Nicholas Granath, Esq., *pro hac vice*
ngranath@ssmplaw.com
Lucas K. Middlebrook, Esq., *pro hac vice*
lmiddlebrook@ssmplaw.com
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
445 Hamilton Avenue, Suite 1204
White Plains, NY 10601
Tel: 914 997-1346; Fax: 914 997-7125

Nicholas J. Enoch, Esq., State Bar No. 016473
nick@lubinandenoch.com
LUBIN & ENOCH, PC
349 North 4th Avenue
Phoenix, AZ 85003-1505
Tel: 602 234-0008; Fax: 602 626 3586

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Don Addington, an individual, *et al*,

Plaintiffs,

vs.

US Airline Pilots Association, *et al*,

Defendants.

Case No. 2:08-CV-01633-PHX-NVW

Case No. 2:10-CV-01570-PHX-ROS

DEFENDANT USAPA'S MEMORANDUM IN OPPOSITION TO THE *ADDINGTON* PLAINTIFFS' MOTION TO TRANSFER CASE

I. SUMMARY

The plaintiffs in this case (2:08-cv-01633) (defendants in the other) seek to transfer to this Court, pursuant to Local Rule of Civil Procedure 42.1, a recent declaratory judgment action filed by US Airways, Inc. ("US Airways" or "Company") that was assigned to the Honorable Roslyn O. Silver. (*See* 2:10-cv-01570 "US Airways action or matter"). However, for the reasons set forth herein, there is no action currently "pending" in this Court and therefore transfer pursuant to LRCiv 42.1 is improper. Even assuming, *arguendo*, that there was an action currently "pending" in this Court, the new lawsuit filed by US Airways is so akin to a remand on the merits of this case that given the circumstances it must remain with Judge Silver in order to "preserve the appearance of justice." *Ellis v. United States*, 356 F.3d 1198, 1211 (9th Cir. 2004). Moreover, denial is necessary to avoid unfair prejudice to USAPA, as well as further need for correction by the Ninth Circuit Court of Appeals.

II. PROCEDURAL POSTURE

On June 4, 2010, the Ninth Circuit Court of Appeals ruled, in a published decision, that this action was never ripe for adjudication and ordered that the matter be remanded to this Court with "direction that the action be dismissed." *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1184 (9th Cir. 2010). However, as a result of various post-decision filings by plaintiffs-appellees, issuance of the Ninth Circuit's mandate was effectively delayed.

First, on June 10, 2010, plaintiffs petitioned the Ninth Circuit for an *en banc* rehearing. That request was denied less than one month later, on July 8, after not a single

judge of the Ninth Circuit requested a vote. (Granath Decl., Ex. A).

Second, on June 11, plaintiffs asked the panel to clarify its decision so that their damage claims could proceed in this Court despite the fact that the underlying DFR claim was held by the Ninth Circuit to be unripe. This, too, was denied by the Ninth Circuit, also on July 8. (Granath Decl., Ex. A).

Third, on July 14, 2010, one day before the Ninth Circuit's mandate was scheduled to issue, plaintiffs filed a motion to stay the mandate. (Granath Decl., Ex. B). The predicate of the motion was plaintiffs' representation to the Court of Appeals of their, "bona fide intention to make proper and timely application to the Supreme Court of the United States for a writ of certiorari" (*Id.*) – an intent that plaintiffs have not abandoned (Doc. # 644-1). However, on August 3, the Court of Appeals denied this motion as well. (Granath Decl., Ex. C).

