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

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

12 Plaintiffs,

13 v.

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

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

**DEFENDANT USAPA'S
REPLY BRIEF
IN SUPPORT OF MOTION TO STAY**

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

18 Plaintiffs,

19 v.

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

22 Defendants.

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

1 In reply to Plaintiffs' response (Doc. # 602), and in support of Defendant's
2 motion to stay (Doc. # 596), Defendant replies as follows:

3 **A. The Expedited Appeal Favors the Granting of a Stay of the Injunction**

4 As the Plaintiffs note in their response, on August 4, 2009, the U.S. Court of
5 Appeals for the Ninth Circuit granted Defendant's unopposed motion for expedited
6 treatment. (*See, Exhibit A*, attached hereto). Significantly, not only has the briefing
7 schedule been shortened but the Ninth Circuit has also ordered that the case "shall be
8 placed on the December 2009 calendar." Thus, it is now apparent that the appeal does
9 not face the prospect of an open horizon of time but rather that there is a reasonable
10 expectation that a decision could issue shortly after oral argument in December.

11 Plaintiffs concede that a stay of the injunction is not only appropriate but will
12 cause no prejudice or hardship to them. As a result of the expedited appeal, Plaintiffs
13 state that "[i]t is quite likely, therefore, that the [Ninth] Circuit will decide the appeal
14 before USAPA and the Airline complete negotiations of a CBA." (Doc. # 602 at 1:26-
15 28). USAPA agrees with that prediction. Assuming that the appeal will be decided
16 before negotiations are completed, there can be no hardship to the Plaintiffs in staying
17 the injunction because the Nicolau seniority list can **only go into effect when there is a**
18 **signed and ratified contract**. If the appeal is decided before negotiations are
19 completed, Plaintiffs cannot be harmed by a stay because the contract will not go into
20 effect during the pendency of the appeal.

21 While Plaintiffs concede that they will not be harmed or prejudiced by a stay of
22

1 the injunction, they argue that US Airways and the public will be harmed because, if the
2 injunction is stayed, USAPA “will push to negotiate separate CBAs” and – without
3 citing any evidence – Plaintiffs speculate that “[t]he disruption caused by such tactics
4 could well lead to the economic collapse of the Airline.” (Doc. # 602 at 7:10-11).

5 Plaintiffs’ unsubstantiated fear of “economic collapse” due to an alleged “push to
6 negotiate separate CBAs” in the event of a stay is absurd. The Company has already
7 been operating under separate pilot contracts since 2005, and even under the assault of
8 record fuel prices and the worst recession ever, US Airways has not collapsed. In fact,
9 even the Company’s top officers have admitted that there is no merit to the argument
10 that prolonged separate operations would harm US Airways. As explained by US
11 Airways CEO Douglas Parker in an April 24, 2008 Earnings Call, a continuation of
12 separate pilot operations would **not** cause the “economic collapse” of US Airways:

13 The one issue is we have two separate contracts in place for separate
14 groups of our pilots and we manage that very well, and we’ve been doing
15 that since the time of the merger and **yeah, we could do that indefinitely.**
Of course we could. We’ve been doing it for three years.

16 (Exhibit B, attached hereto, at 18)(emphasis added). In the same Earnings Call, US
17 Airways President, J. Scott Kirby, stated that “[i]t’s the right thing to do to get all of our
18 employees working on a single agreement, but **there won’t be a big positive financial**
19 **synergy from getting to a single agreement.**” (*Id.* at 9)(emphasis added). Clearly, the
20 Plaintiffs’ concern about “economic collapse” is unwarranted.
21
22

1 **B. The Expedited Appeal Favors the Granting of a Stay of the Damages**
2 **Trial and the Motion for Attorneys' Fees**

3 Plaintiffs also effectively concede that a stay of the damages trial pending appeal
4 is appropriate and would not harm or prejudice the Plaintiffs.¹ Plaintiffs state that “[i]n
5 light of the accelerated appeal schedule, however, Plaintiffs ask the Court to schedule a
6 trial date for March or April 2010 and to issue a pre-trial order consistent with that
7 timeframe.” (Doc. # 602 at 2:2-4). Before the order expediting the appeal, Plaintiffs
8 first sought a continuance of the August 2009 damages trial date and later requested that
9 the damages trial be scheduled to commence on January 19, 2010. (Doc. # 587 at 4:28).
10 As a result of the expedited appeal, Plaintiffs state that the damages trial should now be
11 stayed until “March or April 2010,” which coincidentally is likely after the Ninth
12 Circuit will have decided the appeal.

