UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-16564

Don ADDINGTON, John BOSTIC, Mark BURMAN, Afshin IRANPOUR, Roger VELEZ, and Steve WARGOCKI, *individually and representing a class of persons similarly situated*,

Plaintiffs-Appellees

v.

US AIRLINE PILOTS ASSOCIATION, *an unincorporated association representing the pilots in the employment of US Airways Inc.*,

Defendant-Appellant

Appeal from Permanent Injunction and Related Rulings Necessary Thereto by the United States District Court for the District of Arizona.
No. CV08-1633 and CV08-1728 (consolidated)
Honorable Neil V. Wake, United States District Judge

PLAINTIFFS-APPELLEES' RESPONSE IN OPPOSITION TO MOTION TO STAY JUDGMENT AND ALL OTHER PROCEEDINGS PENDING APPEAL

Marty Harper (SBN 003416)
Kelly J. Flood (SBN 019772)
Andrew S. Jacob (SBN 022516)
POLSINELLI SHUGHART, P.C.
3636 N. Central Avenue, Suite 1200
Phoenix, AZ 85012
Tel: (602) 650-2008 Fax: (602) 264-7033

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III. BACKGROUND

When America West and US Airways merged in 2005, the former US Airways pilots ("East Pilots") and the former America West pilots ("West Pilots") agreed to arbitrate a final and binding integration of their seniority lists. *See Findings of Fact & Conclusions of Law & Order*, 2:5 to 2:11, 4:2 to 5:4, & 5:14 to 5:17 (Jul. 17, 2009) ("*Findings & Concl.*") (copy attached as Ex. "A").[1] [Doc. # 593.] The East Pilots, who outnumbered the West Pilots almost two to one, refused to abide by the award from this arbitration ("Nicolau Award"). *See id.* at 5:21 to 5:22 & 6:11 to 6:23.

After shopping several law firms, a group of East Pilots found a law firm willing to guide, indeed *promote*, a scheme to disregard the Nicolau Award. *See id.* at 7:4 to 7:9 ("East Pilots formed a committee to explore how to prevent implementation of

[1] This Court gives great deference to the district court's findings of fact whether evaluating the merits of an appeal or a motion for a stay during an appeal. *See United States v. Kapp*, 564 F.3d 1103, 1112 (9th Cir. 2009). This Court defers to such findings "unless they strike [the Court] as wrong with the force of a five-week-old, unrefrigerated dead fish." *Prete v. Bradbury*, 438 F.3d 949, 968, n.23 (9th Cir. 2006).

the Nicolau Award by forming and certifying a new union with a different seniority objective."). This scheme was motivated solely to advance East Pilot seniority rights to the detriment of West Pilot seniority rights. *Id.* at 1:6 to 1:8 ("[T]he jury found in Plaintiffs' favor that USAPA had breached its duty by abandoning an arbitrated seniority list in favor of a date-of-hire list solely to benefit one group of pilots at the expense of another"). USAPA's law firm wrongly advised the East Pilots that, with majority status, they could control USAPA and that USAPA, as a different union entity, could ignore an arbitration conducted during representation by a predecessor union. *See id.* at 7:6 to 7:9. *See also* Trial Ex. ## 14, 315 (copies attached as Ex. "B" and "C," respectively).

USAPA drafted a constitution intended to create a pretextual duty to disregard the Nicolau Award. *Findings & Concl.* at 9:10 to 9:12. It made campaign promises to disregard the Nicolau Award. *Id.* at 7:15 to 7:17. Once elected, it embarked on a preordained course to disregard the Nicolau Award. *Id.* at 7:22 to 7:24. In so doing, USAPA advanced a

seniority proposal that "is far less favorable to West Pilots than the Nicolau Award." *Id.* at 8:22 to 8:24. It did all these things solely for illegitimate motives. *Id.* at 9:8 to 9:10.

The West Pilots had no option but to institute this litigation. *See*, *generally*, *id.* at 10:6 to 10:14. USAPA selected the same law firm that devised its scheme to handle its defense. *See* Trial Ex. 315 at 4-5. In essence, therefore, this law firm was put in a position of defending both itself for advising USAPA to take the actions that led to this lawsuit and USAPA for following that advice.

