**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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| JOHN GILDING,<br><br>Plaintiff and Appellee,<br><br>v.<br><br>NATIONAL AIR TRAFFIC CONTROLLERS' ASSOCIATION, AFL-CIO, et al.<br><br>Defendants and Appellants. | **No.** 09-15883<br><br>**CIV:** 08-2137-PHX-GMS<br>(Dist. of Arizona)<br><br>**APPELLEE'S RESPONSE TO NATCA'S MOTION FOR A STAY PENDING APPEAL** |

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

HONORABLE G. MURRAY SNOW, PRESIDING

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# INTRODUCTION

The Union requested a stay of the state court proceedings from the District Court in late April. After careful consideration of the parties' positions, the District Court denied the Union's motion.

The Union now repackages its request for the Ninth Circuit almost verbatim. In so doing, the Union improperly attempts to obtain *de novo* review of the District Court's denial of the previously-rejected request for a stay. The proper standard of review is much more stringent. Yet, even if this Court were to re-weigh the Union's request *de novo*, it is clear that the Union cannot establish entitlement to a stay of the state court proceedings pending appeal.

# LEGAL ARGUMENT

## I. STANDARD OF REVIEW

The Union erroneously asserts that this Court will review a request for a stay *de novo*.[1] When a request for a stay is rejected in the District Court, the Ninth Circuit will review the decision to determine whether it rises to an abuse of discretion. If it does not, the decision of the District Court will stand.

The District Court applies a "sliding scale" approach to determine whether to grant stays of proceedings pending appeal to the Ninth Circuit:

> "Under the traditional test, a plaintiff must show: (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases). The alternative test requires that a plaintiff demonstrate either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor. These

[1] NATCA's Motion for a Stay of the Court's Remand Order Pending Appeal, p. 5.

> two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. They are not separate tests but rather outer reaches of a single continuum."[2]

Should the request for a stay be denied, the Ninth Circuit will not apply the same "sliding scale" approach *de novo*. Instead, the Ninth Circuit will review the District Court's ruling for an abuse of discretion.[3]

## II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION

"A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence."[4]

Judge Snow cited the correct legal principle when ruling on the Union's request for a stay.[5] As such, his decision will not be upset on appeal unless his application of the facts to that legal principle constitutes a "clearly erroneous assessment of the evidence."

Judge Snow properly considered the evidence and the positions of the parties. His ruling rejects some of Gilding's arguments, as well as some of the Union's. The grounds for Judge Snow's ruling are clearly set forth in the body of

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[2] *Natural Resources Defense Council, Inc. v. Winter*, 502 F.3d 859, 862 (9th Cir. 2007).

[3] *Id.*, *citing Sports Form, Inc. v. United Press Intern, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982); *see also Regents of University of California v. American Broadcasting Corp.*, 747 F.2d 511, 515 (9th Cir. 1984); *Lopez v. Heckler*, 713 F.2d 1432, 1436 (9th Cir. 1983); *Multistate Tax Comm'n v. U.S. Steel Corp.*, 659 F.2d 931, 932 (9th Cir. 1981).

[4] *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 2461 (1990).

[5] Judge Snow's decision cites two seminal Ninth Circuit cases pertaining to applications for a stay pending appeal: *Golden Gate Rest. Ass'n v. City and County of San Francisco,* 512 F.3d 1112, 1115-16 (9th Cir.2008) and *Lopez v. Heckler,* 713 F.2d 1432, 1435-6 (9th Cir.1983).

the order. As a result, it cannot be said that Judge Snow abused his discretion in rejecting the Union's request for a stay pending appeal.

## III. EVEN IF *DE NOVO* REVIEW WERE POSSIBLE, THE UNION FAILS TO ESTABLISH THAT IT IS ENTITLED TO A STAY

### A. The Union Will Not Succeed on Appeal.

A party seeking a stay must generally show "a strong likelihood of success on the merits."[6] Gilding obviously disputes the Union's assertion that it enjoys "a very strong likelihood of success on the merits of this appeal."[7] All hyperbole aside, there are two reasons the Union will not succeed in its appeal. First and foremost, the remand statute prevents appeals of remand orders based on lack of jurisdiction. For that reason, a Motion to Dismiss is currently pending in this Court. Yet, even if the Union can somehow establish jurisdiction for its appeal, it will likely fail on the merits.

