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9 **IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF ARIZONA**

10 Don ADDINGTON; John BOSTIC; Mark  
11 BURMAN; Afshin IRANPOUR; Roger  
12 VELEZ; and Steve WARGOCKI,

13 Plaintiffs,

14 vs.

15 US AIRLINE PILOTS ASSOCIATION,  
16 US AIRWAYS, INC.,  
Defendants,

Case No. 2:08-cv-1633-PHX-NVW  
(Consolidated)

**DEFENDANT USAPA'S**  
**MEMORANDUM OF POINTS AND**  
**AUTHORITIES IN SUPPORT OF**  
**ORDER TO SHOW CAUSE FOR STAY**  
**OF PROCEEDINGS PENDING APPEAL**

17 Don ADDINGTON; John BOSTIC; Mark  
18 BURMAN; Afshin IRANPOUR; Roger  
VELEZ; and Steve WARGOCKI,

19 Plaintiffs,

20 vs.

21 Steven H. BRADFORD, Paul J. DIORIO,  
22 Robert., A. FREAR, Mark. W. KING,  
Douglas L. MOWERY, and John A.  
23 STEPHAN,

Defendants.

Case No. 2:08-cv-1728-PHX-NVW

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1 **I. INTRODUCTION.**

2 Contemporaneously with this motion, Defendant US Airline Pilots Association  
3 (“USAPA”) has filed a Petition with the Ninth Circuit Court of Appeals pursuant to Fed.  
4 R. Civ. P. 23(f) requesting permission to immediately appeal this Court’s Order Granting  
5 Class Certification [Dkt. No. 248] (“Order”). USAPA’s Petition asks the Court of  
6 Appeals to resolve important legal questions raised by the Order, which have significance  
7 far beyond this case. If the Court of Appeals answers those questions in USAPA’s favor,  
8 this case will either be dismissed entirely for lack of subject matter jurisdiction, or it will  
9 not proceed as a (b)(2) class action.  
10

11 Therefore, USAPA now respectfully requests that the Court stay further  
12 proceedings pending final disposition of USAPA’s Petition. USAPA has at least a  
13 reasonable chance of success on its Petition, given the novel and unsettled issues  
14 underlying and addressed in the Court’s class certification Order. Further, the balance of  
15 hardships tips in favor of granting a stay. Among other issues, USAPA’s Petition asks  
16 the Court of Appeals to determine whether this Court has subject matter jurisdiction over  
17 this case. Without a stay, if the Ninth Circuit grants the Petition and determines that this  
18 Court lacked subject matter jurisdiction to hear the dispute, the parties will have been  
19 forced to invest great amounts of time and money litigating a matter over which this  
20 Court had no subject matter jurisdiction. This is especially so given the accelerated trial  
21 schedule recently ordered by this Court and the adverse impact that schedule has on the  
22 parties’ ability to properly litigate related contractual issues currently pending before the  
23 System Board of Adjustment.

1           Conversely, a stay of proceedings will not prejudice the class of West Pilots, because  
2 even if they were to prevail at trial, any injunction would have no remedial effect until  
3 final negotiation of a single collective bargaining agreement and ratification of any  
4 tentative agreement by the pilot group. Additionally, the Plaintiffs abandoned any wage  
5 related damages on behalf of the class in this matter, and this relief is being pursued in  
6 Plaintiffs' Counts One and Two class grievances against US Airways separately  
7 scheduled to be heard by a single neutral arbitrator in May. This scheduled arbitration  
8 would not be subject to any stay issued by this Court, and as conceded by the  
9 organization funding the Plaintiffs' litigation, would provide the Plaintiffs with make  
10 whole relief. (Granath Decl. ¶ 4, Ex. B). Finally, a stay will benefit the public by  
11 preserving valuable federal judicial resources. Additionally, if this case were to proceed  
12 through completion of trial, Arizona residents will have been convened to sit on a jury to  
13 decide a case over which this Court had no subject matter jurisdiction.  
14

## 15                           **II.     FACTUAL AND PROCEDURAL BACKGROUND.**

16           The Court is familiar with the facts underlying this action. On March 10, 2009, the  
17 Court issued its Order certifying this matter as a class action. USAPA filed a Petition for  
18 permission to appeal that Order pursuant to Rule 23(f) with the Ninth Circuit on March  
19 17, 2009. (Granath Decl. ¶ 3, Ex. A). USAPA's Petition is timely. Fed. R. Civ. P. 23(f)  
20 (stating that petition must be filed within 10 days after entry of order); *Beck v. Boeing*  
21 *Co.*, 320 F.3d 1021, 1023 (9th Cir. 2003) (Fed. R. Civ. P. 6 governs timing of Rule 23(f)  
22 petitions).  
23

          USAPA's Petition asks the Court of Appeals to review the following questions:

- 1 1. Whether the District Court has subject matter jurisdiction?
- 2 2. Whether the District Court's certification presents a death knell situation by
- 3 paralyzing ongoing collective bargaining?
- 4 3. Whether the District Court ignored the record on adequacy of class representatives
- 5 and denied an evidentiary hearing that would have obviated this error?
- 6 4. Whether the District Court has certified a (b)(2) class that includes damages that
- 7 would preclude a (b)(2) class?