On July 26, 2010 – again, just before the impending Mandate of the Ninth Circuit was to issue – US Airways filed a complaint for declaratory relief against both the US Airline Pilots Association ("USAPA") and the six Addington plaintiffs, individually and in their capacity as class representatives of the West Pilots.[1] The Company's complaint purports to seek one of three alternative declaratory judgments:

1. A declaration that USAPA is violating its duty under the Railway Labor

[1] However, because the Ninth Circuit ordered dismissal, US Airways is not entitled to a presumption that a defendant class will be certified. *See Zimmerman v. Epstein Becker & Green, P.C.*, 2010 U.S. Dist. LEXIS 67835, at *8 (D. Mass. July 8, 2010). This is particularly true in light of the fact that adequate class discovery and USAPA's request for an evidentiary hearing were denied by this Court prior to its certification of the West Pilot class, which USAPA objected to on a number of different grounds. (*See* Doc. # 195) (*See also* Main appellate brief at DktEntry: 7074777, pp. 55-56).

Act ("RLA") to "exert every reasonable effort to make and maintain agreements" by negotiating over a seniority list other than the Nicolau Award, and that entry into a CBA that does not incorporate the Nicolau Award constitutes a breach of USAPA's duty of fair representation. (Complaint at p. 22, ¶ 1); or

2. A declaration that entry into a CBA that does not incorporate the Nicolau Award would ***not*** constitute a breach of USAPA's duty of fair representation, and therefore USAPA is not in violation of its duty under the RLA to "exert every reasonable effort to make and maintain agreements." (Complaint at p. 22, ¶ 2); or

3. Regardless of whether it would constitute a breach of USAPA's duty of fair representation or otherwise violate the RLA, a declaration that US Airways would not be liable under the RLA if it were to enter into such a collective bargaining agreement. (Complaint at p. 3, ¶ 3).

One day after US Airways filed its declaratory judgment action, plaintiffs filed a barebones motion requesting that the US Airways case be transferred to this Court. (Doc. # 642). Three days later, on July 30, 2010, USAPA filed a motion with Judge Silver requesting that the Company's action be stayed pending final disposition of this matter by the U.S. Supreme Court, or until plaintiffs affirmatively and effectively waive their right to any further petitions or appeals.[2] Plaintiffs continue to maintain their intent to seek review by the Supreme Court. (Doc. # 644-1).

Pursuant to Fed. R. App. P. 41, on August 10, 2010, the Ninth Circuit issued its Mandate directing, without qualification or condition, that this entire action be dismissed for lack of subject matter jurisdiction. (Granath Decl., Ex. D). USAPA now offers this memorandum in opposition to plaintiffs' motion to transfer the US Airways matter (10-

[2] Notwithstanding that no reassignment or transfer had occurred, plaintiffs immediately filed USAPA's stay request to Judge Silver with this Court (*See* Doc. # 643). Although they did not find it necessary to follow the same course of action with respect to the Ninth Circuit's denial of their motion to stay the mandate or USAPA's supplemental filing with Judge Silver informing her of the same.

cv-01570) to this Court.

III. CORRECTION OF FACTS

Response to plaintiffs' allegation of facts contained in their transfer motion is necessary to correct the record because plaintiffs have grossly misstated it.

The parties to the arbitration, as found by the Ninth Circuit, were "the US Airways Pilot Merger Representatives and the America West Pilot Merger Representatives." *Addington*, 606 F.3d at 1177. These Merger Representatives were subject to expulsion from ALPA if they resisted the ALPA-governed process or merger criteria. The Arbitration Board was obligated to render a decision consistent with criteria set forth in ALPA Merger Policy. Whereas these criteria had historically placed primary emphasis on date-of-hire seniority, in 1991, ALPA Merger Policy had been amended (without a vote of the rank-and-file pilots) to eliminate any reference to date-of-hire seniority. In addition, no rank-and-file pilots ever voted on the Transition Agreement that references ALPA Merger Policy. Nevertheless, plaintiffs now allege in their transfer motion that the, "*pilots* agreed to use binding arbitration" (Doc. # 642 at p. 2) (emphasis added). That is inaccurate, and willfully so. Plaintiffs not only *stipulated* to the contrary (Doc. # 417, p. 5, at ¶ 14), but the Court of Appeals found otherwise. *See Addington*, 606 F.3d at 1177.

