Declaration of Nicholas P. Granath In Support of Order to Show Cause for Stay of Proceedings Pending Appeal

Exhibit A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRUICT

NO.

DON ADDINGTON, JOHN BOSTIC; MARK BURMAN AFSHIN IRANPOUR, ROGER VELEZ, and STEVE WARGOCKI, representing themselves and as representatives of the class, and all others similarly situated in the class,

Plaintiffs-Respondents,

v.

US AIRLINE PILOTS ASSOCIATION,

Defendant-Petitioner.

Petition To Immediately Appeal From An Order Granting Class Certification By
The United States District Court For The District Of Arizona,
No. C08-1633 & C08-1728 (consolidated) NVW
Honorable Neil V. Wake, United States District Judge

PETITION FOR PERMISSION TO APPEAL

Stanley Lubin
Lubin & Enoch, P.C.
Attorney for US Airline Pilots Ass'n

349 North 4th Avenue
Phoenix, AZ 85003-1505
(602) 234-0008

Nicholas Granath
Seham, Seham, Meltz & Petersen, LLP
Attorney for US Airline Pilots Ass'n

445 Hamilton Avenue, Suite 1204
White Plains, New York 10601
(914) 997-1346

CORPORATE DISCLOSURE STATEMENT

Defendant-Petitioner, the US Airline Pilots Association, a representative labor union under the Railway Labor Act, 45 U.S.C. § 151, Sixth, is an unincorporated association with no corporate parent or publicly held companies that own 10% or more stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES **Page**

STATE CASES

OTHER DECISIONS

STATUTES

RULES

I. RELIEF REQUESTED.

Pursuant to Fed. R. Civ. P. 23(f) and Fed. R. App. P. 5(a), the US Airline Pilots Association ("USAPA") seeks permission to appeal an Order Granting Class Certification entered by the United States District Court for the District of Arizona on March 10, 2009. (Dt. # 248)[1] (Ex. A). This Petition is timely under Fed. R. Civ. P. 23(f). *See Beck v. Boeing Co.*, 320 F.3d 1021, 1023 (9th Cir. 2003) (Fed. R. Civ. P. 6(a) applies to Rule 23(f) petitions).

II. INTRODUCTION.

This case involves the issue of whether a labor union is required to adopt the seniority integration proposal of a de-certified predecessor, which proposal the predecessor itself was unable to implement.

In the aftermath of the merger between US Airways and America West, the Air Line Pilots Association ("ALPA") developed a seniority integration bargaining proposal based on an internal arbitration process, which did not provide for the consideration of date-of-hire seniority as a criterion. Under ALPA policy, the proposal could only be implemented as part of a single collective bargaining agreement merging the operations of US Airways (East) and America West (West)

[1] References to the District Court docket are cited herein as "Dt. #"

pilots. ALPA was never able to obtain implementation of its seniority integration bargaining proposal because East pilots and their elected representatives refused to consider any single collective bargaining agreement that incorporated that proposal.

On April 18, 2008, ALPA was de-certified and replaced by USAPA, which had adopted a broad constitutional "objective" of seeking date-of-hire seniority integration balanced by "conditions and restrictions" designed to protect each pilot's pre-merger career expectations.[2] In subsequent negotiations, USAPA submitted a seniority integration proposal to US Airways, which has neither been agreed to nor implemented.

Respondents have been certified to represent a class of all pre-merger West pilots. Through this litigation, Respondents seek a judgment that USAPA's bargaining proposal – which has neither been agreed to nor implemented – is a violation of USAPA's duty of fair representation. Respondents also seek an injunction compelling USAPA to implement the failed bargaining proposal of its

---

[2] The use of date of hire as a means to consolidate seniority lists has been found "to be well within the 'wide range of reasonableness which must be allowed a statutory bargaining representative in serving the unit it represents.'" *Laturner v. Burlington Northern, Inc.*, 501 F.2d 593, 599 (9th Cir. 1974) (*quoting Humphrey v. Moore*, 375 U.S. 335, 349 (1964)).

de-certified predecessor.