8 USAPA believes that the Ninth Circuit may well take review of the matter for all of  
9 the reasons set forth in its Petition, and specifically because of the importance of  
10 determining the issue of ripeness, and whether a federal court has subject matter  
11 jurisdiction to entertain a duty of fair representation claim based on the collective  
12 bargaining process where no final product of negotiations exists.

### 13 **III. ARGUMENT.**

14 An Appeal pursuant to Rule 23(f) "does not stay proceedings in the district court  
15 unless the district judge or the court of appeals so orders." Fed. R. Civ. P. 23(f). Under  
16 Ninth Circuit law, "[t]he standard for evaluating stays pending appeal is similar to that  
17 employed by district court[s] in deciding whether to grant a preliminary injunction."  
18 *Lowden v. T-Mobile USA, Inc.*, 2006 U.S. Dist. LEXIS 46424, at \*3 (W.D. Wash. July  
19 10, 2006) (quoting *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983)); see also  
20 *Costco Wholesale Corp. v. Hoen*, 2006 U.S. Dist. LEXIS 65774, at \*6 (W.D. Wash. Sept.  
21 14, 2006). Other courts have adopted this standard when evaluating motions to stay  
22 proceedings pending petitions to appeal under Rule 23(f). *In re Loazepam & Clorazepate*  
23 *Antitrust Litig.*, 208 F.R.D. 1, 3 (D.D.C. 2002) (granting stay); *Chavez v. IBP, Inc.*, 2002

1 U.S. Dist. LEXIS 27910, at \*3 (E.D. Wash. Dec. 23, 2002) (granting stay).

2 Under this standard, courts will stay an action where the moving party shows  
3 either “(1) a probability of success on the merits and the possibility of irreparable injury;  
4 or (2) that serious legal questions are raised and that the balance of hardships tips sharply  
5 in its favor.” *Costco*, 2006 U.S. Dist. LEXIS 65774, at \*6; *Lowden*, 2006 U.S. Dist.  
6 LEXIS 46424, at \*4. These tests are not separate, but are two extremes of a single  
7 “continuum.” *Lopez* 713 F.2d at 1435. Relevant factors include:

8 (1) whether the stay applicant has made a strong showing that he is likely to  
9 succeed on the merits; (2) whether the applicant will be irreparably harmed  
10 absent a stay; (3) whether issuance of the stay will substantially injure the  
11 other parties interested in the proceeding; and (4) where the public interest  
lies.

12 *Costco*, 2006 U.S. Dist. LEXIS 65774, at \*6 (*quoting Hilton v. Braunskill*, 481 U.S. 770,  
13 776 (1987)); *Lowden*, 2006 U.S. Dist. LEXIS 46424, at \*\*4-5 (applying factors); *In re*  
14 *Lorazepam*, 208 F.R.D. at 3 (same).

15 These factors warrant a stay of further proceedings pending USAPA’s 23(f)  
16 appeal.

17 **A. USAPA’s Appeal Raises Important and Difficult Questions of Law.**

18 To satisfy the first factor, USAPA “need not persuade the Court that it is likely to be  
19 reversed on appeal.” *Costco*, 2006 U.S. Dist. LEXIS 65774, at \*7 (*quoting Canterbury*  
20 *Liquors & Pantry v. Sullivan*, 999 F. Supp. 144, 150 (D. Mass. 1998)). Instead, USAPA  
21 need only establish that the appeal raises “serious and difficult questions of law in an area  
22 where the law is somewhat unclear.” *Id.* USAPA raises at least two such questions in its  
23 Petition.



1           **1. Lack of Subject Matter Jurisdiction.**

2                   **a. Ripeness.**

3           At the outset of this case, USAPA argued that this matter was not ripe for adjudication  
4 because there existed no *final product* of negotiations on which to base a DFR claim.

