Interest

On Petition from Orders of the United States District Court
for the District of Arizona
USDC No. CV-13-00471-PHX-ROS

REPLY IN FURTHER SUPPORT OF MOTION FOR STAY PENDING PETITION FOR WRIT OF MANDAMUS

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Petitioner US Airlines Pilots Association ("USAPA") submits this reply in further support of its application for a stay of the expedited district court proceedings and scheduled trial below pending consideration of the contemporaneously-filed Petition for Writ of Mandamus.

The opposition interposed by Real Parties in Interest Don Addington, *et. al.* (referred to herein as "Plaintiffs") makes no claim that they would in any way be prejudiced by the granting of a stay pending consideration of the petition for writ of mandamus. Plaintiffs' implicit concession that they will not suffer any prejudice from a stay is not surprising, since a stay will conserve resources of both parties that would otherwise be wasted on an advisory opinion that is meaningless unless the federal court in the District of Columbia rejects the Justice Department's efforts to permanently enjoin the merger or the parties resolve their differences and the government thereafter affirmatively approves the merger.

Nor do Plaintiffs make any attempt to counter the strong likelihood of success USAPA has shown that the district court is acting in excess of its authority by compelling the parties to proceed to trial on a purely advisory matter concerning the process for negotiating seniority under a contract that will never become effective unless the merger takes place, which, as noted

above, is contingent upon the future outcome of another tribunal or, equally speculative and unpredictable, resolution by the parties.

Plaintiffs do not dispute the merits of Petitioner's claims that the district court has ordered the parties to proceed to trial on a purely advisory matter. Indeed counsel for Plaintiffs repeatedly admitted in proceedings before the district court that if the merger does not go through there is no claim. (Appendix 29, 31; Transcript of August 15, 2013 Hearing, at 14:11-13; 16:8-18)

This is the third time USAPA has been called upon to defend against the same meritless, speculative, and unripe issues brought by Plaintiffs. In the first case, USAPA was subjected to a trial and the judgment was vacated by this Court, finding the Plaintiffs had not suffered any injury and the matter was unripe. *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174 (2010). In the second case, brought by US Airways, USAPA obtained summary judgment and Plaintiffs' cross-claim, asserting the identical unripe claims as those previously dismissed by this Court, was likewise again dismissed. (*U.S. Airways v. Addington, et.al.*, No. CV-10-1570 PHX-ROS (Appendix 116, 118). Now for the third time, USAPA is being forced to undertake an enormous expenditure of resources to defend against the very same speculative claims -- that Plaintiffs might be injured, if and when the airlines merge and the

seniority integration process provided for as part of the merger proves unfavorable. Despite the abundantly clear absence of any present injury being suffered by Plaintiffs and the entirely speculative nature of numerous aspects of their claim, USAPA is being forced to proceed on an expedited schedule to litigate the merits of a future negotiating process that is expressly conditioned on a merger the Justice Department is attempting to permanently enjoin.

There is no question that being forced to participate in an advisory trial in violation of the constitution constitutes irreparable harm warranting a stay. *See, e.g., In re Rail Freight Fuel Surcharge Antitrust Litig.*, 286 F.R.D. 88, 93 (D.D.C. 2012) (stating "[n]o doubt subjecting a party to duplicative and wasteful litigation exercises is a significant harm"); *Gray v. Golden Gate Nat. Recreational Area*, No. C 08-00722 EDL, 2011 WL 6934433 (N.D. Cal. Dec. 29, 2011) ("Although monetary losses incurred in litigation are generally not considered irreparable harm, '[i]f defendants are forced to incur the expense of litigation before their appeal is heard, the appeal will be moot, and their right to appeal would be meaningless.'") (citation omitted). Petitioner has no source from which to recover the fees incurred for these redundant and meritless litigations, which constitutes irreparable harm. *See Goldie's Bookstore, Inc. v. Superior Court,* 739 F.2d 466, 471 (9th Cir. 1984) ("[F]inancial injury ... will

not constitute irreparable harm *if* adequate compensatory relief will be available in the course of litigation.") (emph. added).