District Court Judge G. Murray Snow was well briefed on the Union's complete preemption argument. Gilding filed a Motion to Remand asserting that complete preemption did not exist, and the Union followed with a Motion to Dismiss, asserting exactly the opposite. Each side availed itself of every opportunity to file responses and replies, and both Gilding and the Union submitted multiple supplemental briefs on the issue. Judge Snow reviewed the various motions and held oral argument on the matter before issuing a thoughtful and detailed opinion remanding the case to state court for lack of federal subject matter jurisdiction.[8]

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[6] *Natural Resources Defense Council, Inc. v. Winter*, 502 F.3d 859, 862 (9th Cir. 2007).
[7] NATCA's Motion for a Stay of the Court's Remand Order Pending Appeal, p. 6.
[8] *Gilding v. Carr*, 608 F.Supp.2d 1147 (D.Ariz. 2009).

Judge Snow correctly applied Ninth Circuit precedent and determined that a defendant's conduct cannot be subject to complete preemption under federal labor law unless three factors are satisfied. First, the defendant's conduct must constitute a "personnel action" as defined in the relevant statute.[9] Second, the defendant must have had authority to take, direct of recommend the personnel action.[10] Third, and finally, Congress must have intended for the federal statute in question to create the exclusive remedy for the type of harm suffered.[11]

Judge Snow correctly applied that test to the facts of this case and ruled that Gilding's claims are not preempted. The Union cannot muster any serious

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[9] *Mangano v. United States,* 529 F.3d 1243, 1247 (9th Cir. 2008); *Collins v. Bender,* 195 F.3d 1076, 1079 (9th Cir. 1999); *Brock v. United States,* 64 F.3d 1421, 1424-25 (9th Cir. 1995).

[10] *United States v. Fausto*, 484 U.S. 439 (1987) (claim against Dept. of the Interior); *Bush v. Lucas*, 462 U.S. 367, 368, 103 S.Ct. 2404, 2405 (1983) (Federal labor law preempts "arbitrary action by supervisors."); *Mangano v. United States*, 529 F.3d 1243 (9th Cir. 2008) (claim against the United States); *Henderson v. U.S. Air Force*, 2008 WL 454261 (9th Cir. 2008) (claim against the Dept. of the Air Force); *Mahtesian v. Lee*, 406 F.3d 1131, 1134 (9th Cir. 2005) ("The CSRA limits federal employees challenging their supervisor's 'prohibited personnel practices' to an administrative remedial system."); *Orsay v. Dept. of Justice*, 289 F.3d 1125, 1128 (9th Cir. 2002) ("The CSRA provides a remedial scheme through which federal employees can challenged their supervisor's 'prohibited personnel practices.'"); *Blankenship v. McDonald*, 176 F.3d 1192 (9th Cir. 1999) (claim by federal court reporter against her superiors); *Saul v. United States*, 928 F.2d 829 (9th Cir. 1991) (claim by Social Security Administration employee against his supervisor and area director); *Rollins v. Marsh*, 937 F.2d 134, 139 (5th Cir. 1991) (The CSRA provides "comprehensive and exclusive procedures for settling work-related controversies between federal civil-service employees and the federal government."); *Veit v. Heckler*, 746 F.2d 508 (9th Cir. 1984) (claim against the Secretary of Health and Human Services); *McAuliffe v. Rice*, 966 F.2d 979 (5th Cir. 1992) (claim against the Secretary of the Dept. of the Air Force); *Graham v. Ashcroft*, 358 F.3d 931 (C.A.D.C. 2004) (claim against the U.S. Attorney General).

[11] *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 10-11, 123 S.Ct. 2058, 2068 (2003).

challenge to the District Court's sound ruling on the merits. As a result, this factor weighs against granting the Union's request for a stay.

**B. Gilding Will be Irreparably Harmed if the Stay is Granted.**

Courts in the Ninth Circuit have recognized that loss of evidence is a legitimate harm that should be considered when determining whether to grant or deny a stay pending appeal. In *Asis Internet Services*, for example, the District Court reasoned that pausing discovery during a stay could result in irreparable harm to the affected party.[12] Ultimately, that court concluded that a spoliation instruction would be sufficient to protect Asis from harm.[13]

Placing discovery on hold in this case will result in irreparable harm to Gilding. Many of the defendants—particularly, Defendant Carr—have engaged in widespread and systematic destruction of evidence throughout this litigation, despite having received prior spoliation notices. For that reason, two motions to compel, and a variety of other discovery-related motions, are currently pending in the state court proceedings. The State Court has gone so far as to assign a Special Master to referee the discovery disputes in this case, and the initial hearing with the Special Master is scheduled for July 9, 2009.

Further delay of the State Court proceedings will give the defendants a greater opportunity to hide and destroy relevant evidence. Conversely, there is no risk of irreparable harm if the request for a stay is denied. The Union admits as much, stating "avoidance of litigation is not typically a factor considered to constitute irreparable harm."[14] For those reasons, this factor weighs heavily against granting a stay pending appeal in this case.