It was apparent early on that this lawsuit would have just two material issues: (1) whether, *as a matter of law*, liability attached if USAPA's only actual motivation in adopting and presenting its seniority proposal was to benefit East Pilots at the expense of West Pilots; and (2) whether, *as a matter of fact*, this was USAPA's only actual motivation. *See Findings & Concl.* at 20:13 to 20:15 ("Liability attached because USAPA's only actual motivation in adopting and presenting its seniority proposal was to benefit East Pilots at the expense of West Pilots.").

In ruling on USAPA's Rule 12(b)(6) motion to dismiss, the district court found that the following states a valid "claim for breach of the duty of fair representation":

> The Plaintiff West Pilots allege that the East Pilots have manipulated union procedures for their sole benefit. They formed a union whose constituted purpose was to impose a date-of-hire scheme on the minority membership in disregard of an arbitrated compromise both sides agreed to and deemed fair in advance. The Plaintiff West Pilots allege that USAPA has followed through on that aim without any corresponding benefit to the pilots as a whole.

Order, 11:11 to 11:19 (Nov. 20, 2008) ("*Rule 12 Or.*") (copy attached as Ex. "D"). [Doc. # 84.] The district court explained the law as follows:

> Minority rights imply a limitation on rights of the majority. The union majority may not discriminate against certain members without a rational basis for doing so, grounded in the aggregate welfare of its employees.

Id. at 12:19 to 12:22 (alteration marks and citation omitted). The court, therefore, held in Plaintiff's favor, in regard to the first issue.

Given that the one controlling legal issue was decided in November, 2008, and that there was only one controlling factual issue, USAPA defended this case with unnecessary vigor. Perhaps this was because the defense team was defending itself as well as its client. Perhaps it was a coldly calculated attempt to outspend and exhaust Plaintiffs before they could obtain a verdict.

USAPA took advantage of every possible legal maneuver to delay a decision on the merits and to expand the costs of the litigation. USAPA, through its defense team, demanded substantial amounts of irrelevant discovery, filed unnecessary motions repeatedly raising the same issues, engaged in hostile and abusive practice against Plaintiffs personally, and repeatedly tried legal maneuvers to stay or continue these proceedings.[2]

USAPA repeatedly filed motions for no apparent purpose other than to cause delay. *See Plts.' Resp. Def.'s Mot. OSC Re. Stay Proc. Pend. Appeal*, 4:20 to 5:7 (Mar. 19, 2009) (in response to motion for Rule 23(f) stay, enumerating thirteen items that

[2] This motion is but one more example.

USAPA filed for what appears primarily intended to delay the litigation). [Doc. # 270.] USAPA filed multiple motions for directed verdict or its equivalent, generally each time repeating the same arguments. [Doc. ## 418, 444, 445, 451, 567, 568.] In these motions, USAPA frivolously argued "the Plaintiff West Pilots have sued too early and too late." *Rule 12 Or.* at 13:20 to 13:21. On multiple occasions, the district court rejected USAPA's repeated argument that both the NMB and the System Board had exclusive jurisdiction to remedy breach of that duty. *See Findings & Concl.*, at 35:15 to 35: 17 (citing for examples, doc. ## 84, at 17-22; 104; 250 at 2; 288 at 3).

USAPA continued to show bad faith conduct at trial. For example, defense counsel advanced pretextual arguments throughout the trial on behalf of USAPA. *See Findings & Concl.,* at 26:11 to 26:12. One such pretext was USAPA's claim that its motivation was to overcome an impasse between West and East Pilots. The Court found, in regard to that claim, "The evidence well supports the conclusion, implicit in the verdict and

persuasive to the Court, that any asserted impasse was a pretext for bare favoritism of the East Pilots." *Id.* at 26:17 to 26:18.[3]

The jury saw though USAPA's pretextual arguments and found in favor of Plaintiffs with only an hour or two of deliberation. Following a bench trial on injunctive remedy, the district court ordered injunctive relief as follows.