Plaintiffs' allegation that "subsequent events" (Doc. # 642 at 2) were as stated in the *dissent* in *Addington*, 606 F.3d 1174, is inaccurate because the majority speaks for the Court – not the dissent which only speaks for itself. *See* 606 F.3d at 1176-1178 (majority recitation of facts). Plaintiffs also allege that USAPA has made "clear its intention to

push US Airways to accept a date-of-hire seniority list" (Doc. # 642 at 3), following plaintiffs failed motion to stay the Ninth Circuit's mandate. This is inaccurate now and it continues to grossly misrepresent USAPA's last bargaining position. Consistent with its constitutional objective, the USAPA seniority integration proposal provided for a combined list based on date-of-hire, modified with conditions and restrictions designed to protect each pilot's un-merged career expectations. For example, the proposal provided for a ten-year "fence" that prevented senior East pilots from displacing junior West pilots from their existing positions and preserved the promotional opportunities arising from West attrition *exclusively* for West pilots. Significantly, within the specified ten-year time frame, the majority of East pilots will have retired, thereby opening up thousands of promotional opportunities for junior West pilots within East operations – opportunities that were never previously available to them. The conditions and restrictions proposed by USAPA constitute six pages of West pilot safeguards, in contrast to the approach taken by every other employee group that integrated seniority by strict date-of-hire. In fact, recent events confirm that many junior West Pilots would be currently employed or returning to work under the USAPA proposal. 606 F.3d at 1180, n.1.

Finally, plaintiffs allege in their motion that, "negotiation of a new CBA faltered" while USAPA "appealed." (Doc. # 642 at 3). This disingenuous allegation was made without even the pretense of any claim of factual support, apparently a self-serving attempt to manufacture facts. The truth is that the Company has sought to deliberately delay negotiations in order to promote its own economic gain by prolonging the pilots' wage rates, which are currently the lowest among all major airline pilot groups.

IV. LEGAL STANDARD

A transfer pursuant to LRCiv 42.1 is not automatic. To the contrary, "district courts have broad discretion in determining whether to grant [or deny] such motions." *Pangerl v. Ehrlich*, 2007 U.S. Dist. LEXIS 19502, at *5 (D. Ariz. Mar. 2, 2007) (*citing Investors Research Co. v. U.S. Dist. Ct. for Cent. Dist. of California*, 877 F.2d 777 (1989)). "The standard for transfer [under LRCiv. 42.1] is similar to the standard for consolidation under Rule 42(a) of the Federal Rules of Civil Procedure." *Pangerl*, 2007 U.S. Dist. LEXIS 19502, at *5.

The "mere fact that a common question is present, and that consolidation therefore is *permissible* under Rule 42(a), does not mean that the trial court judge must order consolidation." *Fin-Ag, Inc., v. NAU Country Ins., Co*., 2009 U.S. Dist. LEXIS 520, at *5 (D.S.D. Jan. 6, 2009) (*quoting* 9A Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 2383 (2008)) (emphasis added). And, in the context of Fed. R. Civ. P. 42(a), "the party seeking consolidation bears the burden of establishing that the judicial economy and convenience benefits outweigh any prejudice." *Single Chip Systems Corp. v. Intermec IP Corp*., 495 F. Supp. 2d 1052, 1057 (S.D. Cal. 2007). Plaintiffs have failed to carry that burden.

V. ARGUMENT

A. Transfer Pursuant To LRCiv 42.1 Is Improper, And The Motion Is Now Moot Because There Is No Action "Currently Pending" Before This Court.

LRCiv. 42.1(a) for the District of Arizona provides in pertinent part that:

> Any party may file a motion to transfer the case or cases involved to a single Judge **whenever two or more cases are *pending*** before different

> Judges and any party believes that such cases: (1) arise from substantially the same transaction or event; (2) involve substantially the same parties or property; … (4) calls for determination of substantially the same questions of law; or (5) for any other reason would entail substantial duplication of labor if heard by different Judges. [emphasis added].