So too, under the circumstances of this case, a stay is warranted to curtail the harm currently being suffered by Petitioner as a result of being forced to proceed to prepare for trial and litigate *for the third time,* a claim that presents no case or controversy, with no right to recover the enormous expenses being daily incurred.

Because there is no present case or controversy and the trial in the DOJ's antitrust action is not even scheduled to begin until a month after trial of this matter is scheduled, these very expensive proceedings – paid for with membership dues of USAPA members – will result in nothing more than an advisory opinion in violation of Article III as well as a colossal waste of time, effort, and money. An immediate stay of the proceedings pending disposition of the mandamus petition is appropriate.[1]

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[1] USAPA categorically rejects the characterization of this application as an effort to impede a proper judicial ruling and/or to delay the proceedings. While Plaintiffs appear to be complaining that while seeking a stay USAPA is also continuing to prepare for trial, USAPA hardly has an alternative. It has been fully complying with the district court's accelerated discovery schedule, even while it believes that its petition for a writ of mandamus will be granted and that the expedited trial schedule is neither necessary nor legally supportable. Thus, over the past several weeks, USAPA answered discovery demands, produced tens of thousands of pages of documents, took 15 depositions, and depositions of USAPA's witnesses are going forward.

Contrary to the Plaintiffs' suggestion, USAPA fully exhausted possible remedies in the court below and was not required to make a separate application for a stay of the district court proceedings prior to filing this application. *See* Fed. R. Civ. App. P. 8. First, USAPA moved to dismiss the complaint arguing that the district court lacked subject matter jurisdiction, and that motion was denied. (Doc. 122) Second, following the Justice Department's refusal to grant approval of the merger and filing of the lawsuit to permanently enjoin the merger, a request for stay was made to the district court. By order dated August 13, 2013, the district court ordered the parties to address the effect of the DOJ's antitrust action on this case and whether, as a result of that action, the proceeding before the district court should be dismissed without prejudice. USAPA again argued for dismissal but alternatively urged the district court to stay the proceedings. (Appendix 82; Transcript of Aug. 15, 2013 Hearing, at 47:13-22) The district court declined to dismiss or stay the proceedings and, in fact, entered the expedited discovery schedule providing for a trial date of September 24, 2013 (later changed, *sua sponte*, to October 22, 2013) (Appendix 10-14, 15; Doc. 160; Doc. 174)

Third, prior to making the instant motion for stay and petition for writ of mandamus petition, USAPA moved for reconsideration of the district court's order declining to dismiss the action due to the lack of Article III

jurisdiction and requested expedited briefing on that motion. (Doc. 183) By order entered on September 18, 2013, attached hereto as Exhibit A, the district court denied the motion stating:

> This case, like the previous disputes involving these parties, presents very difficult issues regarding standing and ripeness. The Court's ruling on the motion to dismiss was based on the facts available at that time. While those facts have changed, the Court is not convinced that the changes require dismissal. Therefore, the motion for reconsideration will be denied.

Although Fed. R. Civ. App. P. 8. "ordinarily" requires a motion for stay to be filed below, this rule is rarely applied to petitions for mandamus -- which already require a heightened showing of abuse by the district court -- and is in any event (understandably) excused when requesting a stay below would be futile. *Cf. Western Airlines v. Int'l Brotherhood of Teamsters*, 480 U.S. 1301, 1304-05 (1987) (applying similar exception to stay requirement in labor dispute involving airline merger). The district court below (1) has thrice refused to dismiss this case for lack of standing, (2) refused to delay the trial and instead set an expedited trial date in response to the latest motion to dismiss, with an introductory line (alongside its refusal to dismiss) stating that "[I]n the context of airline travel, a delay is never welcomed[]" (Appendix 10), and (3) has denied the motion for reconsideration. Any further request to the trial court to delay the trial that the court expressly expedited, particularly on the ground that the court made a manifest legal error (as established in the

petition for mandamus), would have been futile. *Cf., Convertino v. U.S. Dep't of Justice*, 684 F.3d 93, 98-99 (D.C. Cir. 2012) ("[T]he court was 'unwilling to prolong this litigation further' on '[a party's] speculative hope that things will suddenly go his way in Michigan."). Finally, to the degree that a motion in the district court is "ordinarily" required on appeal, the motion for reconsideration -- which the district court denied -- should suffice. Any other result would further needlessly burden the parties (as well as the Court) and elevate futility over substance.

