UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-80051

Don ADDINGTON, John BOSTIC, Mark BURMAN, Afshin IRANPOUR, Roger VELEZ, and Steve WARGOCKI, *individually and representing a class of persons similarly situated*,

Plaintiffs-Respondents

v.

US AIRLINE PILOTS ASSOCIATION, *an unincorporated association representing the pilots in the employment of US Airways Inc.*,

Defendant-Petitioner

Answer in Opposition to Petition For Permission to File Interlocutory Appeal of Order Certifying (b)(2) Class

Case No. 2:08-cv-1633-PHX-NVW

Honorable Neil V. Wake, United States District Court Judge

ANSWER TO PETITION FOR PERMISSION TO APPEAL

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OVERVIEW AND SUMMARY OF ANSWER

America West and US Airways merged in 2005. All parties to the merger agreed that Respondents, America West airline pilots, and the pilots of the former US Airways would arbitrate a final and binding seniority compromise. The agreed-to arbitration occurred and resulted in an integrated seniority list. The US Airways pilots formed Petitioner, US Airline Pilots Association ("USAPA"), as a means of breaching the agreement to treat the arbitration as final and binding, to avoid implementation of the integrated seniority list, and to enable the majority to impose instead a date-of-hire scheme to the detriment of the minority. Respondents filed the underlying action, in September 2008, to obtain injunctive relief to compel USAPA to enforce the arbitration results.[1]

On November 21, 2008, the district court found that Respondents "stated a claim for breach of the duty of fair representation," *Addington*

[1] Petitioner has grossly mischaracterized the facts underlying the dispute that gave rise to Respondents' suit, as well as the record of the dispute in the district court. Petitioner's mischaracterizations pertain for the most part to issues not properly the subject of this interlocutory appeal. Respondents will therefore focus their response on the only issue properly before this Court: whether permission should be granted to appeal the district court's order certifying a class.

v. US Airline Pilots Assn., 588 F.Supp.2d 1051, 1061 (D. Ariz. 2008) ("West Pilots allege that USAPA has followed through" to prevent implementation of the arbitration award "without any corresponding benefit to the pilots as a whole."). On March 14, 2008, the district court certified a Rule 23(b)(2) class. Starting on April 28, 2009, it will hold a jury trial to allow Respondents to prove their claim.

Because USAPA has no defense, its only strategy has been to delay. In furtherance of that strategy, it most recently filed this Rule 23(f) petition and is already seeking a stay from the district court.

Before this Court could possibly review the class certification order here there will be a trial and final judgment. At that point, the class certification order can be appealed pursuant to 28 U.S.C. § 1291. Quite plainly, therefore, the only possible effect of a Rule 23(f) appeal here, indeed the only reason that USAPA is using Rule 23(f), is to stop the impending trial, not to get an earlier review of the order.

USAPA is so focused on stopping the trial that it immediately filed a motion for a stay in the district court. *Defendant's Motion For Order To Show Cause Regarding Stay Of Proceedings Pending Appeal* (doc.

260).[2] Ordinarily, a litigant would wait to see if this Court granted its petition. USAPA did not wait, it could not wait, because the sole purpose for the petition is to stop the trial.

Moreover, this case does not satisfy any of the *Chamberlan* factors. Because of that and because USAPA is misusing Rule 23(f) to try to stop a trial on the merits, Respondents ask this Court to deny USAPA's Petition.

[2] "Doc." refers to the docket number in the District Court docket.

ARGUMENT

A. Rule 23(f) Provides a Basis to File a Petition for *Permission* to Appeal a Class Certification Order—Nothing More.

1. The Decision to Permit Appeal is Discretionary and Review, if Granted, is Limited to Class Certification Issues.

Appeals are generally limited to final decisions on the merits. 28 U.S.C. § 1291. Class certification rulings are interlocutory, and not immediately appealable under § 1291. In 1992, however, Congress authorized the Supreme Court to issue rules that would expand the scope of allowable interlocutory appeals. 28 U.S.C. § 1292(e). In 1998, the Supreme Court promulgated Rule 23(f), Federal Rules of Civil Procedure, which permits, but does not require, interlocutory appeals of orders granting class certification.

