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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF ARIZONA**

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| Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI, on behalf of themselves and all other similarly-situated individuals,<br>*Plaintiffs*,<br>vs.<br>US AIRLINE PILOTS ASS'N, an unincorporated association,<br>*Defendant.* | Case No. 2:08-CV-01633<br>**PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF FROM THE JUDGMENT DISMISING FOR LACK OF RIPENESS**<br>**(Oral Argument Requested)** |

Plaintiffs Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI, on behalf of themselves and all other similarly-situated individuals, file this Rule 60(b)[1] motion for relief from the judgment mandated by the Ninth Circuit, dismissing this case for lack of ripeness. This motion is properly made after the mandate issues because it presents matters that were not of record before the

[1] All references to "Rules" are to the Federal Rules of Civil Procedure.

appellate court—that US Airways filed a ripe declaratory action that requires a determination of whether USAPA's intractable insistence on date-of-hire seniority integration breaches the duty of fair representation. US Airways risks liability for unfair labor practices whether it acquiesces to date-of-hire seniority integration or not, depending on whether USAPA's insistence on date-of-hire seniority integration is a breach of the duty of fair representation. The issue of breach of that duty, therefore, is now surely ripe for decision. Plaintiffs therefore, respectfully ask this Court to grant relief from the judgment dismissing this case for lack of ripeness. This motion is supported by the Memorandum of Points and Authorities that follows.

Dated this 6th day of August, 2010.

**POLSINELLI SHUGHART, PC**

By */s/ Andrew S. Jacob*

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## BACKGROUND

The history of the underlying dispute is well known to the Court. US Airways and America West merged in 2005. The two pilot groups, referred to as the West Pilots and East Pilots, agreed to integrate their respective seniority lists to complete the integration of airline operations. Nearly five years later, they have not done so. The pilots agreed to use binding arbitration conducted by George Nicolau to determine a method of seniority integration. That result of that arbitration is referred to as the Nicolau Award.

After the arbitration was completed, the East Pilots objected to the Nicolau Award and vigorously prevented its implementation. The East Pilots, for example, stopped participating in contract negotiations with US Airways. They also withdrew support from ALPA, causing it to be decertified, and formed and voted a new union into its place, Defendant US Airline Pilots Association ("USAPA") — all to frustrate implementation of the Nicolau Award. The jury found that USAPA represented Plaintiffs and the class of West Pilots in bad faith because its sole objective was to benefit East Pilots at the expense of West Pilots, rather than to benefit the bargaining union as a whole.

This Court found that the issue of breach of the duty of fair representation was ripe for decision largely because USAPA conceded that, absent judicial intervention, it would never bargain for seniority integration in a manner consistent with its duty of fair representation. The Ninth Circuit, however, disagreed and held that the case was not ripe for decision because the district court "cannot fashion a[n] [injunctive] remedy that will alleviate Plaintiffs' harm." *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1180 (9th Cir. 2010). The Ninth Circuit "le[ft]

USAPA to bargain in good faith pursuant to its DFR, with the interests of all members—both East and West—in mind, under pain of an unquestionably ripe DFR suit, once a contract is ratified." *Id.* at 1180 n.1. "[I]t did not discuss, [however,] the legal rights, constraints and obligations of US Airways in those collective bargaining negotiations, including how US Airways could complete those negotiations without exposure to potential legal liability in light of the conflicting assertions by the West Pilots and USAPA regarding the permissibility of USAPA's position on the seniority issues." *Compl. for Decl. Relief*, ¶ 2 (D. Ariz., Case no. 10-cv-01579, July 26, 2010).

During the appeal, USAPA apparently avoided pressuring US Airways to implement date-of-hire seniority integration. That changed, according to the US Airways declaratory action complaint, when the Ninth Circuit found a lack of ripeness: "Since the Ninth Circuit's decision, USAPA has re-affirmed [its insistence on a date-of-hire integrated seniority list] and expressed the view that, in light of *Addington*, it is now free to negotiate for and agree to a collective bargaining agreement which does not incorporate the Nicolau Award." *Id.* at ¶ 3. As US Airways explains, USAPA's insistence on date-of-hire seniority integration leaves the airline in an impossible predicament:

