Docket No. 13-1500
In the
UNITED STATES COURT OF APPEALS
for the
NINTH CIRCUIT

US AIRWAYS, INC.
Appellant,

vs.

DON ADDINGTON, *et al.*,
Appellees.

Appeal from the United States District Court
For the District of Arizona
Honorable Roslyn O. Silver, Presiding
Case No. 2:10-cv-0570-PHX-ROS

ADDINGTON (WEST PILOTS) APPELLEES' ANSWERING BRIEF

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Corporate Disclosure Statement

Appellees Addington, *et al.* and the West Pilot class (hereinafter, collectively the "West Pilots") are not a corporate entity that is required to make a disclosure of ownership.

Dated July 5, 2013,

POLSINELLI, PC
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Table of Contents

Corporate Disclosure Statement ii

Table of Authorities v

Jurisdictional Statement 1

Statement of Issue 2

Statement of the Case 3

Factual and Procedural Background 4

Legal Argument 5

A. This action is ripe 5

1. Inquiry into ripeness should focus on the precise question asked. 5

2. *Addington* was not ripe because there was insufficient immediate harm. 5

3. US Airways is situated differently here than the West Pilots were situated in *Addington*. 6

4. A declaratory ruling is ripe because it will allow US Airways to avoid making an illegal CBA. 7

B. The district court misapplied *Addington* 9

1. USAPA must have a legitimate union purpose to abandon the Nicolau Award. 9

2. The district court should have decided whether USAPA has a legitimate union purpose. 9

a. A court need not be certain that its decision would not be advisory....10

b. In other contexts, courts require only that it is substantially unlikely that changed circumstances will make a decision advisory. 11

C. Conclusion....14

Certification of Compliance....15

Proof of Service....17

Statement of Related Cases....18

Table of Authorities

Cases

Addington v. US Airline Pilots Ass'n,
606 F.3d 1174 (9th Cir. 2010) .....passim

Bernard v. Air Line Pilots Ass'n, Int'l,
873 F.2d 213 (9th Cir. 1989) 6, 7, 8

Cat Tech LLC v. TubeMaster, Inc.,
528 F.3d 871 (Fed. Cir. 2008) 12

Flores v. Arizona,
516 F.3d 1140 (9th Cir. 2008) 11

Horne v. Flores,
557 U.S. 433 (2009) 11

Int'l Harvester Co. v. Deere & Co.,
623 F.2d 1207 (7th Cir. 1980) 11, 12

Medimmune, Inc. v. Genentech, Inc.,
549 U.S. 118 (2007) 8, 10

N.D. v. State of Hawaii Dept. of Educ.,
No. 10-17909, 2012 WL 605711 (9th Cir. Feb. 27, 2012) 10

ProShipLine Inc. v. Aspen Infrastructures Ltd.,
609 F.3d 960 (9th Cir. 2010) 9

Sierra Applied Sciences v. Advanced Energy Indus.,
363 F.3d 1361 (Fed. Cir. 2004) 12

Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme,
433 F.3d 1199 (9th Cir.2006) 5

Statutes

28 U.S.C. § 1291..... 1

Jurisdictional Statement

The West Pilots agree with the jurisdictional statement of Appellant US Airways with one exception. The district court's summary judgment on Count II was neither complete nor favorable to US Airline Pilots Association ("USAPA"). (Doc. 205 at 1[ER 1]).[1] Rather, the court entered only a partial judgment on Count II and what it entered favored the West Pilots because it held that USAPA's "seniority proposal does not breach its duty of fair representation *provided it is supported by a legitimate union purpose*." (*Id.* (emphasis added).)

[1] "Doc." refers to the document number in the district court; "Dkt." refers to the document number in this Court; and "ER" refers to the page in the Excerpts of Record submitted by US Airways with its Opening Brief.

Statement of Issue

Unless USAPA has a legitimate union purpose, US Airways will suffer detriment if it agrees to a CBA that abandons the Nicolau Award. The question of legitimate purpose is ripe if it is unlikely that a change in circumstances would make a ruling advisory. Was it error for the district court to decline to address legitimate purpose if it was highly unlikely that a change in circumstances would make its ruling advisory?

Statement of the Case

For purposes of this appeal, the West Pilots agree with the Statement of the Case set out in the Opening Brief filed by US Airways. [Dkt. 17-1.]