Plaintiffs conclude their opposition by requesting that this Court not issue a stay before permitting them to file an opposition to the writ for mandamus. Petitioner does not oppose permitting Plaintiffs to file an opposition, but simply requests that this opposition, and a stay, be entered promptly, and in full recognition of the continuing violation of Article III and the ongoing, massive expenditure of resources on an advisory opinion that is indisputably moot unless the D.C. district court denies the DOJ's application to enjoin the merger.

CONCLUSION

Proceeding in the absence of a merger of the two airlines is not only unconstitutional, it is extremely prejudicial to USAPA, which has been forced to defend these meritless claims on multiple occasions. Plaintiffs fail to

identify any harm that will result if a stay is granted. If the merger is approved and the challenged seniority process contained in the conditional MOU becomes effective, Plaintiffs can re-assert their claims at an appropriate time.

Dated this 18th day of September, 2013

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on this 18th day of September, 2013.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellant CM/ECF system to the following counsel for Plaintiffs/Real Parties in Interest:

Marty Harper
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I further certify that a copy of the foregoing was mailed on September 18, 2013 and a copy will be hand delivered on September 19, 2013 to:

Honorable Roslyn O. Silver
United States District Court, District of Arizona
Sandra Day O'Connor U.S. Courthouse, Suite 624
401 West Washington Street, SPC 59
Phoenix, AZ 85003-2158

Dated this 18th day of September, 2013.

s/Susan Martin
Attorney for Petitioner

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Don Addington, et al., Plaintiffs, vs. US Airline Pilots Association, et al., Defendants.	No. CV-13-00471-PHX-ROS **ORDER**

Plaintiffs have moved to certify a class, US Airways Inc. has moved to intervene, third-party Leonidas LLC has moved to quash two subpoenas, and the US Airline Pilots Association ("USAPA") has moved for reconsideration of the Court's refusal to dismiss this case. As set forth below, a class will be certified, intervention will be allowed, the subpoenas will be quashed, and the request for reconsideration will be denied.

I. Class Certification

This is the third time a number of West Pilots have been involved in litigation with their current union, USAPA. In the two previous litigations, the court certified a class comprised of approximately 1,600 West Pilots. This time around, a motion to certify the class was filed very early. (Doc. 11). The Court deferred briefing on that motion until some preliminary issues were resolved. (Doc. 43). After resolving those issues, the Court set a briefing schedule on the class certification issue. (Doc. 122). In doing so, the Court observed that USAPA had opposed class certification in the previous case using very weak

arguments. Thus, the Court instructed USAPA that if it planned on opposing certification in this case, it should present "substantially better arguments" than what it presented in the past. Unfortunately, USAPA did not listen.

In opposing the class certification motion, USAPA's only meaningful argument involves the vote approving the Memorandum of Understanding ("MOU"). According to USAPA, the MOU was approved by 97.69% of the West Pilots and that approval rate means certification would be inappropriate. In other words, "[t]he fact that 1,017 West Pilots voted to approve the MOU raises the question of whether any of those 1,017 have a dispute with USAPA regarding the Nicolau Award." (Doc. 135 at 10). This argument cannot be taken seriously.

During the vote on the MOU, USAPA repeatedly assured all its members that the vote would have no bearing on adoption of the Nicolau Award. In USAPA's own words, "no East pilot should vote against the MOU because they fear that ratifying the MOU will implement the Nicolau Award, and no West pilot should vote for the MOU because they believe the MOU will implement the Nicolau Award." (Doc. 136). In light of this and similar statements during the ratification vote, USAPA's current position that the vote was a clear statement by the majority of the West Pilots that they are no longer interested in pursuing the Nicolau Award is very close to frivolous.