The standard for transfer under LRCiv 42.1 is similar to the standard for consolidation under Rule 42(a) of the Federal Rules of Civil Procedure.[3] And Federal Rule of Civil Procedure 42(a) provides that:

> If **actions before the court** involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay. [emphasis added].

"The powers conferred by Rule 42 are available **only** when actions involving a common question of law or fact are **pending before the court**." *Pan American World Airways, Inc. v. United States*, 523 F.2d 1073, 1080 (9th Cir. 1975) (emphasis added); *Oregon Egg Producers v. Andrew*, 458 F.2d 382, 383 (9th Cir. 1972) ("because this case is not properly before the district court … Rule 42 cannot be invoked.").

Both LRCiv 42.1 and Fed. R. Civ. P. 42 are each prefaced by the requirement that a case be pending before a transfer or consolidation take place. For purposes of Federal Rule 42, if a court does not have jurisdiction over one of the two actions sought to be consolidated, Rule 42 cannot be properly invoked. This is no mere technicality, it is jurisdictional:

> Not only does a cursory review of the plain language of Rule 42(a) indicate that **both cases must be pending** before the same court in order for consolidation to be proper, but relevant authority discussing Rule 42(a) also makes this point clear. *See United States v. Brandt Constr. Co*., 826 F.2d

[3] *See supra* at 5.

> 643, 647 (7th Cir. 1987) (holding that federal case could not be consolidated with improperly removed state case because state case was not "pending before the court"); *Mourik Int'l B.V. v. Reactor Servs. Int'l, Inc*., 182 F. Supp. 2d 599, 602 (S.D. Tex. 2002) (same); *see also Glencore Ltd. v. Schnitzer Steel Products Co*., 189 F.3d 264, 267 (2d Cir. 1999) …

Cummings v. Conglobal Industries, Inc., 2008 U.S. Dist. LEXIS 17634, at *4-5 (N.D. Okla. Mar. 6, 2008) (emphasis added). Notwithstanding the wishes of plaintiffs, the Addington matter is simply not currently "pending" with this Court.

On August 3, 2010, the Ninth Circuit Court of Appeals denied plaintiffs' motion to stay issuance of the Mandate.[4] The Mandate remands the case back to this Court but only with directions from the Ninth Circuit that the entire action be dismissed. *Addington*, 606 F.3d at 1184. Complying with the instructions of the Mandate is not optional for this Court and the Mandate becomes the "law of the case" for all parties and this Court:

> When a case has been once decided by this Court on appeal, and remanded to the [lower] court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The [lower] court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it, for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.

Atlas Scraper & Eng'g Co. v. Pursche, 357 F.2d 296 (9th Cir. 1996), *cert. denied*, 385 U.S. 846 (1996); *United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1985) (the rule that the district court must follow the Mandate is broader than the law of the case doctrine in that

[4] Plaintiffs have the option to request the same relief from the Supreme Court pursuant to 28 U.S.C. § 2101(f). However, "[d]enial of such in-chambers stay applications is the norm; relief is granted only in 'extraordinary cases.'" *Conkright v. Frommert*, 129 S. Ct. 1861 (2009) (Ginsburg, J., in chambers).

the district court may not vary or examine the Mandate for any purpose other than its execution).

Here, there is no possible ambiguity about the Mandate, which is plain enough: "the case is REMANDED to the district court with directions that the action be DISMISSED" for lack of subject matter jurisdiction. 606 F.3d at 1184. Where, as here, the district court has been ordered to relinquish jurisdiction, the court must immediately dismiss the action.

> The language of our mandate directed the district court to dismiss this case for lack of subject matter jurisdiction and, on its face, does not authorize the district court to open the case for further adjudication. **Because our order stated that the district court lacked jurisdiction, the court was not free to do anything else but to dismiss the case.** As we have explained previously, compliance with an order to relinquish jurisdiction necessarily precludes the lower court from taking any further action other than dismissal. … Thus, to comply with our mandate, the district court could only dismiss the case. Any action by the lower court other than immediate and complete dismissal would have been by definition inconsistent with – and therefore a violation of – the order to dismiss.