5 (Dkt. No. 36 at 12-13). This Court determined that this matter was ripe based on the  
6 following:

7                   The claim against USAPA is ripe for adjudication. At least in these  
8 circumstances, what USAPA calls a mere “bargaining position” can be the  
9 subject of a fair representation claim. *It satisfies the constitutional case or*  
10 *controversy requirement to allege, as the Plaintiff West Pilots have, that*  
11 *USAPA has breached its duty by deliberately delaying the single collective*  
12 *bargaining agreement in order to frustrate its pre-existing obligation to the*  
13 *minority and thereby causing injury to the West Pilots in the form of*  
14 *ongoing furloughs and other detriments.*

15 *Addington v. US Airline Pilots Ass’n*, 588 F. Supp. 2d 1051, 1062 (D. Ariz. 2008) (Dkt.  
16 No. 84 at 13) (citations omitted) (emphasis added). The Plaintiffs have now disavowed  
17 any pleading that USAPA was deliberately delaying negotiations, and instead claim that  
18 USAPA “is working hard to finalize negotiation and approval of a date-of-hire single  
19 collective bargaining agreement with the Company.” (Dkt. No. 239 at 7:25).<sup>1</sup> Plaintiffs’  
20 original “deliberate delaying” allegation that led this Court to determine this issue was  
21 ripe for adjudication has undergone a sea change and is no longer a disputed issue.

22                   “Whether a claim is ripe for adjudication goes to a court’s subject matter  
23 jurisdiction under the case or controversy clause of article II of the federal Constitution.”

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<sup>1</sup> USAPA brought Plaintiffs’ disavowal of the “deliberately delaying” pleading to the Court’s attention in its Response in Opposition to Plaintiffs’ Motion for Class Certification. (*See* Dkt. No. 195 at 10).

1 *Shelton v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989) (citing *Unity Ventures v.*  
2 *County of Lake*, 841 F.2d 770, 774 (7th Cir.), *cert. denied*, 488 U.S. 891 (1988)). “The  
3 question of subject matter jurisdiction is a prerequisite to class certification and is  
4 therefore properly raised in [a] Rule 23(f) appeal.” *Olden v. Lafarge Corp.*, 383 F.3d  
5 495, 498 (6th Cir. 2004). *See also Poulos v. Ceasars World, Inc.*, 379 F.3d 654, 662 (9th  
6 Cir. 2004). USAPA’s Petition asks the Ninth Circuit to consider whether this case is ripe  
7 for adjudication in order to determine whether this Court has subject matter jurisdiction,  
8 which is a prerequisite to a determination of class certification. (Granath Decl., Ex. A).

9  
10 **b. The System Board Has Exclusive Jurisdiction.**

11 Due to the overlap between Plaintiffs’ Count Three DFR claim and their Count  
12 One/Two claims of contractual breach, USAPA anticipates that the System Board will  
13 address several issues that could have a dispositive impact on the Plaintiffs’ Count Three  
14 DFR claim, including whether the Transition Agreement created any contractual  
15 obligation for continued adherence to the failed ALPA Merger Policy. Therefore,  
16 USAPA’s Petition further argues that this Court lacks subject matter jurisdiction to  
17 decide any of these issues, because the System Board of Adjustment maintains exclusive  
18 jurisdiction over all of these overlapping contractual issues. *Consol. Rail Corp. v. Ry.*  
19 *Labor Executives Ass’n*, 491 U.S. 299 (1989).

20  
21 **c. The NMB Has Exclusive Jurisdiction Over All Election-Related Disputes.**

22 In the Order granting class certification, in the context of examining adequacy of  
23 class representatives, this Court appeared to reason that this matter is ripe because  
Plaintiffs have alleged that USAPA “abdicated its duty—through delay or otherwise—to

1 honor the Nicolau award.” (Dkt. No. 248 at 10:17-18). If this Court is now proceeding  
2 on the thesis that no proposal within the broad parameters of the USAPA Constitution  
3 could satisfy the DFR standard, then this case arose no later than the pilot group’s  
4 adoption of that Constitution through the NMB certification process. Therefore, nothing  
5 that occurred post-certification could be relevant to a trial proceeding on this basis, and  
6 this Court lacks subject matter jurisdiction because the NMB has exclusive jurisdiction  
7 under the RLA to determine union representation disputes arising from alleged pre-  
8 certification misconduct. *McNamara-Blad v. Ass’n of Prof’l Flight Attendants*, 275 F.3d  
9 1165, 1170, n.1 (9th Cir. 2002).<sup>2</sup>

11 For all of these reasons and those more fully set forth in USAPA’s Petition,  
12 serious legal questions are raised regarding this Court’s subject matter jurisdiction over  
13 this matter.<sup>3</sup>

## 14 **2. The Death Knell To Collective Bargaining.**

15 Despite the fluid and ongoing collective bargaining process and the necessity of  
16 ratification by a majority vote of USAPA members upon its completion, this Court  
17