> [T]hat Defendant US Airline Pilots Association and its officers, committees, representatives, agents, and all persons in active concert and participation with them are permanently enjoined and ordered to:
>
> A. Immediately, and in good faith, make all reasonable efforts to negotiate and implement a single collective bargaining agreement with US Airways that will implement the Nicolau Award seniority proposal unmodified, according to its terms;
>
> B. Make all reasonable efforts to support and defend the seniority rights provided by or arising from the Nicolau Award in negotiations with US Airways; and
>
> C. Not negotiate for separate collective bargaining agreements for the separate pilot groups, but rather negotiate for a single collective bargaining agreement for both pilot groups that incorporates the Nicolau Award. This injunction does not restrain USAPA from pursuing

[3] Advancing pretextual arguments is not a valid litigation tactic because pretext, by definition, is dishonest. BLACK'S LAW DICTIONARY, 1206 (7th ed. 1999) ("**pretext** . . . A false or weak reason or motive advanced to hide actual or strong reason or motive.").

> its rights under Section 6 of the Railway Labor Act, consistent with the previous sentence.

Part. Judg. & Perm. Inj., 2:21 to 3:3 (Jul. 17, 2009) (copy attached as Ex. A to *Def.-Appellant's Mot. Stay Judg. & All Other Proc. Pend. Appeal*). [Doc. # 594.]

USAPA moved for a stay of the injunction in the district court. [Doc. # 596.] The district court denied this motion, finding that none of the four *Hilton* factors weighed in favor of a stay. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). *Order*, 3:7 to 5:7 (Aug. 28, 2009) (copy attached as Ex. "E"). [Doc. # 610.] In its Order, the district court explained its findings as follows:

First, the court found that "USAPA has not made a strong showing of likely success on the merits" because the court "based its jury instructions and equitable judgment upon an established and essentially harmonious line of fair representation liability cases spanning several circuits, including this one." *Id.* at 3:7 to 3:10. The court noted that it was not "forced to choose between two lines of irreconcilable precedent," and that no court has "expressed doubt about the continuing viability of existing precedent." *Id.* at 3:12 to 3:14.

Second, the district court found that "USAPA . . . failed to show that any hardship would result to it from enforcing the injunction during the appeal." *Id.* at 3:18 to 3:19. It explained that the injunction would only affect USAPA's efforts to re-open seniority rights issues that US Airways has agreed to and does not oppose. *See id.* at 3:24 to 3:25. It found, under the facts of this matter, that there was no "legitimate connection between the negotiation of seniority rights and the negotiation of other economic terms for the pilot groups as a whole." *Id.* at 3:22 to 3:24.

The court concluded, to the extent that something is obstructing collective bargaining,

> it is not the enforcement of the injunction that obstructs bargaining, but rather the existence of this lawsuit and the pendency of the appeal. To stay the injunction and allow USAPA to abandon the Nicolau Award as its bargaining position would not hasten negotiations by any means.

Id. at 4:11 to 4:14.

Most importantly, the district court concluded in regard to USAPA's motivation to seek a stay during this appeal:

> It would only **enable USAPA to engage in the very activity that this Court has ruled unlawful:** negotiating for a seniority list other than the Nicolau Award, and negotiating for separate CBAs for the two pilot groups.
>
> In the same way, a stay of the injunction would **impose a hardship on the Plaintiff West Pilots.** While the appeal is pending, the standing judgment of the Court is that USAPA deprives the West Pilots of fair representation when it adopts, promotes, and negotiates a seniority proposal other than the Nicolau Award for no legitimate purpose, only to discriminate between the two pilot groups. To stay the injunction **would allow USAPA to persist in this abuse of its representational function and resources.**

Id. at 4:14 to 4:22 (emphasis added).

Third, in regard to the effect on public interest, the district court found that "the relief USAPA seeks would have no impact" on "the operations of a major airline in a troubled national economy." *Id.* at 4:24 to 4:27.

Fourth, in regard to substantial questions of law, the district court found, "regardless that this case presents questions that touch on core issues of federal labor policy, including the power of a union to resolve internal disputes by a binding neutral procedure even when the outcome is unpopular, [that] . . . does not justify a stay." *Id.* at 5:2 to 5:6.