> Because the pilots' seniority dispute remains unresolved and because the Ninth Circuit's decision provides no guidance to US Airways, unless this Court issues declaratory relief clarifying the parties' respective rights, constraints and obligations, US Airways will face substantial damage to its operations and finances through either: (i) protracted negotiations and a possible work stoppage at the end of those negotiations, potentially exposing US Airways to hundreds of millions of dollars in lost revenue and customer goodwill, if it does not agree to USAPA's requirements for

> a non-Nicolau integrated seniority list; or (ii) litigation by the West Pilots against USAPA and US Airways for USAPA's alleged breach of the duty of fair representation if it does agree to USAPA's requirements for a non-Nicolau integrated seniority list, exposing US Airways to potentially tens of millions of dollars in litigation costs and monetary damages, as well as an injunction invalidating an integrated seniority list and combined collective bargaining agreement that had taken literally years to negotiate.

*Id.* at ¶ 4

In its declaratory action, US Airways claims it:

> is entitled to a declaratory judgment to the effect that: (i) USAPA's continued insistence that US Airways accept a collective bargaining agreement which does not incorporate the Nicolau Award, but rather a seniority list based on "date-of-hire" principles, violates USAPA's duty under Section 2, First, of the Railway Labor Act, to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions . . ., in order to avoid any interruption to commerce or to the operation of any carrier," and entry into a collective bargaining agreement that does not incorporate the Nicolau Award would constitute a breach of USAPA's duty of fair representation to the West Pilots and therefore US Airways is prohibited from accepting or implementing a non-Nicolau seniority list . . . .

*Id.* at ¶ 5.

## LEGAL ARGUMENT

### A. This Court may consider a Rule 60(b) motion notwithstanding that the Ninth Circuit issued its mandate.

*Standard Oil Co. of California v. United States*, 429 U.S. 17 (1976), established that "the district court may consider a motion to vacate once the mandate has issued." *Gould v. Mutual Life Ins. Co. of New York*, 790 F.2d 769, 772 -773 (9th Cir. 1986). "The [Supreme] Court recognized that requiring appellate leave for the district court's consideration of Rule 60(b)

motions is often inefficient and that the district court may better recognize a frivolous motion." *Id.* The rule, therefore, is "that, once the appellate mandate has issued, leave of this court [Ninth Circuit] is not required for district court consideration of a Rule 60(b) motion." *Id.* (emphasis added).

*Gould* also noted that it was unnecessary for the district court to defer consideration of Rule 60(b) motions while a petition for certiorari is pending. *Id.* (noting that "*Standard Oil* applies to preclude the necessity of seeking leave of the Supreme Court"). Finally, the Ninth Circuit "review[s] the grant or denial of Rule 60(b) motions for relief from judgment . . . for abuse of discretion." *California Dept. of Social Services v. Leavitt*, 523 F.3d 1025, 1031 (9th Cir. 2008).

A treatise on federal procedure explains the nuances of the *Standard Oil* doctrine—including the requirement that the Rule 60(b) motion present matters that were not before the appellate court:

> It is also possible to move directly in the district court, pursuant to FRCP 60 for relief from a judgment, **if the motion presents matters not of record before the appellate court**. The permission of the appellate court is not required before the district court can hear the FRCP 60 motion. Furthermore, the district court does not flout the mandate by considering the FRCP 60 motion, since the **mandate only relates to the record and issues before the appellate court and does not purport to deal with possible later events** or newly discovered evidence.

2A *Fed. Proc., L. Ed.* § 3:1017 (2010) (emphasis added).

### B. This Court may vacate a dismissal made for lack of ripeness if post-judgment circumstances establish ripeness.

#### 1. Ripeness is decided on the basis of present circumstances.

Wright & Miller explains that "[r]ipeness should be decided on the basis of all the information available to the court. Intervening events that

occur after decision in lower courts should be included, just as must be done with questions of mootness." 13B *Fed. Prac. & Proc. Juris.* § 3532.7 (3d ed.). This doctrine was established in the *Regional Rail Reorganization Act Cases*:

> We agree with the parties that this change in circumstance has substantially altered the posture of the case as regards the maturity of the final-conveyance issues. Whatever may have been the case at the time of the District Court decision, there can be little doubt, for reasons to be detailed, that some of the "conveyance taking" issues can and must be decided at this time. And, since ripeness is peculiarly a question of timing**, it is the situation now rather than the situation at the time of the District Court's decision that must govern**.