This Court should permit appeal and reverse class certification because: i) the District Court lacks subject matter jurisdiction; ii) the erroneous class certification imposes a "death knell" impact on the ongoing collective bargaining process; and iii) the grant of class certification is tainted by manifest error and abuse of discretion.

III. FACTUAL AND PROCEDURAL BACKGROUND.

In early 2005, commercial airline carriers US Airways, Inc. and America West Airlines, Inc. merged. (Dt. # 77 Stipulated Statement of Facts, ¶ 2) (Ex. B). At the time of the merger, ALPA represented both the US Airways pilots ("East") and the America West pilots ("West") (Dt. # 86 Amended Complaint, ¶¶ 28-29) (Ex. C). Under the ALPA structure, the two pilot groups' separate collective bargaining agreements were administered by their respective Master Executive Councils (MEC's).

Operational merger raised the issue of the seniority integration of the two airlines' respective employee groups. Non-pilot employee groups – including flight attendants, mechanics, baggage handlers and dispatchers – agreed to seniority integration based on a date-of-hire basis. (Dt. # 38 at ¶ 9) (Ex. F). By contrast, ALPA Merger Policy provided for the two MEC's designated Merger

Representatives to attempt to jointly negotiate a seniority integration proposal to be presented to the employer. In the event the Merger Representatives failed to reach an agreement on a joint proposal, ALPA Merger Policy provided that its seniority integration proposal would be determined by an ALPA-approved arbitrator who would render his decision pursuant to ALPA-determined criteria. (Ex. B, ¶¶ 19, 20). Whereas these criteria had historically placed special emphasis on date-of-hire seniority, by 1991, ALPA Merger Policy had been amended to eliminate any reference to date-of-hire seniority. (Ex. F, ¶13).

In this instance, the ALPA arbitration culminated in a May, 2007 decision referred to as the "Nicolau Award." (Ex. B, ¶¶ 26, 27). The Nicolau Award disregarded date-of-hire seniority principles in favor of granting super seniority to more junior West pilots ostensibly based on a snapshot approach of the respective airlines' economic status. (*Id*. at ¶¶ 26, 27). The impact of the award, at the time it was issued, included the placement of West pilots with as few as two months seniority above East pilots who had more than seventeen years seniority.

Under both ALPA Merger Policy and the terms of the Transition Agreement ("TA") negotiated between ALPA and the airlines, ALPA's seniority integration bargaining proposal could only be implemented as part of a single collective bargaining agreement merging the pilot operations of the two airlines. (Dt. # 200, ¶

9) (Ex. D). Adoption of a single collective bargaining agreement, however, required prior approval of both the East and West MEC's and a majority ratification vote by their respective pilot groups. (*Id*. at ¶ 10). ALPA was never able to obtain implementation of its seniority integration bargaining proposal because the East MEC and the East pilots refused to consider any single collective bargaining agreement that incorporated the ALPA proposal embodied in the Nicolau Award. (*Id*. at ¶ 15).

ALPA attempted to break the impasse by sponsoring intense efforts to force a compromise between the US Airways MEC and the America West MEC. ALPA's efforts failed because the West MEC refused to consider any modification of the Nicolau Award. ALPA acknowledged that an impasse of indefinite duration had arisen. (*Id*.). This impasse, among other things, meant that the pilot group could not obtain company-offered wage and retirement improvements, which were contingent on the adoption of a single collective bargaining agreement.

On April 18, 2008, ALPA was de-certified and replaced by USAPA in a democratic vote under the auspices of the National Mediation Board (NMB), the federal agency responsible for conducting union elections in the airline and railroad industries. *US Airways*, 35 NMB 135 (2008). The NMB provides a process for filing objections to the election process; however, no objections were

filed.