13 While the Plaintiffs concede that the trial should be scheduled in March or April
14 2010 “to allow the parties to focus on the appellate briefing schedule and argument that
15 will occur in December 2009,” (Doc. # 602 at 3:8-10), they disingenuously argue that
16 discovery should proceed at the same time as the appellate briefing schedule. Plaintiffs
17 claim that they seek an interlude in order to focus on the appeal, yet they inconsistently
18 demand that USAPA conduct discovery during the appellate process.

19 Plaintiffs’ statement that “USAPA suffers no cognizable hardship if it is unable

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21 ¹ Plaintiffs’ Response to USAPA’s Motion to Stay contains no opposition to USAPA’s
22 request to stay Plaintiffs’ Motion for Attorneys’ Fees pending appeal.

1 [to] stay damages litigation on the off chance that the liability judgment might be
2 reversed” (Doc. # 602 at 8:22-23) utterly fails to acknowledge that conducting the
3 significant amount of discovery that Plaintiffs envision (Doc. # 587), such as 15
4 depositions in several different states, requires the Union to spend its members’ funds
5 on litigation that may prove to be unnecessary. What Plaintiffs cavalierly call a
6 “convenience” (Doc. # 602 at 8:25) are pilot funds that are necessary to operate the
7 Union. If the Plaintiffs are intent on forcing USAPA to spend money that may later
8 prove to have been unnecessary, it would appear that Plaintiffs’ true motive is to cause
9 punitive, financial harm to the Union.

10 Irreparable harm results from the burden of litigation expenses. The prospect of
11 a new jury trial on damages has the potential to double the litigation costs to date.²
12 During this potentially unnecessary litigation, USAPA will have to use funds to defend
13 against this action that could instead support its representation functions, such as
14 ongoing collective bargaining,³ and now faces the demands of Plaintiffs for millions of
15 dollars in damages and attorneys’ fees. (Doc. # 600). This constitutes grounds to find
16 irreparable harm. *Lowden v. T-Mobile USA, Inc.* 2006 U.S. Dist. LEXIS 46424, at *4-5
17 (W.D. Wash. July 10, 2006) (litigation expenses have been held to “constitute a

18 _____
19 ² Litigation expenses associated with the damages trial will escalate quickly without a
20 stay as plaintiffs have requested the right to take an additional 15 depositions in cities
21 around the country to develop their new theory of causation that would be tried at any
22 future damages trial.

³ USAPA’s only source of funding, membership dues and agency fees, has suffered
from an ongoing dues boycott by a majority of the West pilots, which constitute up to a
third of all pilots.

1 significant hardship” so as to satisfy the second factor relevant to a request for a stay).

2 **C. A Stay Should Be Granted Because the Appeal Presents Serious**
3 **Questions of Law that are Unprecedented in the Ninth Circuit**

4 The pending appeal undoubtedly raises serious legal questions in the Ninth
5 Circuit for development of the jurisprudence of DFR law because, as this Court already
6 noted in the context of analyzing case law, there is no Ninth Circuit holding that would
7 support the judgment and injunction now entered:

8 COURT: I will consider anything. **We have an unfortunate lack of Ninth**
9 **Circuit cases in this case.**

(Trial Transcript, 5/13/09, at 32:12-13).

10 Given this judicially recognized lack of Ninth Circuit precedent, matters of first
11 impression will certainly be considered on appeal. Inevitably, this raises “serious
12 questions” for the purpose of determining whether to grant a stay pending appeal. *See*
13 *Overstreet v. Thomas Davis Med. Ctr., P.C.*, 978 F. Supp. 1313, 1314 (D. Ariz. 1997)
14 (“courts have interpreted [the likelihood of success] criterion as requiring that the
15 movant show that the appeal raises serious and difficult questions of law in an area
16 where the law is somewhat unclear”); *Stop H-3 Ass’n v. Volpe*, 353 F. Supp. 14, 16 (D.
17 Haw. 1972) (“a stay is frequently issued where the trial court is charting new and
18 unexplored ground and the court determines that a novel interpretation of the law may
19 succumb to appellate review”); *Ecommerce Innovations, LLC v. Xcentric Ventures,*
20 *LLC*, 2009 U.S. Dist. LEXIS 10535, at *8 (D. Ariz. Feb. 10, 2009) (granting stay and
21 finding that serious legal questions were raised because the appeal involved issues “that
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1 have not been addressed by the Ninth Circuit”).