Having disposed of USAPA's only argument opposing certification, it is obvious that certification is appropriate. The four requirements of Rule 23(a) are met. First, the proposed class satisfies the numerosity requirement because it consists of approximately 1,600 West Pilots. Second, the commonality requirement is met because this litigation will "generate common *answers*" to classwide issues. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). In particular, this litigation will decide whether USAPA acted appropriately with respect to all West Pilots. Third, the typicality requirement is met because the claims of the representative parties are identical to the claims of the proposed class. *See Hanlon v. Chyrsler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). And fourth, the adequacy

requirement is met because the representative parties will fairly and adequately protect the interests of the class.

Having satisfied the four requirements of Rule 23(a), certification requires the West Pilots also satisfy one of the requirements of 23(b). In this case, certification is appropriate under Rule 23(b)(1)(A) because "prosecuting separate actions by or against individual class members would create a risk of . . . inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." That is, USAPA is obligated to act consistently regarding all of its union members. Imposing a single course of conduct on USAPA will prevent inconsistent treatment of West Pilots. Therefore, the Court will certify a class defined as "All pilots who are on the America West seniority list currently incorporated into the West Pilot's collective bargaining agreement."

The proposed class counsel has substantial experience regarding the precise issues presented in this case and were successful in the prior jury trial. USAPA offered no plausible basis for the Court to reject the proposed class counsel and there is none. The Court will appoint Marty Harper, Andrew S. Jacob, and Jennifer Axel as class counsel.

Finally, notice is not required when a class is certified under Rule 23(b)(1). Fed. R. Civ. P. 23(c)(2). Given the circumstances of this case, notice is neither needed nor appropriate.

II. US Airways' Intervention Request

US Airways has moved to intervene to protect its interest in "the prompt and final resolution of the merits of plaintiffs' DFR claim against USAPA." (Doc. 128 at 2). A party wishing to intervene must show that it meets four requirements:

> (1) it has a significant protectable interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest.

United States v. City of Los Angeles, Cal., 288 F.3d 391, 397 (9th Cir. 2002) (quotation omitted). These factors should be evaluated in light of "practical and equitable

considerations" and the "liberal policy in favor of intervention." *Id.* (quotations omitted). US Airways satisfies all four requirements.

First, US Airways has a "significant protectable interest" in the timely resolution of the seniority dispute. Second, the failure to resolve the seniority dispute in a timely manner may "impair or impede" US Airways' interest by frustrating the expected realization of "the operational and financial benefits from the combined pilot workforce." (Doc. 128 at 5). Third, US Airways' requested intervention is timely because it moved to intervene while this case was in its infancy. And finally, US Airways' interest is different from the interests of the West Pilots and USAPA in that US Airways takes no position on the underlying merits but is only interested in ensuring "a prompt adjudication of the merits." (Doc. 128 at 8). US Airways will be allowed to intervene.

III. Motions to Quash

Third-party Leonidas has moved to quash two subpoenas issued by USAPA. Despite filing lengthy oppositions to those motions, USAPA has not been able to establish the relevance of the information sought by either subpoena. Both subpoenas will be quashed.

IV. Motion for Reconsideration

USAPA has moved for reconsideration of the Court's order refusing to dismiss this case for lack of jurisdiction. This case, like the previous disputes involving these parties, presents very difficult issues regarding standing and ripeness. The Court's ruling on the motion to dismiss was based on the facts available at that time. While those facts have changed, the Court is not convinced that the changes require dismissal. Therefore, the motion for reconsideration will be denied.

Accordingly,

IT IS ORDERED the Motion to Certify Class (**Doc. 11**) is **GRANTED**.

IT IS FURTHER ORDERED the Motion to Intervene **(Doc. 128**) and Motions to Expedite (**Doc. 129, 188**) are **GRANTED**. US Airways shall file its intervention pleading within five days of this Order.

IT IS FURTHER ORDERED the Motions to Quash (**Doc. 149, 178**) are **GRANTED**.

IT IS FURTHER ORDERED the Motion for Reconsideration (**Doc. 183**) is **DENIED**.

DATED this 18th day of September, 2013.

Roslyn O. Silver
Senior United States District Judge