Factual and Procedural Background

For purposes of this appeal, the West Pilots agree with the Statement of Facts set out in the Opening Brief filed by US Airways, adding only that the district court certified the West Pilot class that it defined as "[a]ll pilots employed by the airline US Airways in September 2008 who were on the America West seniority list on September 20, 2005." (Doc. 125 at 10:7 to 10:9.)

Legal Argument

A. This action is ripe.

1. Inquiry into ripeness should focus on the precise question asked.

In *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199 (9th Cir.2006) (en banc), this Court explained that the answer to a question of ripeness hinges on the "precise question" at issue:

> It is . . . important to a ripeness analysis that we specify the precise legal question to be answered. Depending on the legal question, the case may be ripe or unripe. If we ask the wrong legal question, we risk getting the wrong answer to the ripeness question.

*Id.*at 1212. The question being asked here is decidedly different than what was asked in *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174 (9th Cir. 2010). Consequently, the answer to whether the issues here are ripe for decision is also decidedly different.

2. *Addington* was not ripe because there was insufficient immediate harm.

This Court recognized in *Addington* that the question of USAPA's DFR breach could be ripe for decision at a point prior to USAPA entering into a CBA that abandons the Nicolau Award. 606 F.3d at 1181 ("We do not hold that a DFR claim based on a union's promotion of a policy is never ripe until that policy is effectuated."). This Court explained, however, that *Addington* was not ripe because there was too much uncertainty as to the immediacy of

harm to the West Pilots. *Id.* ("[T]here is too much uncertainty standing in the way of effectuation of Plaintiffs' harm to warrant judicial intervention at this stage."). In essence, this Court determined that the West Pilots could wait until USAPA made an illegal CBA before they sought judicial relief. *See id.*[2]

3. US Airways is situated differently here than the West Pilots were situated in *Addington*.

In *Bernard v. Air Line Pilots Ass'n, Int'l*, 873 F.2d 213, 218 (9th Cir. 1989), this Court affirmed an order that partly voided a post-merger CBA because it had a seniority integration provision that violated the union's DFR. US Airways is actively involved here in making a post-merger CBA that will also have a seniority integration provision. If the seniority integration provision in that CBA does not use the Nicolau Award, the West Pilots will challenge the CBA (as was done in *Bernard*) as a breach of USAPA's DFR.

US Airways, therefore, is situated here like Alaska Airlines was situated in *Bernard* when it was negotiating the CBA that was later voided for illegality. Alaska Airlines would have had a ripe declaratory claim to test

[2] The West Pilots filed Case No. 13-cv-471-PHX-ROS after USAPA and US Airways entered into a contract that abandoned the commitment to implement the Nicolau Award. As US Airways explained in its Opening Brief, the outcome in that litigation could make this appeal moot.

the legality of the seniority provision that was at issue in *Bernard*. By the same reasoning, US Airways has a ripe claim to test the legality of the date-of-hire seniority provision that is advanced here by USAPA.

US Airways, therefore, is situated differently than the West Pilots were situated in *Addington*. The West Pilots were not on the verge of taking action that might be determined to be illegal. US Airways is. That makes the DFR question ripe here.

4. A declaratory ruling is ripe because it will allow US Airways to avoid making an illegal CBA.

The legality of abandoning the Nicolau Award hinges on whether USAPA has a legitimate union purpose. US Airways seeks a ruling now that determines whether USAPA has such a purpose. If USAPA has no such purpose, US Airways can (and must) refuse to agree to a CBA that abandons the Nicolau Award. But if USAPA has a legitimate purpose, US Airways can agree to such a CBA without risking liability to the West Pilots. US Airways, therefore, is at a proverbial fork in the road. It must either agree to a CBA that abandons the Nicolau Award, or oppose a union that is steadfastly committed to abandoning the Award. That materially distinguishes the ripeness inquiry here from that in *Addington*.

The ripeness of US Airways' declaratory claim is perhaps even clearer to see by considering ripeness if USAPA brought a claim raising the same

question: whether it has a legitimate union purpose to abandon the Nicolau Award. A union should not have to violate its DFR to obtain such a ruling. *See Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 137 (2007). Surely then, USAPA would have a ripe declaratory claim if it were asking whether it would breach its DFR by making a CBA that abandoned the Nicolau Award.