2 In response, Plaintiff merely asserts in conclusory fashion that “[t]he Court had
3 substantial support for each ruling that will be appealed.” (Doc. # 602 at 4:9-10).
4 However, whether the district court’s decision is erroneous is not the analysis to be
5 undertaken when evaluating likelihood of success on appeal.

6 [T]he success on the merits factor cannot be rigidly applied. If it were so
7 applied, a stay would seldom, if ever, be granted because the district court
8 would have to conclude that it was probably incorrect in its determination
9 of the merits. Confronted with this problem, the Court of Appeals for the
10 District of Columbia recently concluded:

11 “Prior recourse to the initial decisionmaker would hardly be required as a
12 general matter if it could properly grant interim relief only on a prediction
13 that it has rendered an erroneous decision. What is fairly contemplated is
14 that tribunals may properly stay their own order when they have ruled on
15 an admittedly difficult legal question and when the equities of the case
16 suggest that the status quo should be maintained.”

17 *Himebaugh v. Smith*, 476 F. Supp. 502, 510 (C.D. Cal. 1978) (quoting *Washington*
18 *Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C.
19 Cir. 1977). This Court has recognized this is a unique case that involves difficult legal
20 questions, which may succumb to appellate review.⁴ When this is considered alongside
21 the propriety of maintaining the status quo pending USAPA’s now expedited appeal, a
22 stay is certainly warranted.

One of the cases cited by Plaintiffs in support of their assertion that USAPA has
little chance of success on appeal is *Ramey v. Dist. 141, International Association of*

⁴ COURT: [I]t may be for the Court of Appeals to give us refinement to fit a case like
this if such refinements are to be made.” (Tr. May 8, 2009 at 1883:1-2).

1 *Machinists*, 378 F.3d 269 (2d Cir. 2004). Notably, Plaintiffs do not mention that in
2 *Ramey*, shortly after the Notice of Appeal was filed, the district court issued an order
3 “that the court defer any further proceedings until after an appellate decision has been
4 rendered.” (E.D.N.Y. Case No. 99-4341, Doc. # 142, attached hereto as Exhibit C).
5 Thus, **in *Ramey*, the Court stayed the damages and attorneys’ fees phases** of the
6 case until after the Second Circuit decided the appeal.

7 USAPA respectfully submits that the Court, having claimed to follow *Ramey* in
8 the past, should follow *Ramey* now, grant USAPA’s motion for a stay and issue an order
9 that: (i) suspends and stays the permanent injunction; (ii) stays any proceedings to
10 enforce partial judgment; (iii) stays all aspects of the damages phase, and attorneys’ fees
11 litigation; (iv) and does so without terms for any bond, pending the outcome of
12 USAPA’s appeal to the U.S. Court of Appeals for the Ninth Circuit.

13 Respectfully Submitted,

14 Dated: August 14, 2009

15 By: /s/ Nicholas P. Granath, Esq.

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1 **CERTIFICATE OF SERVICE**

2 This is to certify that on the date indicated herein below true and accurate copies
3 of the foregoing documents and their attachments, *to wit*,

- 4 • Defendant USAPA's Reply Brief In Support Of Its Motion To Stay
5 • All exhibits or attachments
6 • Certificate of Service

7 were electronically filed with the Clerk of Court using the CM/ECF system, which
8 will send notification of such filing to all admitted counsel who have registered with
9 the ECF system, including but not limited, to:

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10 Further, I certify that paper hard copies shall be provided to The Honorable Neil
11 V. Wake, District Court Judge, 401 W. Washington Street, SPC 52, Phoenix, AZ 85003.

12 On August 14, 2009, by:

13 */s/ Nicholas P. Granath, Esq.*