The Rule states as follows:

> A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Fed. R. Civ. P. 23(f).

Even where permission to appeal is granted, courts uniformly limit their review in a Rule 23(f) appeal issues to class certification issues.

Dukes v. Wal-Mart, Inc., 509 F.3d 1168, 1176 (9th Cir. 2007) ("Our review is limited to whether the district court correctly selected and applied Rule 23's criteria."); *Bertulli v. Indep. Assn. of Contl. Pilots*, 242 F.3d 290, 294 (5th Cir.2001) ("[A] party may appeal only the issue of class certification; no other issues may be raised.").

Quite plainly, therefore, Rule 23(f) provides merely a possibility of interlocutory appeal of the district court's application of Rule 23—nothing more. As such, USAPA's request that this Court allow it to file an interlocutory appeal on jurisdiction should be summarily dismissed.

2. Rule 23(f) Should Not be Used to Delay a Trial.

Respondents find no instance where a court used Rule 23(f) to stay trial proceedings before the court of appeals granted permission to appeal the class certification order. It would be unreasonable to do so because the courts of appeals so rarely grant a Rule 23(f) petition. *See Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005) (explaining that "petitions for Rule 23(f) review should be granted sparingly," in "rare cases"). Moreover, there is a strong policy against granting a Rule 23(f) stay, as here, on the eve of a trial because "interlocutory appeals under Rule 23(f) should not unduly retard the

pace of litigation." *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 835 (7th Cir. 1999). Rule 23(f) should not be used as a "vehicle to delay proceedings in the district court." *Sumitomo Copper Litigation v. Credit Lyonnais Rouse, Ltd*, 262 F.3d 134, 140 (2d Cir. 2001).

3. USAPA Misuses Rule 23(f) to Delay.

Courts do not, and should not, "countenance … shameless effort[s] to unjustifiably prolong litigation." *In re Zelis*, 66 F.3d 205, 207 (9th Cir. 1995). As explained by the district court, this is a particularly important concern here because:

> this … injunction case … is very much affected by urgency of time and interests of the parties to the case and of US Airways. They have a vital interest in having this matter resolved for their own business benefits. So I see that the Court has an extremely serious duty to process this case as quickly as possible.

(RT 20:2-8 (Mar. 3, 2009) (SER 4).) [3]

Rather than have any sense of urgency, USAPA has a strong sense of delay. In furtherance of that "sense," in less than six months, USAPA filed ten motions and raised three written discovery disputes,

[3] "RT" denotes the Reporter's Transcript from the indicated hearing date and "SER" denotes the pages in Respondents' Supplemental Excerpts of Record.

all of which was primarily intended to delay the litigation. The following list of filings is taken from the district court docket:

- First MOTION for Extension of Time page limit and time ext (09/25/08) (doc. 22);
- MOTION to Continue Trial (12/01/08) (doc. 91);
- MOTION for Reconsideration re dismissal (12/01/08) (doc. 93);
- MOTION to Strike re Motion To Compel (12/14/08) (doc. 111);
- First MOTION for Extension of Time to file brief re class cert (01/05/09) (doc. 131);
- MOTION to Compel class RFPD (02/16/09) (doc. 187);
- MOTION to Compel class Interrogatories (02/16/09) (doc. 191);
- MOTION to Strike Plaintiffs' Reply (02/27/09) (doc. 217);
- Notice re Discovery Dispute re Feb 20 order (03/03/09) (doc. 222);
- First MOTION for Reconsideration re Order Setting Trial Date (03/05/09) (doc. 231);
- Notice re Notice of Discovery Dispute (03/16/09) (doc. 254);
- Notice re Notice of Discovery Dispute (03/16/09) (doc. 255);
- MOTION for Order to Show Cause For Stay of Proceedings Pending Appeal (03/17/09) (260).