There is little difference whether USAPA or US Airways brings this claim. Both parties are negotiating the same CBA that could be a DFR breach. Both parties are under pressure from the East Pilot majority to abandon the obligation set out in the Transition Agreement to implement the Nicolau Award. Both risk adverse consequences (as happened in *Bernard*) if they make a CBA that breaches USAPA's DFR. A declaratory claim would be ripe if brought by USAPA. It is no less ripe because it is brought by US Airways.

In sum, the precise legal question here is different from that in *Addington* because the status of the party asking the question is different. The West Pilots, in 2008, sought to prevent USAPA from causing them harm. US Airways here seeks to avoid liability for its actions. US Airways has a valid interest in obtaining a determination that will assist it in doing so. That makes the DFR question here ripe for decision.

B. The district court misapplied *Addington*.

1. USAPA must have a legitimate union purpose to abandon the Nicolau Award.

The district court correctly identified the legal standard that determines whether USAPA breaches its DFR by abandoning the Nicolau Award. USAPA breaches its DFR if, without a "legitimate union purpose," it makes a CBA with US Airways that would not implement the Nicolau Award seniority list. (Doc. 205 at 1 [ER 1].) None of the parties appealed that ruling. Between these parties, therefore, that ruling has preclusive effect. *ProShipLine Inc. v. Aspen Infrastructures Ltd.*, 609 F.3d 960, 968 (9th Cir. 2010). USAPA, therefore, must have a legitimate union purpose to make a CBA that abandons the Nicolau Award. The DFR question, consequently, comes down to whether USAPA has such a purpose. As explained below, the district court found (in error) that it was constrained from addressing that question on the merits.

2. The district court should have decided whether USAPA has a legitimate union purpose.

The district court determined (in error) that it was constrained by *Addington* from determining whether USAPA has a legitimate union purpose. "[T]he best 'declaratory judgment the Court can offer," it explained, "is that USAPA's seniority proposal does not automatically breach its duty of fair representation." (Doc. 193 at 8:5 to 8:7 [ER 9].) That

was error for two reasons. First, as explained above (and as argued effectively by US Airways in its Opening Brief), the ripeness ruling in *Addington* does not apply here because US Airways, as a party to the CBA under negotiation, has an immediate need for a declaratory ruling.

Second, as explained below, a court can make a declaratory ruling without being certain that it would apply to all possible future circumstances. A declaratory ruling can be based on present circumstances as long as it is unlikely that a material changes in circumstances would make the ruling advisory.

a. A court need not be certain that its decision would not be advisory.

Declaratory rulings should be withheld where they would merely be an "opinion advising what the law would be upon a hypothetical state of facts." *Medimmune*, 549 U.S. at 127. Declaratory rulings should not be withheld, however, merely because an unlikely, hypothetical change in circumstances might render that opinion advisory. If that were so, there would never be declaratory rulings because it is always possible that some such change in circumstances might occur. Courts generally disregard such remote possibilities. *E.g.*, *N.D. v. State of Hawaii Dept. of Educ.*, No. 10-17909, 2012 WL 605711, at *2 (9th Cir. Feb. 27, 2012) ("We must, of course, concede that anything is possible, but it does not follow that Appellants have

a reasonable expectation that such a series of events will occur."). Moreover, if circumstances did materially change, the rules allow a court to reconsider a declaratory ruling on that basis. *See*, *generally*, *Flores v. Arizona,* 516 F.3d 1140 (9th Cir. 2008), reversed on other grounds by *Horne v. Flores*, 557 U.S. 433 (2009). A question is ripe for decision, therefore, if it is substantially unlikely that the decision will be advisory. It need not be certain.

b. In other contexts, courts require only that it is substantially unlikely that changed circumstances will make a decision advisory.

Courts look at the likelihood that circumstances will materially change where they determine ripeness of noninfringement declaratory claims. *E.g.*, *Int'l Harvester Co. v. Deere & Co.*, 623 F.2d 1207, 1216 (7th Cir. 1980). Where the product at issue is in the early stages of development, courts generally hold that a declaratory ruling on noninfringement would be advisory (and, therefore, unripe) because it is too likely that the product could materially change before it is brought to market. *Id.* ("The existence of an actual justiciable controversy depends upon the definiteness of the plaintiff's intention to produce a particular product which presents a question of possible infringement."). A party seeking such a ruling, therefore, must establish that the product is close enough to market that

material changes in circumstances will likely not occur. *Id.* ("For a decision in a case such as this to be anything other than an advisory opinion, the plaintiff must establish that the product presented to the court is the same product which will be produced if a declaration of noninfringement is obtained.").