On September 30, 2008, USAPA Merger Committee presented its first seniority integration proposal to US Airways. (Ex. B at ¶ 46). The seniority integration proposal provided for a combined seniority list based on date-of-hire seniority principles with reasonable conditions and restrictions to protect each pilot's un-merged career expectations. (*Id*. at ¶ 52). USAPA's proposal has neither been agreed to nor implemented by the Company. To date, the two pilot groups remain in separate operations just as they had under ALPA. (*Id*. at ¶ 44).

This case arose in September 2008 when the six named Respondents, financed by a private corporation, brought suit in federal court against US Airways and USAPA. Plaintiffs alleged in Counts One and Two that US Airways had unlawfully furloughed West pilots in violation of the Transition Agreement and demanded implementation of the seniority list embodied in the Nicolau Award. *Addington v. US Airline Pilots Ass'n*, 588 F. Supp. 2d 1051, 1058 (D. Ariz. 2008). Plaintiffs alleged in Count Three that USAPA had violated its duty of fair representation ("DFR") by, *inter alia*, inducing the contractual breaches alleged in Counts One and Two and by its failure to adopt the Nicolau List as its bargaining proposal.

The District Court dismissed all claims against the Company on the grounds

that they involved issues of contractual interpretation that were within the exclusive jurisdiction of an arbitral forum known as the System Board of Adjustment. *Id*. at 1063-64. Despite the District Court's finding that "Count 2 is inseparable from Count 3" (Oct. 28 Tr., Dt. # 80 at p. 43, line 2) (Ex. G), the court retained jurisdiction of all of the Count Three claims against USAPA. *Addington*, 588 F. Supp. 2d at 1068.

Following dismissal of Counts One and Two against US Airways on the grounds that a System Board of Adjustment had exclusive jurisdiction over the underlying claims, USAPA made arrangement for these contractual claims to be heard before the System Board on January 8-9, 2009. Respondents rejected the offer despite their knowledge that the next available hearing dates were in late May, 2009. The District Court's determination to proceed to trial in late April threatens to pre-determine contractual interpretation issues that are within the exclusive jurisdiction of the System Board.

The District Court has prohibited any summary judgment motions despite the fact that the court's sole rationale for rejecting USAPA's ripeness argument – that the Respondents had alleged a deliberate delay in the negotiating process – had been uniformly disavowed by the Respondents' deposition testimony.

Before entry of a Case Management order, on March 3, 2009, the District

Court set a jury trial date of April 28, 2009. (Dt. # 224). On March 10, 2009, the Court granted Respondents' motion for class certification under Rule 23(b)(2) (i.e. an injunction class). A motion to reconsider setting trial for April was denied on March 11, 2009. (Dt. # 250).

IV. QUESTIONS SOUGHT TO BE APPEALED.

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

V. ARGUMENT.

Appeal is authorized by Fed. R. Civ. P. 23(f) and should be permitted because:

A. The District Court Lacks Subject Matter Jurisdiction.

Appeal should be permitted, certification reversed, and the case remanded with instruction to dismiss, because the District Court lacks subject matter jurisdiction, which is a necessary prerequisite to any class certification. First, this

case is not ripe for adjudication. Second, the District Court lacks subject matter jurisdiction because Respondents' Count Three claim against USAPA is "inseparable" from the claims that the District Court determined were within the exclusive jurisdiction of the System Board of Adjustment. Third, any issue related to USAPA's adoption of its constitutional seniority integration policy is within the exclusive jurisdiction of the National Mediation Board.

As a threshold matter, it is appropriate and necessary that this Court should consider whether the District Court has subject matter jurisdiction over this case. *Olden v. Lafarge Corp.*, 383 F.3d 495, 498 (6th Cir. 2004) ("The question of subject matter jurisdiction is a prerequisite to class certification and is therefore properly raised in [a] Rule 23(f) appeal."). The Court may consider this either in the "open grant of discretion" the drafters of Rule 23(f) intended, *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 957 (9th Cir. 2005), or as "manifest error of law," *Id*. at 959, or as a matter outside the three categories of usual review, *Id*. at 960 ("We acknowledge the possibility that a petition that does not fit within any of the foregoing situations may be worthy of interlocutory appeal"). *See also Poulos v. Caesars World Inc.*, 379 F.3d 654, 659 (9th Cir. 2004) ("We address subject matter jurisdiction as a threshold matter").

