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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Don ADDINGTON, *et al.*, Plaintiffs, vs. US AIRLINE PILOTS ASSOCIATION, *et al*, Defendants.	Case No. 2:08-CV-1633-PHX-NVW (Consolidated) **PLAINTIFFS' RESPONSE TO:** ***DEFENDANT'S MOTION FOR ORDER TO SHOW CAUSE REGARDING STAY OF PROCEEDINGS PENDING APPEAL***
Don ADDINGTON, *et al.*, Plaintiffs, vs. Steven H. BRADFORD, *et al.*, Defendants.	Case No. 2:08-CV-1728-PHX-NVW

Plaintiffs file their response opposing *Defendant's Motion For Order To Show Cause Regarding Stay Of Proceedings Pending Appeal* (doc. 260). The Court should reject USAPA's filing outright, without scheduling any hearing or further briefing, because it has no merit and is improperly intended only to delay this litigation. This Response is supported by the Memorandum of Points and Authorities that follows.

MEMORANDUM OF POINTS AND AUTHORITIES

I. OVERVIEW

Although Rule 23(f)[1] provides for interlocutory appeal of a class certification order, appeal is not a matter of right and is granted by the Ninth Circuit under very limited circumstances that are clearly not present here. Until and unless the Ninth Circuit were to grant USAPA permission to appeal class certification, this Court should not even consider granting a stay. In this instance, neither the factors that warrant a stay nor the factors that warrant granting permission to appeal are present. The Court should, therefore, reject USAPA's filing styled as an "order to show cause" and proceed with the present trial schedule.

II. LEGAL 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 Grant Permission to Appeal is Entirely Discretionary

Appeals are generally limited to final decisions on the merits. 28 U.S.C. § 1291. Because class certification rulings are interlocutory, they are 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), which permits, but does not require, interlocutory appeals from 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

1 "Rule" refers to the Federal Rules of Civil Procedures unless otherwise noted.

> in the district court unless the district judge or the court of appeals so orders.

Rule 23(f).

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

2. The Question of a Stay is Not Ripe.

Rule 23(f), which is the only basis on which USAPA asks for a stay, provides discretion to grant a stay in those few cases where the court of appeals takes the unusual step of granting a "petition for permission to appeal." FRAP 5(a). Plaintiffs find no instance of a court staying trial proceedings before the court of appeals addresses whether it will, in fact, permit an appeal. USAPA cites no such authority. USAPA, therefore, has no basis to ask for a stay the very same day that it filed its Rule 23(f) petition with the Ninth Circuit.

Because Rule 23(f) petitions are so rarely granted, it makes no sense to stay proceedings merely because such a petition has been filed. *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"). Indeed, there is a strong policy against granting unnecessary stays under Rule 23(f) 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).

Plaintiffs show that none of the factors are present here that favor granting permission to appeal and none of the factors are present here that favor granting a stay if permission to appeal were granted. There is, therefore, no reason to delay this trial, no reason to stay the proceedings, and frankly not even a reason to consider doing so.

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

By this point, the Court is well educated that USAPA's litigation strategy is delay and nothing more.

> 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 (03/16/09).)

Indeed, the present filing is the thirteenth USAPA filing in this case that appears primarily intended to cause delay. The entire list of such filings is as follows:

- *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.)

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). Courts do not, and should not, "countenance such a shameless effort to unjustifiably prolong litigation." *In re Zelis*, 66 F.3d 205, 207 (9th Cir. 1995).

C. This Matter Neither Meets The Standards To Grant Rule 23(f) Review Nor the Standards to Stay Trial Proceedings During Such Review.

1. A decision to grant a stay requires the type of analysis applied to grant preliminary injunctive relief.

To decide whether to stay district court proceedings, courts employ an analysis similar to that used in motions for preliminary injunction. *Chamberlan v. Ford Motor Co.*, 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."); *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, four-factor balancing 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 v. Equifax Check Services, Inc.*, 181 F.3d 832, 835 (7th Cir. 1999) ("[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."); *Daniels v. City of New York*, 138 F.Supp.2d 562, 564 (S.D.N.Y. 2001) (same); *West Tenn. Assoc. Builders v. City of Memphis*, 138 F.Supp.2d 1015, 1027 (W.D. Tenn. 2000). Those factors are likelihood of success on the merits and balance of hardships.