(Docket 08-cv-1633 (ER Ex. E).)[4]

USAPA now turns to Rule 23(f) because the district court will no longer allow it to delay. For example, the district court stated what follows on the record:

[4] "ER" denotes Petitioner's Excerpt of Record.

> THE COURT: Well, let me tell you, candidly, when I read the class certification motions, it was an eye opener for me. I saw there has been significant unnecessary discovery, likely costly and attenuated, or what to me are matters that were highly attenuated and expensive. And I recognize my responsibility to bring that kind of discovery practice to an end. This is not relevant. This is expensive, you – everyone needs to focus on the discovery that matters rather than a fishing expedition. I remind you all this is an injunction case, and we have to focus on priorities and timing. And so I'm – thank you, but I am not persuaded. This is just far too attenuated and expensive. It's just a little more – maybe nothing more than a fishing expedition.

(RT 12:21-13:8 (Mar. 16, 2009) (SER 7-8).) Along the same lines, the district court also made the following observations:

> COURT: I find no difficulty whatever in concluding that this is an appropriate (b)(2) class, probably even a (b)(1) class, and indeed, much of the material presented in objection I find to be either entirely unpersuasive or even completely irrelevant. So we have spent a lot of time, not to particularly good advantage, on a lot of that.

(RT 7:5-10 (Mar. 3, 2009) (SER 3).)

B. *Chamberlan* Defines The Standard To Stay Trial Proceedings During Rule 23(f) Review, and That Standard is not Met.

1. The Standard to Grant a Stay is Analogous to the Standard to Grant Preliminary Injunctive Relief.

If Rule 23(f) review is granted, a stay of district court proceedings is not a matter of course. To decide whether to grant a stay during Rule 23(f) review, courts analyze the likelihood that the appellant will obtain

reversal of the certification order and they balance the hardships if a stay were granted against the hardships if it were not granted. *Chamberlan*, 402 F.3d at 959 ("While the rule gives both the district court and the court of appeals discretion to stay the proceedings, we hold that a stay will not issue unless the likelihood of error on the part of the district court tips the balance of hardships in favor of the party seeking the stay."). This is closely analogous to how courts decide whether to grant preliminary injunctive relief. *In re Lorazepam & Clorazepate Antitrust Litig.*, 208 F.R.D. 1, 3 (D.D.C. 2002) ("[W]hether or not a stay should be granted in the context of a pending Rule 23(f) petition is a discretionary matter to be informed by a flexible application of the well-established, … test employed to consider preliminary injunctive relief."); *Sumitomo*, 262 F.3d at 140 ("[S]tay will not issue unless the likelihood of error on the part of the district court tips the balance of hardships in favor of the party seeking the stay."); *Blair*, 181 F.3d at 835 ("[S]tay would depend on a demonstration that the probability of error in the class certification decision is high enough that the costs of pressing ahead in the district court exceed the costs of waiting.").

2. Neither Likelihood of Success, Nor Balance of Hardship, Supports Granting a Stay.

Analysis of the relevant factors here does not support granting a stay. There is hardly any likelihood that certification will be reversed. The district court applied the appropriate authority and found that the merits of Rule 23(b)(2) class certification were clear. "It is not difficult to conclude that the standard of *Molski* and related authority is met." (Order, 5:18-19 (Mar. 14, 2009) (doc. 248) (ER Ex. A).) It also noted that most of USAPA's arguments against class certification "barely merit discussion." (Id. at 9:23.) The order speaks for itself.

Analysis of hardship assumes that there will be Rule 23(f) review and considers the hardship with and without a stay. The analysis compares the hardship if the trial were delayed until after review of class certification could be completed to the hardship if trial is held during review of class certification.