But there would never be declaratory ripeness if a party seeking a noninfringement ruling had to prove to an absolute certainty that there would be no material changes in circumstances. Rather, it need only establish that material changes are substantially unlikely to occur. *See Sierra Applied Sciences v. Advanced Energy Indus.*, 363 F.3d 1361, 1379 (Fed. Cir. 2004) (requiring evidence that the product's design "was substantially fixed, particularly in its potentially infringing characteristics, on the date the complaint was filed.") (emphasis added); *see also Cat Tech LLC v. TubeMaster, Inc.*, 528 F.3d 871, 881 (Fed. Cir. 2008) ("[T]he greater the length of time before potentially infringing activity is expected to occur, the more likely the case lacks the requisite immediacy.").

Although *Sierra Applied Sciences* addressed the ripeness of a patent infringement declaratory claim, the rationale underlying the decision applies more broadly. There would have been ripeness in *Sierra Applied Sciences* if there was evidence that the design of the product was substantially fixed. There should be ripeness here if there is evidence (as there is) that the

circumstances affecting USAPA's reasons for abandoning the Nicolau Award are substantially fixed.[3]

The district court declined to decide the DFR question here only because it could not say with certainty that a ruling on legitimate union purpose would apply to every hypothetical future circumstance. But, as just explained, if that degree of uncertainty (reflected in the well-worn saying that "anything is possible") defeated ripeness, no declaratory claim would be ripe. In other words, remote, hypothetical possibilities do not impact ripeness.

In sum, the district court declined to decide whether USAPA had a legitimate reason to abandon the Nicolau Award because it could not determine whether USAPA would lack a legitimate reason under every conceivable circumstance. That was error because it is the wrong standard for ripeness. This declaratory claim was ripe for decision if it was substantially unlikely that a change in circumstances would make that decision advisory. This Court, therefore, should vacate the judgment and remand for the district court to apply that standard.

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[3] USAPA was created in 2007 with a constitution that blocks implementation of the Nicolau Award. Because USAPA needs a 2/3 vote of its membership to change that constitutional provision, it is hard to conceive how USAPA's reasons could change.

C. Conclusion

The West Pilots respectfully ask that this Court vacate the judgment and remand for the district court to: (1) decide ripeness based on whether it is substantially unlikely that a change in circumstances would affect whether USAPA has a legitimate union purpose for abandoning the Nicolau Award; and (2), if there is ripeness, decide on the merits whether USAPA has such a purpose.

DATED: July 5, 2013

Respectfully submitted,
/s/ Andrew S Jacob

_____

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Certification of Compliance

Certification of compliance to Fed. R. App. 32 (a)(7)(c) and Circuit Rule 32-1 for case number 12-15941.

I certify that: (check appropriate option(s))

__X__1. Pursuant to FRAP 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is

◙ Proportionately spaced, has a typeface of 14 points or more and contains 2,403 words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

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□ This brief is being filed in a capital case pursuant to the type-volume limitations set forth in Circuit Rule 32-4 and is

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_____ 4. Amicus Briefs.

□ Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionately spaced, has a typeface of 14 points or more and contains 7,000 words or less,

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/s/ Andrew S. Jacob

July 5, 2013 _____

Date Signature of Attorney

Proof of Service

I hereby certify that I electronically filed the foregoing Brief for Appellees West Pilots 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 July 5, 2013. I certify that, other than as noted, all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. For those participants in the case who are not registered CM/ECF users, I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following persons:

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I declare under penalty of perjury under the laws of Arizona that the foregoing is true and correct and this declaration was executed on July 5, 2013 at Phoenix, AZ.

/s/ *Andrew S. Jacob*

Statement of Related Cases

Pursuant to 9th Cir. R. 28-1.6, Cross-Appellant states that it is not aware of any cases related to the instant case now pending before this Court. A related case, 13-cv-00471-PHX-ROS, is pending in the United States District Court for the District of Arizona.

DATED: July 5, 2013

/s/ Andrew S. Jacob
Andrew S. Jacob