2. The relevant factors here do not support a stay.

The relevant factors here do not favor granting a stay. First, this Court correctly found that the merits of (b)(2) certification were easily established. "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).) Most of USAPA's arguments against class certification "barely merit discussion." (*Id.* at 9:23.)

> 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).) If the Court finds no difficulty on the merits of class certification, it logically must find that USAPA is highly unlikely to reverse certification on appeal. Hence, the likelihood of success factor does not favor granting a stay.

Second, whether or not the class is certified, this case is going to go to trial. There will be decisions on liability for breach of the duty of fair representation and as to whether an injunction should issue. The hardship

issue, therefore, is whether having the trial before, rather than after, any appeal of class certification would cause more harm to USAPA or to Plaintiffs.

USAPA's own words belie it having a good faith concern that it would be harmed if the jury decided class-wide duty of fair representation liability and the Court issued class-wide injunctive relief. Indeed, USAPA has argued that "an order requiring USAPA to negotiate toward the implementation of the Nicolau list would have the same impact with or without class certification thereby rendering class certification unnecessary and 'inappropriate.' " (*Resp. Mot. Class Cert.*, 16:23-17:1 (Feb. 17, 2009) (doc. 195).) If the impact would be the same, why must the trial be stayed to allow an appeal of class certification? The obvious reason is delay for delay's sake.

The Court need only consider the delay caused by the stay in the *Duke's* case, which was a Rule 23(f) appeal, to see that a stay here would cause Plaintiffs substantial harm. In *Dukes*, fourteen months elapsed between the class certification order and argument on the Rule 23(f) appeal of that order. *See 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 ("Argued and Submitted Aug. 8, 2005"). If the same schedule unfolded here, the Ninth Circuit would be hearing USAPA's appeal in May 2010 and it would be reporting its decision sometime thereafter. Delay for delay's sake.

This Court has repeatedly emphasized:

> [T]his … 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).)

Given that a stay will only cause delay and that USAPA is obviously seeking a stay only for that purpose, the hardships tip strongly against granting a stay.

D. The Ninth Circuit Should Not, and Will Not, Grant Review.

The circuits agree that 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.*

1. The Ninth Circuit applies a three-factor test to decide a Rule 23(f) petition.

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 Ninth 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.

Id. at 959.

In the context of appeal 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." *Chamberlan*, 402 F.3d at 960. The second element applies where the district court lacked guidance in a particular 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"). Along such lines, the Ninth Circuit has explained:

> [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). Finally, 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. Such 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, therefore, must be obvious.

2. The *Chamberlan* factors do not apply here.

(a) Death Knell

None of the Ninth Circuit's *Chamberlan* factors apply here. The first factor (death knell) does not apply because neither Plaintiffs nor USAPA will quit, whether or not the class is certified. Moreover, USAPA has no reason to quit because it and its members are protected from the sort of extreme economic pressure that underlies death-knell doctrine.

A union is protected from such pressure by the overriding federal policy to avoid "compromising the collective interests of union members in protecting limited funds." *Intl. Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 50 (1979);

see Peterson v. Air Line Pilots Assn., Intl., 759 F.2d 1161, 1167 (4th Cir. 1985) (calling this per se rule).

This same policy is 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 will neither intimidate USAPA nor its members into dropping their defense. The Court has no reason to order a stay on that basis.

(b) Unsettled Law

The second factor (unsettled law) does not apply because the Parties and the Court agreed that *Molski v. Gleich*, 318 F.3d 937, 949 & n.13 (9th Cir. 2003), was controlling. As in *Lorazepam*, therefore, the law guiding this Court's certification decision is well settled. There is no need, therefore, to order a stay so that the Ninth Circuit can re-apply *Molski*.

(c) Manifest Error

Finally, it is hard to conceive how the Ninth Circuit could grant a Rule 23(f) petition here on the basis of manifest error. It is absurd to even consider that a district court would grant a Rule 23(f) stay on the basis of manifest error. If a court believed that it made manifest error it would sooner correct that error itself than stay its proceedings and await an appeal process likely to take more than a year to complete. This Court has no reason to order a stay on such basis here.

II. CONCLUSION

Plaintiffs are not at all surprised that USAPA is trying to use Rule 23(f) to further delay the trial. The Court should reject USAPA's attempt to do so.

Plaintiffs, therefore, ask the Court to deny the stay, refuse any further briefing or argument on the issue, and proceed with trial as scheduled.

Dated this 19th day of March, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March 2009, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the ECF System for filing and transmittal.

By */s/ Andrew S. Jacob*