The district court denied also USAPA's request for a stay of the entire litigation during the appeal. It did so at a hearing held on August 20, 2009. *Civil Minutes* (Aug. 20, 2009) (copy attached as Ex. "F"). [Doc. 606.] In so doing, the court set a schedule from August through October for Plaintiffs to file an amended complaint and a memorandum in support of their motion for an award of attorneys' fees and for USAPA to file a motion to dismiss. *Id.*

Although it was staying discovery for a few months, the court offered the following explanation as to why it was not staying other aspects of the litigation during the appeal:

> THE COURT: What I am most concerned about in this and in most cases is keeping the case moving along without delay because of the economy it gives to both sides. You don't forget the work you have done. You don't have to go reinvent the wheel. You keep -- both clients remain attentive and motivated to do the things that they have to do. And that shortens the -- and also, it makes it harder if anyone is tempted to just run up the bill with unnecessary discovery if you have a finite time to get it done.

Hearing Tr., 28:8 to 28:16 (Aug. 20, 2009) (copy attached as Ex. "G").

On August 4, 2009, this Court granted a stipulated motion for an accelerated schedule, ordering that "[t]his case shall be placed on the December 2009 calendar."

On August 28, 2009, the district court filed its Order denying USAPA's motion for a stay. [Doc. # 610.] USAPA filed this motion that same day.

IV. ARGUMENT

A. Standard of decision.

Although 28 U.S.C. § 1292(a)(1) allows immediate appeal of an injunction, "[a] stay is not a matter of right." *Virginian R. Co. v. United States*, 272 U. S. 658, 672 (1926). To obtain a stay, an appellant such as USAPA must satisfy the same four-factor analysis used for preliminary injunctive relief. *Nken v. Holder*, ___ US ___, 129 S.Ct 1749, 1753 (April 22, 2009).

> The factors regulating issuance of a stay [include]: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Natural Resources Defense Council, Inc. v. Winter, 502 F.3d 859, 863 (9th Cir. 2007). The Ninth Circuit analyzes these factors as

"points on a sliding scale," just as it does for preliminary injunctive relief. *Golden Gate Restaurant Ass'n v. San Francisco*, 512 F.3d 1112, 1115-16 (9th Cir. 2008).

Applying this analysis, this Circuit rarely stays a permanent injunction pending an appeal, reserving stays for cases where one or more of these factors clearly weighs heavily in favor of a stay. *See*, *e.g.*, *id.* at 1126-27 (stay granted for two reasons—because "preventable human suffering" is given more weight than "financial concerns" and because restraint of an ordinance is counter to public interest on the basis that an ordinance defines public interest); *Winter*, 502 F.3d at 864-865 (stay granted because decision to impose injunction failed to consider overriding public interest in national security and that alternatives existed that would have less impact on national security).

This Circuit generally gives substantial deference to a district court's analysis that denied an earlier motion to stay an injunction. *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*, 472 F.3d 1097, 1101 (9th Cir. 2006).

> To justify vacating the injunction (other than on the failure to comply with *Purcell's* specificity requirement), Coeur Alaska must demonstrate that facts have changed sufficiently since the court issued its order.
>
> * * *
>
> For these reasons, Coeur Alaska's urgent motion to vacate the injunction pending appeal is denied.

Id. *Cf. United States v. Kapp*, 564 F.3d 1103, 1112 (9th Cir. 2009) ("The district court's finding that an injunction is necessary is a fact sensitive determination which we review for clear error.").

Other Circuits concur with this approach:

> Rule 8 . . . does indeed authorize this court to stay a judgment pending appeal, with or without bond; and if the basis of the application for such a stay lay in events occurring after the district court had denied a similar application, we would make an independent judgment. But if as in the present case the application is in effect an appeal from the district judge's denial of the stay, we shall treat it as such and give the district judge's action the appropriate deference.

Lightfoot v. Walker, 797 F.2d 505, 507 (7th Cir. 1986).

Although recognizing that some courts "eschew[ ] such deference," Wright & Miller explains as follows:

> In addressing the question of the stay, some courts of appeals will defer to the district court's determination and will reach a differing conclusion only if the district court has abused its discretion or if **events subsequent to**

> **the district court's determination** justify a different conclusion.