1. This Case Is Not Ripe For Adjudication.

Whether a District Court has subject matter jurisdiction due to a lack of ripeness is reviewed *de novo*. *Verizon Cal., Inc. v. Peevey*, 413 F.3d 1069, 1072 (9th Cir. 2005); *Mfg. Home Cmtys. Inc. v. City of San Jose*, 420 F.3d 1022, 1025 (9th Cir. 2005). Here, the instant case is not ripe.

Ripeness cannot be based on a contingent future event. "An issue is not fit for review if 'it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). In the context of collective bargaining, the Supreme Court – and the Ninth Circuit – have consistently recognized that it is only the "*final product*" of the bargaining process that may constitute evidence of a DFR violation. *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 79 (1991) (emphasis added); *Marquez v. Screen Actors Guild, Inc.*, 124 F.3d 1034, 1037 (9th Cir. 1997). A mere intent to make a collective bargaining proposal, or the making of a bargaining proposal, does not create a ripe controversy. *O'Neill*, 499 U.S. at 79. *See also Federal Express Corp. v. Air Line Pilots Ass'n*, 67 F.3d 961, 964-65 (D.C. Cir. 1995) (an exchange between negotiators against the backdrop of ongoing negotiations does not create a case or controversy); *Huff v. Int'l Union of Sec. Officers*, 2002 U.S. Dist. LEXIS 2003, at *17-18 (N.D. Cal. Jan. 31, 2002) (finding DFR cause of

action based on proposed union affiliation "not yet ripe" and noting that it "would be entirely premature for the court to act in regard to an affiliation that has yet to be voted on by union members . . . [because] the affiliation may not be ratified."); *Dolan v. Ass'n of Flight Attendants*, 1996 U.S. Dist. LEXIS 3342, at *14 (N.D. Ill. Mar. 20, 1996) ("whether the union has acted in an arbitrary, discriminatory, or bad faith manner by adopting a particular bargaining position is an issue that is not appropriate for judicial decision"); *Fraternal Order of Police v. Yablonsky*, 867 A.2d 658, 663 (Pa. Commw. Ct. 2005) ("any controversy arising from the impact . . . on the negotiations or arbitration between the City and the FOP will not be ripe until after the bargaining and arbitration process is completed.").

In this case there is *no dispute* that the alleged DFR claim against Petitioner is not based on any "final product" of negotiation, because no contract has been formed. Rather, this case is based only on *intent*. Petitioner had not even made a seniority integration proposal when the case was commenced, and there is no dispute that no CBA has been tentatively agreed to, let alone signed, ratified or implemented. Since Respondents' entire lawsuit is based on the alleged unlawfulness of a bargaining proposal that has neither been agreed to nor implemented, no ripe case or controversy can be said to exist.

In the context of USAPA's Motion to Dismiss, and prior to any discovery,

the District Court had found ripeness based solely on the Respondents' alternatively pled factual allegation that Petitioner was "deliberately delaying" the negotiation of a single collective bargaining agreement, thereby triggering immediate harm. *Addington*, 588 F. Supp. 2d at 1062 ("It satisfies the constitutional case or controversy requirement to allege, as the Plaintiff West Pilots have, that USAPA has breached its duty by deliberately delaying the single collective bargaining agreement..."). But subsequently it has become an undisputed fact that USAPA is and has been negotiating for a single CBA. In their deposition testimony, all six putative class-representatives *disavowed* any pleading that Petitioner deliberately engaged in a negotiation delay. Moreover, Respondents have now *conceded* this point. Only days before the filing of this Petition, Respondents admitted in a filing to the District Court that:

> While USAPA seeks to delay this litigation, *it is working hard to finalize negotiation and approval of a date-of-hire single collective bargaining agreement* with the company.