Invention Submission Corp. v. Dudas, 413 F.3d 411, 415 (4th Cir. 2005) [emphasis added]. Consequently, there can be no non-frivolous argument that this case is currently "pending." Therefore, the requirement for transfer that is embodied in LRCiv 42.1 – that "two or more cases are *pending* before different Judges" – cannot possibly be satisfied, thus rendering plaintiffs' transfer motion moot.

B. <u>Denial Is Also Warranted In Order To "Preserve The Appearance Of Justice."</u>

The recent declaratory judgment action filed by US Airways is akin to a remand on the merits of this case by the Ninth Circuit. It involves and implicates the same or

overlapping legal and factual issues and the same parties. And plaintiffs have now conceded as much by acknowledging that, "[b]y filing its declaratory action, US Airways, in effect, rejoined *Addington* to protect its interest." (Doc. # 642 at 5). Yet, a re-do of the Addington DFR claim would simply end-run the law of the case. Plaintiffs ask this Court, consequently, to exceed the Mandate of the Ninth Circuit Court of Appeals.

"The requirement that a case or controversy exist under the Declaratory Judgment Act is identical to Article III's constitutional case or controversy requirement." *Principal Life Ins. Co. v. Petula Associates, Ltd*., 394 F.3d 665, 669 (9th Cir. 2005). "If a case is not ripe for review, then there is no case or controversy, and the court lacks subject-matter jurisdiction." *Id*. The same contingent events that deprived this matter of ripeness deprive the US Airways matter of ripeness, i.e., negotiation, tentative agreement, and ratification. *See* 606 F.3d at 1180. As the Ninth Circuit observed, the Addington plaintiffs could not claim to be injured by non-implementation of the Nicolau Award because "[f]orced to bargain for the Nicolau Award, any contract USAPA could negotiate would undoubtedly be rejected by its membership." 606 F.3d at 1180, n.1.[5]

Moreover, while the Ninth Circuit ultimately remanded this case in order to direct that it be dismissed, for example, if the Appeals Court had instead remanded in a manner that called for this Court to retain jurisdiction and conduct a new trial, then USAPA had

[5] And, "[T]he East Pilots had expressed their intentions not to ratify a CBA containing the Nicolau Award. Thus, even under the district court's injunction mandating USAPA to pursue the Nicolau Award, it is uncertain that the West Pilots' preferred seniority system ever would be effectuated." 606 F.3d at 1180.

requested of the Appeals Court that the case be *reassigned*. (Main brief at DktEntry: 7074777, p. 75: "In the alternative, USAPA requests this Court order a new trial, remand, and order that the case be reassigned to a new judge"). The basis for this request was argued to the Ninth Circuit in briefing, namely that the, "district court demonstrated a lack of impartiality that unfairly prejudiced USAPA." (Main brief at DktEntry: 7074777, p. 68). Now, the recently filed US Airways action presents the same or a similar scenario. Consequently, whether or not this Court could be impartial in actuality, the US Airways matter should remain with Judge Silver to whom it was randomly assigned "in order to preserve the appearance of justice" as that phrase has been construed by a long line of controlling cases.

When presented with a request to reassign a case upon remand, the Ninth Circuit makes two initial inquiries. First, it "ask[s] whether the district court has exhibited personal bias requiring recusal from a case." *Ellis*, 356 F.3d at 1211 (*citing United Nat'l Ins. Co. v. R&D Latex Corp*., 242 F.3d 1102, 1118 (9th Cir. 2001)). But "second, in the absence of a showing of personal bias, [the Ninth Circuit] look[s] to whether 'unusual circumstances warrant reassignment." *Id*. The "unusual circumstances" inquiry focuses on the following three factors:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Id. "Because factors one and two are of equal importance, a finding of *either* factor

supports remand to a different district court judge." *United States v. Alberto*, 385 F.3d 1199, 1201 (9th Cir. 2004) (*citing State of California v. Montrose Chemical Corp. of California*, 104 F.3d 1507, 1521 (9th Cir. 1997)) (emphasis added). Under the unusual circumstance doctrine reassignment does not require a finding of bias. *Jefferson v. Budge*, 419 F.3d 1013, 1017 (9th Cir. 2005); *Montiel v. City of Los Angles*, 2 F.3d 335, 344 (9th Cir. 1993) (remanding to a different judge where, although original judge's remark did not constitute plain error or deny the plaintiff a fair trial on his claims, they reasonably could have led plaintiff to believe that judge was biased).