16A Wright & Miller, *Fed. Prac. & Proc.* Juris. 4th § 394 (2009) (emphasis added).

The court cited by Wright & Miller as an example of eschewing deference that would require evidence of changed circumstances still gave deference to the district court's factual findings. *Congregation Lubavitch v. City of Cincinnati*, 923 F.2d 458, 460 (6th Cir. 1991). Indeed, this court gave the same deference it gives when reviewing the merits of an injunction itself:

> We note that we are not reviewing the district judge's grant of the injunction, and are therefore not bound to defer to his judgment. We are, however, bound to accept the district court's factual findings unless we find them to be "clearly erroneous."

Id. (*quoting* Fed. R. Civ. P. 52(a)).

Two recent decisions demonstrate that the Ninth Circuit also gives substantial deference to a district court's findings of fact, and does so even where there is a component of a question of law in the analysis. *U-Haul Intern., Inc. v. Lumbermens Mut. Cas. Co.*, --- F.3d ----, 2009 WL 2449804, 2 (9th Cir. 2009)

("Findings of fact made in a bench trial are reviewed for clear error, and conclusions of law are reviewed de novo."); *J.L. v. Mercer Island School Dist.*, --- F.3d ----, 2009 WL 2393323, 9 (9th Cir. Aug. 6, 2009) ("Questions of law and mixed questions of fact and law are reviewed de novo, unless the mixed question is primarily factual.").

B. USAPA has little chance of success on appeal.

USAPA repeats the same worn arguments on the merits that failed in the district court. This Court will reach the merits of those arguments in December. When deciding a motion to stay an injunction during an appeal, this Court does not reach the underlying merits if it cannot first establish a compelling case of irreparable harm. *See*, *e.g.*, *Stormans Inc. v. Selecky*, 526 F.3d 406, 408 (9th Cir. 2008) ("Even assuming the district court erred in concluding that the Washington regulations violate the Free Exercise Clause, there is insufficient evidence that Appellant-Intervenors will face irreparable harm if the injunction remains in effect pending appeal.").

As demonstrated below, USAPA cannot establish anything close to a compelling case for hardship because it fails to show any causal nexus between hardship and the injunction. This Court, therefore, should not address the merits of the appeal sooner than the already-accelerated schedule.

C. USAPA fails to show hardship.

1. USAPA fails to show a causal nexus to the injunction.

USAPA fails to show any causal nexus between the injunction and hardship. It argues that "collective bargaining . . . is now effectively paralyzed until this **case** is finally resolved." *USAPA Mot. Stay* at 14 (emphasis added). As a factual matter, this is simply not true. USAPA itself admitted to the district court that negotiations are proceeding pursuant to a schedule with the Company. *Hearing Tr.*, 4:6 to 4:12. [Ex. "G."] Moreover, it claims that the "case," not the injunction, is what is impacting collective bargaining. A stay would do nothing to mitigate hardship caused by the case because it would do nothing to end the case any sooner. This Court, therefore, should concur

with the following language in the district court's Order denying USAPA's motion for a stay:

> [I]t is not the enforcement of the injunction that obstructs bargaining, but rather the existence of this lawsuit and the pendency of the appeal. To stay the injunction and allow USAPA to abandon the Nicolau Award as its bargaining position would not hasten negotiations by any means.

Order at 4:11 to 4:14. [Doc. # 610.]

2. Litigation expenses do not justify a stay.

During an interlocutory appeal, the district court is supposed to proceed "as though no such appeal had been taken, unless otherwise specially ordered." *Ex parte Nat'l Enameling & Stamping Co.*, 201 U.S. 156, 162 (1906). "[I]t is firmly established that an appeal from an interlocutory order [denying injunctive relief] ... does not divest the trial court of jurisdiction to continue with other phases of the case." *Plotkin v. Pac. Tel. & Tel. Co.*, 688 F.2d 1291, 1293 (9th Cir. 1982).