(Dt. # 239 at 7:23) (emphasis added). In other words, this class action does not concern an implemented contract proposal, it does not concern a refusal to bargain for any contract, rather it only concerns what has not yet been put into a contract under negotiation – a pure future contingency.

Furthermore, *even the District Court has now recognized* that there is no

factual dispute that Petitioner is currently negotiating towards a single contract. In the class certification order, the District Court directly contradicted the sole basis upon which it originally determined this matter to be ripe, by recognizing that the Petitioner is not in fact delaying bargaining but rather currently negotiating:

> Similarly, Plaintiffs are not deficient for acknowledging in depositions that USAPA is not delaying negotiations (as previously asserted) *but is currently negotiating toward a single CBA* on terms inconsistent with the Nicolau Award.

(Ex. A at 10:14) (emphasis added). Consequently, there is *no longer any factual dispute* concerning the issue of whether Petitioner is "deliberately delaying" the negotiation process, just as there is no fact dispute that no contract has yet been negotiated. As a result, the District Court has certified a class action based solely on a claim that Petitioner *intends to negotiate* in a certain manner, not on any *final product* of collective bargaining. Under *O'Neill* and its progeny, therefore, this case should not be certified for class action and set for trial in April, 2009, but rather, because it is not ripe it should be dismissed for lack of subject matter jurisdiction. *William St. Clair v. City of Chico*, 880 F.2d 199, 202 (9th Cir. 1989) ("the issue of ripeness has nothing to do with the merits ... a district court errs if it submits the issue to the jury").

2. This Dispute Is Within The Exclusive Jurisdiction Of The System Board Of Adjustment.

Count Three of Respondents' complaint, to which USAPA is subject to trial,

was expressly pled to allege that Defendant violated its duty of fair representation in part by causing the company to violate the collective bargaining agreement. (Ex. C, ¶¶ 112, 118, 119). Nevertheless, the District Court has held that all of the Count One and Two allegations of contractual breach that underlie the Count Three DFR claim are within the exclusive jurisdiction of the Transition Agreement System Board. *Addington*, 588 F. Supp. 2d at 1063-63.

In addition to the overlap between Respondents' Count Three DFR claim and their Count One/Two claims of contractual breach, USAPA anticipates that the System Board will address several issues that could have a dispositive impact on the Respondents' Count Three DFR claim, including whether the Transition Agreement created any contractual obligation for continued adherence to the failed ALPA Merger Policy.

The District Court lacks jurisdiction because the System Board of Adjustment maintains exclusive jurisdiction over all of these overlapping contractual issues. This is especially so given the District Court's recognition of the "inseparable" nature of these claims. Proceeding with the instant case subverts Railway Labor Act policy of granting the System Board exclusive jurisdiction over all contractual disputes. *Consol. Rail Corp. v. Ry. Labor Executives Ass'n*, 491 U.S. 299 (1989).

3. The NMB Has Exclusive Jurisdiction Over All Election-Related Disputes.

If the District Court is now proceeding on the thesis that no proposal within the broad parameters of the USAPA Constitution could satisfy the DFR standard, then this case arose no later than the pilot group's adoption of that Constitution through the NMB certification process. Indeed, in denying USAPA's motion to dismiss, the District Court relied on what it deemed to be analogous case law in which a union improperly won an election by promising to endtail another employee group. *Addington,* 588 F. Supp. 2d at 1060 (*citing Truck Drivers & Helpers, Local Union 568 v. NLRB,* 379 F.2d 137, 145 (D.C. Cir. 1967)). In that case however, 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. Thus, *Truck Drivers* confirms once more that the District Court lacks subject matter jurisdiction because the NMB has exclusive jurisdiction under the RLA to determine union representation disputes. *McNamara-Blad v. Ass'n of Prof'l Flight Attendants,* 275 F.3d 1165, 1170, n.1 (9th Cir. 2002).