If there would be no trial if certification were reversed on appeal, there might be efficiency to reviewing certification before incurring the cost of trial. If trial will go forward whether or not there is a class—if plaintiffs as individuals would take the matter to trial—there is no efficiency to reviewing before incurring the cost of trial. The hardship

issue, therefore, should have a threshold inquiry asking whether trial would be avoided if certification were reversed.

In this instance, trial will not be avoided if certification were reversed. It would only be delayed. Respondents would still go to trial and would seek the same injunctive relief. They would do so because, as USAPA admits, the effect of injunctive relief would be the same, whether obtained by individuals or by a class. "[A]n order requiring USAPA to negotiate toward the implementation of the [arbitration] would have the same impact with or without class certification thereby rendering class certification unnecessary and 'inappropriate.' " (Def.'s *Resp. Mot. Class Cert.*, 16:23-17:1 (Feb. 17, 2009) (doc. 195) (SER 10-11).)

Whether or not there is a certified class, therefore, the effect of the trial will be the same. From USAPA's viewpoint, therefore, the only difference in whether trial or appeal comes first is delay. USAPA has no right to delay.

Delay would be substantial if a stay were granted. The Court need only consider the delay in the *Duke's* Rule 23(f) appeal to see this. In *Dukes*, it took fourteen month to hear argument in a Rule 23(f) appeal.

Dukes, 509 F.3d at 1175 (noting that "[o]n June 21, 2004, the district court issued an …order granting … class certification"); *id.* at 1168 (noting that the appeal was "Argued and Submitted Aug. 8, 2005"). If the same schedule unfolded here, the Court would not hear argument in this matter before May 2010.

Because delay is a recognized hardship and facing a decision on the merits is not, the hardships tip strongly against granting a stay.

C. *Chamberlan* Defines The Standard To Grant 23(f) Review, and That Standard is not Met.

There are "too many class actions filed each year for federal appeals courts practicably to adjudicate class certification decisions on an interlocutory basis as a matter of course." *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1273 (11th Cir. 2000). If freely allowed, such appeals would "add to the heavy workload of the appellate courts, require consideration of issues that may become moot, and undermine the district court's ability to manage the class action." *Chamberlan*, 402 F.3d at 959. Hence, "petitions for Rule 23(f) review should be granted sparingly," in "rare cases." *Id.* This is not one of those cases.

1. *Chamberlan* Applies a Three-factor Analysis.

The Ninth Circuit considers three factors to determine where it is appropriate to hear an appeal under Rule 23(f). *See*, *generally*, *id.* at 957-60. Although, "these factors are merely guidelines, not a rigid test," *id.* at 960, the Circuit has never gone outside these factors *See* 2 *McLaughlin on Class Actions* § 7:11 (5th ed.) (Standards under Rule 23(f)—Ninth Circuit). The three factors are as follows:

> (1) there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable; (2) the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; or (3) the district court's class certification decision is manifestly erroneous.

Chamberlan, 402 F.3d at 959.

In the context of an order certifying a class, the death-knell element applies when "the damages claimed would force [the defendant] to settle without relation to the merits of the class's claims." *Id.* at 960. The second element applies where the district court lacked guidance in a relevant area of law. *See In re Lorazepam*, 289 F.3d at 109 (second element did not apply where the district court had "established law to

guide it"). The unsettled issue must be fundamental and likely to otherwise evade review:

> [A] creative lawyer almost always will be able to argue that deciding her case would clarify some 'fundamental' issue." To limit review of cases in which a novel legal issue is claimed, [the Ninth Circuit] … confin[es] [this] category to novel legal questions that are important to class action law and likely to evade effective review after the completion of the case.

Chamberlan, 402 F.3d at 958-59 (citations and quotation marks omitted). The third element applies where there is "a manifest error of law, as opposed to an incorrect application of law to facts." *Id.* at 959. Manifest errors are "more obvious and susceptible to review at an early stage than an error that must be evaluated based on a well developed factual record." *Id.* Manifest error, in other words, must be obvious.