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[12] *Asis Internet Services v. Active Response Group*, 2008 WL 4279695 *5 (N.D.Cal. 2007).
[13] *Id.*
[14] NATCA's Motion for a Stay of the Court's Remand Order Pending Appeal, p. 9.

### C. The Balance of Hardships Does Not Tip in the Union's Favor.

For purposes of a stay request, "hardships" are usually categorized as "human suffering" or "financial concerns."[15] Financial concerns must be substantial in order to trigger entitlement to a stay.[16]

The Union erroneously cites *Stiener* for the proposition that a hardship can be established where the litigation itself is contrary to public policy. In reality, *Stiener* did not involve a request for a stay pending appeal. Instead, the defendant in that case moved to stay an upcoming case management conference, as well as alternative dispute resolution deadlines.[17] The defendant argued that a stay was in order because it had recently moved to compel arbitration and dismiss the plaintiffs' claims.[18]

The *Stiener* court did not analyze the request for a stay using the standard that is applied when a party requests a stay pending appeal. As such, it has absolutely no relevance to this case.

The Union fails to argue that "human suffering" or substantial "financial concerns" will result should its request for a stay be denied. As a result, the Union fails to establish this factor of the "sliding scale" used to evaluate stay requests.

The Union may allege that the cost of the State Court proceedings constitutes a substantial financial concern; however, this allegation would be false. *Golden Gate* makes it clear that a financial consideration will not qualify as a hardship unless the financial burden is quite substantial. The cost of the State Court proceedings does not rise to this level. Moreover, even if the cost of the state Court

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[15] *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 512 F.3d 1112, 1125-25 (9th Cir. 2008).
[16] *See Id.* (reasoning that the cost of insuring approximately 20,000 individuals is a legitimate "hardship" for purposes of a stay request).
[17] *Stiener v. Apple Computer, Inc.*, 2007 WL 4219388 *1 (N.D.Cal. 2007).
[18] *Id.*

proceedings *could* qualify as a hardship, such a hardship would be shared equally by the parties. As a result, the Union would fail to establish that the balance of such a hardship tips disproportionately in its favor.

For those reasons, this factor weighs heavily against granting a stay pending appeal in this case.

### D. Public Policy Favors Swift Resolutions of Claim on Their Merits Instead of Protracted Litigation Over Jurisdiction.

The remand statute's prohibition on appealing a remand order is specifically designed to reduce protracted litigation of jurisdictional claims and to allow for speedy adjudication of the merits of the State Court claims.[19] The remand statute "reflects Congress's longstanding 'policy of not permitting interruption of the litigation of the merits of a removed case by prolonged litigation of questions of jurisdiction of the district court to which the case is removed.' Appellate courts must take that jurisdictional prescription seriously, however pressing the merits of the appeal might seem."[20]

This clearly defined public policy favors the denial of the Union's request for a stay of the State Court proceedings so that the State Court proceedings may continue without interruption. For that reason, this factor weighs heavily against granting a stay pending appeal in this case.

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[19] *See Shapiro v. Logistec USA, Inc.*, 412 F.3d 307 (2nd Cir. 2005); *Mobil Corp. v. Abeille General Ins. Co.*, 984 F.2d 664 (5th Cir. 1993); *State of Ohio v. Wright*, 992 F.2d 616 (6th Cir. 1993); *Chandler v. O'Bryan*, 445 F.2d 1045 (10th Cir. 1971); *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530 (6th Cir. 1970); *In re MacNeil Bros. Co.*, 259 F.2d 386 (1st Cir. 1958); *Peerless Weighing & Vending Mach. Corp. v. Public Bldg. Commission of Chicago*, 209 F.Supp. 877 (N.D.Ill. 1962).

[20] *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 234, 127 S.Ct. 2411, 2421 (2007), *quoting United States v. Rice*, 327 U.S. 742, 751, 66 S.Ct. 835, 844 (1946).

## IV. CONCLUSION

The District Court did not abuse its discretion in denying the Union's request for a stay pending appeal. None of the traditional factors used by the Ninth Circuit to evaluate requests for a stay weigh in the Union's favor. The Union will not be harmed in any way whatsoever by continuing the State Court proceedings, and frankly, Gilding believes that the only reason the Union is requesting a stay at this juncture is to avoid potentially embarrassing disclosures during the discovery process in the few months remaining before the next Union election cycle.

**RESPECTFULLY SUBMITTED** this 12th day of June, 2009.

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**CERTIFICATE OF MAILING**

U.S. Court of Appeals Docket Number: 09-15883.

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 12, 2009. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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## CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 27(d)(2), the foregoing is proportionately spaced, has a typeface of 14 points or more, and consists of 8 pages.

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