B. Class Certification Is A "Death Knell" Because It Paralyzes Ongoing Collective Bargaining.

ALPA Merger Policy, through its disregard of date-of-hire seniority principles, resulted in a seniority integration proposal that was deeply offensive to the East pilot group. As the Respondents themselves have conceded, neither the

East MEC nor the East pilot group would approve a CBA that incorporated that proposal. Recognizing the resulting *impasse*, ALPA brought extreme pressure on the West MEC to agree to a modification of the ALPA seniority integration proposal. The West MEC, however, adamantly refused to consider any modification, thereby further cementing the impasse. This impasse has directly resulted in the inability of US Airways pilots – both East and West – to obtain wage and benefit increases that have been offered by the Company as part of an integrated collective bargaining agreement. (Ex. D ¶¶ 8-21).

The injunctive relief that the Respondent class now seeks would compel Petitioner to: 1) adopt *ALPA's* bargaining proposal in ongoing negotiations and, 2) subject any negotiated agreement to *separate* ratification votes by the East and West pilots respectively. (Ex. C, ¶ 123). In short, the Respondents seek injunctive relief that would *return East and West pilots to the political stalemate* that existed under ALPA Merger Policy.

Despite the fluid and ongoing collective bargaining process and the necessity of ratification by a majority vote upon its completion, the District Court certified a class including all pre-merger West pilots. In so doing, the District Court has concluded that all West pilots share a common *preference for indefinite stalemate* as contrasted with the yet undefined economic benefits and seniority

protections that a single CBA would provide. (Ex. D, ¶ 21). Therefore, the District Court's certification determination presents a "death knell" situation for Petitioner by paralyzing the negotiating process.

In the context of a dynamic negotiating process, Petitioner is no longer free to gauge the mix of interests within the two pilot groups and balance these interests in a manner that might produce a ratifiable contract consistent with Petitioner's DFR obligations. Instead, the District Court's certification pre-determines that no combination of elements contained in a future collective bargaining agreement would outweigh the certified class's supposed interest in reinstating a proposal whose benefits, even under ALPA, were wholly illusory. Thus certification sounds a death knell for Petitioner that will condemn the Respondent class members as well.

C. The District Court Ignored The Record On Adequacy Of Class Representatives And Denied An Evidentiary Hearing That Would Have Obviated The Error.

The District Court abused its discretion in its grant of certification by relying on the following finding, because it is contrary to the record and because the Court denied Petitioner's request for an evidentiary hearing, which would have obviated the error:

> There is no issue as to Plaintiffs' abilities to discharge their fiduciary obligations. ... The *record shows that Plaintiffs were provided with an*

> *explanation of their fiduciary duties* when the complaint was amended to allege a class action.

(*See*, Ex. A, p. 10:19) (emphasis added).

First, the record in the form of deposition testimony of all the named class representatives indicates just the *opposite*, i.e. they were either *not* provided with an explanation of their fiduciary duties, or they were ignorant of them. (Dt. # 195 at 10). Second, Petitioner requested an evidentiary hearing (on the record, March 3, 2009; Tr. 5:6) that would have obviated this mistake, but the District Court denied a hearing, and did so arbitrarily, even after it had ordered the parties to prepare a pre-hearing statement illustrating evidence and issues for a hearing (Dt. # 210).

In the face of serious questions about the adequacy of the putative class representatives, the District Court's decision to ignore the record coupled with denial of Petitioner's request for an evidentiary hearing that would have obviated this error, amounts to a failure to conduct the sort of rigorous analysis and detailed findings required by Rule 23.[3] *Molski v. Gleich*, 318 F.3d 937, 946 (9th Cir. 2003); *In re Hydrogen Peroxide*, 552 F.3d 305, 309 (3d Cir. 2008).