USAPA is no different than any other defendant who, after losing on liability in a bifurcated litigation, would like to stay damages litigation on the off chance that the liability might be reversed on appeal. A stay in this context is viewed as a mere

convenience for a defendant—a convenience that does not justify a stay. *See Poulos v. Caesars World, Inc.*, 379 F.3d 654, 668-69 (9th Cir. 2004) (The "longstanding rule against piecemeal appeals trumps convenience and expedience for the parties."). Denial of such "convenience" "does not constitute a clear case of hardship or inequity." *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (internal quotation marks omitted).

In addition, to the extent that a stay might have the effect of avoiding unnecessary costs, USAPA should not be allowed to use that to its advantage. USAPA has largely driven the costs here with abusive litigation tactics. USAPA particularly abused discovery in the context of opposing class certification. The Court recognized this on the record as follows:

> 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.

Tr. 12:21 to 13:8 (Mar. 16, 2009) (copy attached as Ex. "H.").

Just as it did in the district court, USAPA is offering litigation costs as a pretext to hide its true motivation. This Court should reject that pretext and find that litigation costs do not justify a stay.

D. USAPA misapplies the analysis of serious questions of law.

Serious questions of law justify an accelerated schedule for an appeal—which we already have. There is no logical reason, however, that serious questions would justify a stay of an injunction unless the injunction would cause substantial hardship during the appeal. Because the injunction here would not, there is no logical reason to grant a stay solely based on the "seriousness" of the issues. Moreover, staying an injunction when it is the jurisdictional basis for the appeal would make the appeal functionally equivalent to a 28 U.S.C. § 1292(b) appeal of an interlocutory ruling of law. Such appeals must be certified by the district court. *United States v. W.R. Grace*, 526 F.3d 499,

522 (9th Cir. 2008). Moreover, they are generally disfavored. *See In re Cement Antitrust Litigation (MDL No. 296)*, 673 F.2d 1020, 1026 (9th Cir. 1982). This Court, therefore, should reject USAPA's argument that in some way the seriousness of the issues justifies a stay.

E. Public interests favor enforcement.

USAPA's public interest argument has the same flaw as its hardship argument—there is no causal nexus between the injunction and any delay of collective bargaining. Moreover, the District Court already emphasized the public interest benefit of *enforcing* the stay – to promote good faith bargaining toward a single CBA with the Company in troubled economic times.

V. CONCLUSION

For the reasons set forth herein, this Court should deny USAPA's motion for a stay.

DATED: September 8, 2009

Respectfully submitted,

/s/ Andrew S Jacob

Marty Harper
Kelly J. Flood
Andrew S. Jacob
Polisinelli Shughart, P.C.
Attorneys for Plaintiffs-Appellees

VI. CERTIFICATION OF COMPLIANCE

I CERTIFY THAT:

The attached Response to Motion for Stay Pending Appeal is proportionally spaced, has a typeface of 14 points, and contains 4,118 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance and statement of related cases.

DATED: September 8, 2009

Respectfully submitted,

/s/ Andrew S Jacob

Andrew S. Jacob
Polisinelli Shughart, P.C.

VII. PROOF OF SERVICE

I am over the age of eighteen years of age, not a party to this action, and employed by Polsinelli Shughart, P.C.

On September 8, 2009 I caused *Plaintiffs-Appellees' Response In Opposition To Motion To Stay Judgment And All Other Proceedings Pending Appeal*, along with Exhibits "A" through "H," to be electronically filed with the Clerk of the Ninth Circuit Court of Appeals. In addition, I properly served what was electronically filed by mail by causing a true and correct copy to be placed in a sealed envelope, with postage prepaid, deposited with the United States Postal Service on this day following ordinary business practices addressed to opposing counsel at the last address given, as follows:

Lee Seham
Stanley J. Silverstone
Lucas K. Middlebrook
Nicholas P. Granath
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
445 Hamilton Avenue, Suite 1204
White Plains, NY 10601

Nicholas J. Enoch,
LUBIN & ENOCH, PC
349 North 4th Avenue
Phoenix, AZ 85003-1505

I declare under penalty of perjury under the laws of Arizona that the foregoing is true and correct and this declaration was executed on September 9, 2009 at Phoenix, AZ.

/s/ *Andrew S. Jacob*