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18 <sup>2</sup> In denying USAPA’s Motion to Dismiss this matter, this Court relied on *Truck Drivers*  
19 *& Helpers, Local Union 568 v. NLRB*, 379 F.2d 137, 145 (D.C. Cir. 1967) for the  
20 proposition that “a union breaches its duty of fair representation when it ‘arbitrarily  
21 adopts and announces a bargaining policy on seniority merger motivated only by a desire  
22 to win votes of a majority of the employees.’” *Addington*, 588 F. Supp. 2d at 1060. (Dkt.  
23 No. 84 at 10). However, in *Truck Drivers*, the determination of unlawfulness was made  
by the National Labor Relations Board in the context of a union election, and the remedy  
was a rerun election. Any similar remedy in this case would be under the exclusive  
jurisdiction of the National Mediation Board.

<sup>3</sup> Fed. R. Civ. P. 12(h)(3) mandates that if “the court determines at any time that it lacks  
subject matter jurisdiction, the court must dismiss the action.”

1 certified a class including all pre-merger West pilots. In so doing, the Court has  
2 concluded that all West pilots share a common *preference for indefinite stalemate* as  
3 contrasted with the yet undefined economic benefits and seniority protections that a  
4 single CBA would provide. Therefore, the Court's class certification determination  
5 presents a "death knell" situation for USAPA by paralyzing the collective bargaining  
6 process.

7  
8         Consequently, suddenly and in the context of a dynamic negotiating process,  
9 USAPA is no longer free to gauge the mix of interests within the two pilot groups and  
10 balance these interests in a manner that might produce a ratifiable contract consistent  
11 with its DFR obligations. Instead, the Court's certification pre-determines that no  
12 combination of elements contained in a future collective bargaining agreement would  
13 outweigh the West pilots' interest in reinstating a proposal whose supposed benefits, even  
14 under ALPA, were wholly illusory. Thus, certification sounds a death knell for USAPA  
15 that condemns the interests of the class as well. For the reasons set forth herein and those  
16 more fully set forth in USAPA's Petition, the Court's grant of class certification presents  
17 a "death knell" to pilot collective bargaining at US Airways and, therefore, an appeal  
18 pursuant to Rule 23(f) is appropriate. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 957  
19 (9th Cir. 2005).

20  
21         For these reasons, and for all of the reasons set forth in USAPA's Petition, there is  
22 a strong showing that USAPA is likely to succeed on the merits of its Rule 23(f) appeal.  
23 (*See*, Granath Decl., Ex. A).

1       **B. Litigation Expenses Will Inflict Significant Hardship On All Pilots**  
2       **Represented By USAPA.**

3       Litigation expenses have been held to “constitute a significant hardship” so as to  
4 satisfy the second factor relevant to a request for a stay. *See Lowden*, 2006 U.S. Dist.  
5 LEXIS 46424, at \*4-5. This Court recently issued an Order whereby trial in this matter is  
6 set to commence on April 28, 2009. Without a stay of proceedings, over the course of the  
7 next six weeks, the parties will be forced to complete discovery including disclosure of  
8 experts, formulate and exchange witness and exhibit lists, draft motions in limine and  
9 responses thereto, exchange proposed jury instructions and submit final versions to the  
10 Court, confer upon, draft and submit a final pre-trial order, draft and submit proposed  
11 voir dire and form of verdict, attend a final pre-trial conference, finalize all trial  
12 preparation, and litigate an anticipated ten-day jury trial. This will require the investment  
13 of countless attorney hours, thereby costing USAPA, and the Plaintiffs, hundreds of  
14 thousands of dollars in legal fees.

15       If the Ninth Circuit grants USAPA permission to appeal and rules in its favor on the  
16 issue of subject matter jurisdiction, all of this time and money will have been spent for  
17 naught.<sup>4</sup> This waste of resources harms the plaintiff class as well, as USAPA is the  
18 certified bargaining representative of all pilots employed by US Airways, and if its  
19 resources are drained defending against litigation that the Ninth Circuit determines  
20 should not have proceeded for lack of jurisdiction, USAPA’s ability to advance the  
21

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22  
23 <sup>4</sup> Alternatively, if the Ninth Circuit agrees with USAPA that the dues-related damages are not proper for purposes of a (b)(2) class, and the Plaintiffs continue to pursue these

1 interests of its members through negotiations and arbitration will have been severely  
2 compromised.