---

[3] In addition, denial of a hearing completely foreclosed Petitioner from challenging other assumptions the District Court made about the adequacy of representation including, for example, reliance on evidence (emails) cited by Respondents (Dt. # 214, p. 5, fn. 2) which the Court refused to compel disclosure of (Dt. # 207).

D. The District Court Certified A (b)(2) Class That Includes Damages That Should Preclude A (b)(2) Class.

After Respondents filed their motion for class certification, the District Court opined that the "West pilots' dues claims are framed as restitutionary, but even equitable monetary awards weigh against injunction-class certification." (Dt. # 155 at 2)(Ex. H). Nevertheless, the District Court certified a (b)(2) injunction class that contains money damage claims masquerading as "disgorgement." (Ex. A, p. 3:26),[4] and did so while openly questioning – and correctly so – that the dues-related disgorgement remedy not only lacks any legal basis but was never even pled by Respondents. (Ex. A, 6:20).

In order to proceed with class certification pursuant to Rule 23(b)(2), any "claim for monetary damages must be secondary to the primary claim for injunctive or declaratory relief." *Molski*, 318 F.3d at 947. Secondary damages are those "that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." *Id.* at 949.

---

[4] Several courts have held that *disgorgement is not relief* contemplated under Rule 23(b)(2). *See, e.g., Sugai Prod., Inc. v. Kona Kai Farms, Inc.*, 1997 U.S. Dist. LEXIS 21503 at *30 (D. Haw. Nov. 19, 1997); *Cason v. Nissan Motor Acceptance Corp.*, 212 F.R.D. 518, 521 (M.D. Tenn. 2002); *Owner-Operator Indep. Drivers Ass'n v. New Prime, Inc.*, 213 F.R.D. 537, 545 (W.D. Mo. 2002), *aff'd*, 339 F.3d 1001 (8th Cir. 2003), *cert. denied*, 541 U.S. 973 (2004); *Clay v. American Tobacco Co., Inc.*, 188 F.R.D. 483 (S.D. Ill. 1999).

The monetary dues related damages sought on behalf of the class would involve hundreds of thousands of dollars and painstaking individualized factual analyses relating to dues and agency fee calculations, membership status, individual pilot settlements and other case specific issues. Accordingly, the inclusion of these claims for money damages in the form of disgorgement invalidates granting a (b)(2) certification.

VI. CONCLUSION.

Petitioner respectfully requests that this Court grant its petition for an immediate appeal under Fed. R. Civ. P. 23(f), deny class certification, and remand with instructions to dismiss the case for lack of subject matter jurisdiction.

RESPECTFULLY SUBMITTED this 17th day of March, 2009.

By _____
Lee Seham, Esq.

Stanley Silverstone, Esq.
Nicholas Granath, Esq.
Lucas K. Middlebrook, Esq.
Seham, Seham, Meltz & Petersen, LLP
445 Hamilton Avenue, Suite 1204
White Plains, New York 10601
Tel: (914) 997-1346

Stanley Lubin, Esq.
Lubin & Enoch, P.C.
349 North 4th Avenue
Phoenix, AZ 85003-1505
(602) 234-0008

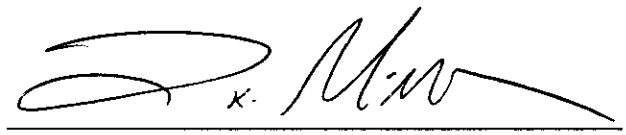
Attorneys for Defendant-Petitioner US Airline Pilots Association

CERTIFICATE OF SERVICE

I hereby certify that on the 17th of March, 2009, I caused the document to which this certificate is attached to be delivered to the following as indicated:

Marty Harper — *via* messenger
Donald Stevens
Kelly Flood
Andrew Jacob
POLSINELLI SHUGHART, P.C.
Security Title Plaza
3636 N. Central Ave., Suite 1200
Phoenix, AZ 85012
Phone: (602) 650-2000

Declared under penalty of perjury dated this 17th of March, 2009.



Lucas K. Middlebrook