2. None of the Three *Chamberlan* Factors Apply.

(a) There is No Death Knell.

None of the *Chamberlan* factors apply here. The first factor (death-knell) does not apply because class certification does not pressure USAPA to settle. No settlement has been offered by either party and none is envisioned. Moreover, USAPA has no reason to feel overly pressured because a union and its members are protected from the extreme economic pressure that underlies death-knell doctrine. *See*

Intl. Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 50 (1979). The policy protecting a union and its members from extreme economic pressure is also expressed in § 301(b) of the LMRA, which provides, in part, that "[a]ny money judgment against a labor organization in a District Court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets." 29 U.S.C. § 185(b). Hence, class certification does not "sound" a death knell for this action.

USAPA claims that class certification presents a death knell to it because it will "paralyze the [union] negotiation process." In making this complaint, USAPA ignores the very purpose of the lawsuit. Respondents have alleged that USAPA has breached its duty of fair representation by forming for the express purpose of avoiding implementation of an arbitrated integrated seniority list, and to enable the majority to impose a date-of-hire scheme to the detriment of the minority. USAPA essentially complains that it should be allowed to continue unfettered to run roughshod over the rights of America West pilots, notwithstanding the subject of the lawsuit. Clearly, such an improper purpose should not be countenanced by this Court.

(b) There is No Unsettled Law.

The second factor (unsettled law) does not apply. Everyone (the Parties and the district court) agrees that *Molski v. Gleich*, 318 F.3d 937, 949 & n.13 (9th Cir. 2003), controls. As in *Lorazepam*, therefore, the law guiding the district court's decision was well settled. There is no need, therefore, to establish new law.

(c) There is No Manifest Error.

Finally, no error is obvious here. The Court can read the class certification order (doc. 248) to see that it is entirely sensible and well-reasoned. The district court certified a Rule 23(b)(2) class.

The court noted that, having read USAPA's strident opposition to class certification, including numerous deposition excerpts and exhibits, Plaintiffs more than satisfied their burden to demonstrate the propriety of class certification.

USAPA complains that the district court erred in allowing Plaintiffs to potentially seek restitution of dues as part of their equitable remedy. First, the district court granted USAPA permission to file a Rule 12(c) motion on the availability of the remedy, and it has done so. Second, the district court is in the best position to determine whether, if it decides to allow Plaintiffs to pursue the remedy, it can

manage this remedy as part of the trial for the class. This Court should not determine in advance what the district court has not yet decided in any event.

CONCLUSION

Respondents are not at all surprised that USAPA is trying to use Rule 23(f) to further delay the trial. This Court should reject USAPA's attempt to do so. Respondents, therefore, ask the Court to deny USAPA's Petition for Permission to Appeal.

CERTIFICATION OF COMPLIANCE WITH F.R.A.P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 09-80051

I CERTIFY THAT:

The attached Answer to Petition For Permission to Appeal is proportionally spaced, has a typeface of 14 points, and contains 3,384 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance and statement of related cases.

DATED: March 23, 2009

Respectfully submitted,

/s/ Andrew S. Jacob

_____

Marty Harper
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PROOF OF SERVICE BY MAIL

I am over the age of eighteen years of age, not a party to this action, and employed by Polsinelli Shughart, P.C.

On March 23, 2007, I served the attached Answer to Petition for Permission to Appeal by causing a true and correct copy to be placed in a sealed envelope, with postage prepaid, deposited with the United States Postal Service on this day following ordinary business practices addressed to opposing counsel at the last address given, as follows:

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I declare under penalty of perjury under the laws of Arizona that the foregoing is true and correct and this declaration was executed on March 23, 2009 at Phoenix, AZ.

/s/ Andrew S. Jacob