419 U.S. 102, 139-40 (1974); *see also Buckley v. Valeo*, 424 U.S. 1, 13-14 (1976) (between the Court of Appeal's decision and Supreme Court consideration of the case, agency action had been taken, making the claims ripe for review); *Western Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186, 1204-05 (9th Cir. 2008) ("[R]ipeness is assessed based on the facts as they exist at the present moment."); *Assiniboine & Sioux Tribes v. Bd. of Oil & Gas Conservation*, 792 F.2d 782, 788 & n.3 (9th Cir. 1986) ("[W]e look to the facts as they exist today in evaluating whether the controversy before us is sufficiently concrete"); *Am. Motorists Ins. Co. v. United Furnace Co.*, 876 F.2d 293, 302 n.4 (2d Cir. 1989) ("[I]t is irrelevant whether the case was ripe for review when the complaint was filed").

2. Declaratory actions are ripe if corresponding coercive actions would be ripe.

"[A] declaratory judgment action is ripe for adjudication [when] . . . the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of

sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1124 (9th Cir. 2009). A case is considered ripe when "all the essential facts establishing the right to declaratory relief have already occurred." *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 893 (9th Cir. 1986). "A declaratory judgment action may be entertained in federal court only if the coercive action that would have been necessary, absent the declaratory judgment procedure, could have been heard in a federal court." *Guaranty Nat. Ins. Co. v. Gates*, 916 F.2d 508, 511 (9th Cir. 1990).

3. The First Claim in US Airways' declaratory action is ripe.

The First Claim in US Airways' action is ripe, notwithstanding the Ninth Circuit's decision in this case. In its First Claim, US Airways seeks a declaratory judgment on what would be an unfair labor practices claim if brought by USAPA. The basis for that claim would be an allegation of US Airways' refusal to exert every reasonable effort to negotiate a CBA:

> The obligation to exert every reasonable effort is central to the effective working of the RLA. The strictest compliance with the formal procedures of the Act is meaningless if one party goes through the motions with a desire not to reach an agreement.
>
> * * *
>
> [T]he duty to exert every reasonable effort imposed by the RLA requires at least the avoidance of bad faith as defined under the NLRA, that is, going through the motions with a desire not to reach an agreement.

*Ass'n of Flight Attendants, AFL-CIO v. Horizon Air Industries, Inc.*, 976 F.2d 541, 544 (9th Cir. 1992) (citations, quotation and alteration marks omitted).

The theory of the First Claim is that US Airways risks liability to USAPA if it refuses to acquiesce to date-of-hire seniority integration. US

Airways rightly seeks to ascertain that risk before it might incur liability. To determine that risk:

> US Airways seeks a declaratory judgment to the effect that: (a) **USAPA is presently violating its duty** under Section 2, First, of the Railway Labor Act "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions" by continuing to insist upon a "date-of-hire" integrated seniority list that does not incorporate the Nicolau Award and is not in accord with the requirements of the Transition Agreement; and (b) entry into a collective bargaining agreement between US Airways and USAPA which does not incorporate the Nicolau Award **would constitute a breach of USAPA's duty of fair representation** to the West Pilots in violation of the Railway Labor Act and therefore **US Airways is prohibited from accepting or implementing a non-Nicolau seniority list**.

*Compl. for Decl. Relief* at ¶ 39 (emphasis added); *see also id.* at ¶ 5.[2]

US Airways also risks liability to Plaintiffs if it knowingly acquiesces to USAPA's breach of the duty of fair representation:

> Similarly, an employer that **knowingly acquiesces** to union pressure and takes **discriminatory action** against an employee may be joined as a defendant. In each of these cases, the court required that the employer have actual notice of, or might

[2] Unfair labor practice and breach of the duty of fair representation are closely intertwined. *See Breininger v. Sheet Metal Workers Int'l Ass'n*, 493 U.S. 67, 86 (1989) (noting *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962) "determined that breaches of the duty of fair representation were also unfair labor practices"). In addition, because the railroad in *Steele v. Louisville & N. R. R.* was not "bound by or entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making," 323 U.S. 192, 203-04 (1944), a union cannot insist that an RLA carrier enter into such a contract. Consequently, it is an unfair labor practice for USAPA to pressure US Airways to acquiesce to its date-of-hire seniority integration if that pressure is a breach of USAPA's duty of fair representation.