3 **C. A Stay Will Not Injure Plaintiffs.**

4 Plaintiffs also stand to suffer significant hardship if they are forced to litigate this  
5 matter to completion over the next six weeks only to have the Ninth Circuit later  
6 determine that subject matter jurisdiction never existed. Additionally, Plaintiffs and the  
7 class will not be injured by a stay of proceedings pending appeal. Even if the Plaintiffs  
8 were to prevail at trial, any injunction would have no remedial effect until final  
9 negotiation of a single collective bargaining agreement including ratification by the pilot  
10 group. *Addington*, 588 F. Supp. 2d at 1057. (Dkt. No. 84 at 6). Any such event is at least  
11 several months off in the future.  
12

13 In terms of any wage impact, the stay would not affect the Plaintiffs' Counts One and  
14 Two grievances currently proceeding before the System Board in May, in which  
15 Plaintiffs are seeking full wage-related compensation from US Airways for alleged  
16 breaches of the Transition Agreement relating to non-implementation of the Nicolau list.  
17 In so far as Plaintiffs' remaining Count Three relates to USAPA, Plaintiffs are seeking no  
18 wage related damages on behalf of the class, but rather injunctive relief for the class, and  
19 any such injunction cannot take effect in the absence of a single collective bargaining  
20 agreement, which is many months away. Moreover, this litigation is serving to delay the  
21 current negotiation process to the detriment of all pilots.  
22

23  

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damages as part of a (b)(3) class, many months will be needed to comply with the  
applicable notice requirements required under Rule 23.

1           **D. A Stay Will Further The Public Interest.**

2           A stay will benefit the public interest by furthering judicial economy. If a stay is not  
3 granted and this case proceeds to and through trial, federal judicial resources and jury  
4 members' time will be expended litigating a matter that the Ninth Circuit could very well  
5 determine that this Court never had subject matter jurisdiction to adjudicate. Promoting  
6 judicial economy is a recognized factor to consider when making any public interest  
7 determination:

8                         [It] “does not make sense for this Court to expend its time and energy  
9                         preparing this case for trial and possibly trying it only to learn at a later date  
10                        from the court of appeals that it was not the proper forum to hear the case.”

11           *Lowden*, 2006 U.S. Dist. LEXIS 46424, at \*5 (quoting *C.B.S. Employees Federal Credit*  
12           *Union v. Donaldson, Lufkin & Jenrette Securities Corp.*, 716 F. Supp. 307, 310 (W.D.  
13           Tenn. 1989)); *Stiener v. Apple Computer, Inc.*, 2008 U.S. Dist. LEXIS 90335, at \*20  
14           (N.D. Cal. Apr. 29, 2008) (granting stay). The same must hold true in this matter. It  
15           “does not make sense” for this Court to expend its time, resources and energy trying this  
16           matter only to learn at a later date from the Ninth Circuit that it did not have subject  
17           matter jurisdiction to do so.

18           **E. Summary.**

19           The point on the “continuum” at which a stay is justified turns on the relative hardship  
20           of the parties. *E.g.*, *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). Here,  
21           USAPA’s interest in avoiding unnecessary litigation costs and preserving its resources  
22           for representation of all of the pilots it represents, including the West Pilot class, far  
23           outweighs the interest of class members whose requested injunctive remedy, even if

1 granted, will not take immediate effect and whose wage-related claims will be heard in  
2 May by the System Board. Nevertheless, even if the Court finds the parties' interests are  
3 in relative balance, the serious questions posed by USAPA's Petition coupled with the  
4 public's interest in avoiding the wasting of judicial resources justifies a stay of  
5 proceedings pending appeal. *See Costco*, 2006 U.S. Dist. LEXIS 65774, at \*19 (granting  
6 stay on strength of issues raised and public interest).  
7

#### 8 **IV. CONCLUSION.**

9 For these reasons, USAPA respectfully requests that the Court stay all further  
10 proceedings until the later of either the (1) denial of USAPA's Petition for Permission to  
11 Appeal; or (2) the Ninth Circuit's entry of its mandate following disposition of USAPA's  
12 appeal, if accepted.

13 Respectfully Submitted,

14 Dated: March 17, 2009

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1 **CERTIFICATE OF SERVICE**

2 This is to certify that on the date indicated herein below a true and accurate copy  
3 of the foregoing pleading, *to wit*,

- 4 • Defendant USAPA’s Memorandum of Points and Authorities in Support of its  
5 Order to Show Cause For Stay of Proceedings Pending Appeal;  
• Certificate of Service

6 were electronically filed with the Clerk of Court using the CM/ECF system, which will  
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22 And further that paper hard copies were provided to The Honorable Neil V. Wake,  
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1 On March 17, 2009, by:

2 /s/ Lucas K. Middlebrook

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