> reasonably be charged with notice of, the union's breach of duty to its members. The employer was then liable for retaliatory action taken against the plaintiff-employees in violation of their rights under the collective bargaining agreement or their organizational rights under [the] NLRA. . . .

*American Postal Workers Union, etc. v. American Postal Workers Union*, 665 F.2d 1096, 1104, n.18 (D.C. Cir. 1981) (citations omitted, emphasis added). *But see, Davenport v. Int'l Broth. of Teamsters, AFL-CIO,* 166 F.3d 356, 361-362 (D.C. Cir. 1999) (identifying but not deciding this issue).

The Court determines the ripeness of a declaratory action by looking at the ripeness of the corresponding coercive action. *See Gates*, 916 F.2d at 511. This means that the First Claim in US Airways' declaratory action is ripe if USAPA would have a ripe claim against US Airways for failing to "exert every reasonable effort" to come to agreement with USAPA on date-of-hire seniority integration before the issue of unfair representation is resolved. *Horizon Air*, 976 F.2d at 544.

USAPA's coercive action would be ripe because US Airways cannot acquiesce to date-of-hire seniority integration without judicial determination of whether USAPA's insistence on date-of-hire seniority integration is a breach of the duty of fair representation. Because USAPA's claim would be ripe, the corresponding declaratory action—that also would decide whether USAPA is breaching its duty of fair representation—is also ripe.

The ripeness of the US Airways declaratory action is different than the ripeness of Plaintiffs' duty of fair representation claim. Plaintiffs' claim was not ripe, according to the Ninth Circuit, because a court "cannot fashion a[n] [injunctive] remedy that will alleviate Plaintiffs' harm."

*Addington*, 606 F.3d at 1180. Any decision on breach of the duty of fair representation would, according to the logic of the Ninth Circuit's decision, be advisory because it would not lead to a direct benefit or remedy for Plaintiffs. In contrast, a decision on the First Claim in US Airways' declaratory action would not be merely advisory. It would enable US Airways to avoid potentially large financial liability.

4. Changed circumstances here establish ripeness.

The Ninth Circuit did not consider the effect that vacating this Court's injunction would have on the ongoing negotiations between US Airways and USAPA. While this case was on appeal, that effect was (according to the Ninth Circuit) a matter of speculation. The material change in circumstances after the Ninth Circuit's decision is that the effect of that decision is no longer a matter for speculation. Without question, USAPA now is manifesting its intention to insist that US Airways acquiesce to date-of-hire seniority integration. Yet, US Airways is apparently concerned that such insistence may be a breach of USAPA's duty of fair representation. US Airways, therefore, needs a decision on the issue of duty of fair representation claim so that it can assess its risks of running afoul of its duties under the Railway Labor Act. This requires, among other things, that the Court address the duty of fair representation issue.

**C. The Court should vacate the dismissal.**

This Court should consider the merits of this Rule 60(b) motion because there has been a material change in circumstances that were not of record before the Ninth Circuit. In so doing, it should vacate the dismissal because, in light of those changed circumstances, this case is now ripe. Breach of the duty of fair representation must now be litigated.

Moreover, it must be litigated by the two real parties in interest—Plaintiffs and USAPA. *See United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 382 (1949) (holding that pleadings "should be made to reveal and assert the actual interest of the plaintiff, and to indicate the interests of any others in the claim"). To accomplish this procedurally, the Court should vacate the judgment of dismissal that was predicated on a finding of lack of ripeness. It can do this because that judgment of dismissal is invalid in light of the current circumstances—circumstances that changed after the Ninth Circuit decided the appeal.

## CONCLUSION

Released from the constraints of the injunction, USAPA is manifesting intention to insist on date-of-hire seniority integration. Because this circumstance and US Airways' concern about incurring liability during contract negotiations were not of record during the appeal, **the Ninth Circuit's decision no longer controls whether this action is ripe.** Surely, the most sensible course now is to transfer the US Airways declaratory action to this Court, consider Plaintiffs' Rule 60(b) motion, and vacate the judgment of dismissal that was based on lack of ripeness. Then, this litigation and the US Airways declaratory action can proceed. Plaintiffs, therefore, respectfully, ask the Court to grant relief accordingly.

Dated this 6th day of August, 2010.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of August 2010, 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*