An examination of these factors supports a finding that the US Airways declaratory judgment action must remain with Judge Silver if the appearance of justice is to be preserved, because whether this Court can be impartial or not, it cannot reasonably be expected to put out of mind its prior strongly expressed views, findings and orders.

i) This Court Would Reasonably Be Expected to Have Difficulty Putting Out of its Mind Previously Expressed Views or Findings that Are Central to Determination of the US Airways Action.

There can be no question that this Court has expressed its views on the issues and the parties in this case, that those views were strongly expressed, and that it cannot now re-approach those same issues and same parties *fresh and anew*. First and foremost, while this Court recognized the East pilots' right to exercise what the Ninth Circuit described as their democratic "veto" (606 F.3d at 1177), it sought to use its power as a means of economic coercion to force the pilots to surrender that right. This Court said:

> [I]t seems to me that the members of the collective bargaining unit have an absolute right to vote up or down on a CBA and that no court can control that. … But they will be knowing that if they act out of an unregulatable

> [sic] disregard of the *Court's determination* of the union's obligation, the result is that they are still the lowest pay scale in the industry…

(Tr. May 7, 2009 at 1746-1747) (emphasis added).

In short, this Court recognized the "absolute" voting rights of the rank-and-file pilots, but at the same time deprived USAPA of the right to make a good faith effort to overcome the ratification impasse. An impasse that the Ninth Circuit recognized would only be prolonged by just such premature judicial interference:

> The present impasse, in fact, could well be prolonged by prematurely resolving the West Pilots' claim judicially at this point. Forced to bargain for the Nicolau Award, any contract USAPA could negotiate would undoubtedly be rejected by its membership.

606 F.3d at 1180, n.1. A further sampling of the Court's strongly expressed views include:

- Expression mid-trial that, "there is a unique quality about the Nicolau Award that established both a legal and an *honorable obligation* to go forward with it." (Trial, May 5, 2009, p. 1117:24) (emphasis added);
- The Court's declaration, at the outset of litigation, that USAPA's seniority proposal was, "a 100 percent victory for the East Pilots and a 100 percent defeat for the West Pilots" – a statement made by the Court before it reviewed any of the conditions and restrictions, which USAPA's constitution mandates be included in order to protect the un-merged career expectations of the West pilots. (Made prior to the start of trial, October 28, 2008, Tr. 45:19);
- The Court's statement that, "You know, it's -- the union -- it appears the union is simply deciding here ahead of time we have a group with the political muscle, they went into this deal, they're not happy, they've got the political muscle and because they've got the political muscle we don't think they'll ratify it, but wait a minute, the group with the political muscle also has to consider their own economic betterment in the totality and if they are told by their leaders who are considering their obligations and their honor, look, you don't like it but it was arrived at according to the agreed process and *it's your responsibility and your honor requires that we present it* and you can vote however you want, and maybe they reject that." (Trial, May 5, 2009, p. 1120:9) (emphasis added);

- The Court's comment that, USAPA was, "created and selected by express campaign promises to disregard the interests of the West pilots." (Made prior to the start of trial, October 28, 2008, Tr. 57:20);
- In reference to USAPA's position that it is not bound by Nicolau because it constituted a predecessor's bargaining proposal created pursuant to ALPA's own manipulated and changing criteria, this Court noted that "This argument offends common sense, the evidence, and fundamental principles of law. In the context of labor rights, it is both discordant and irrelevant." (Doc. # 593, p. 17:13). This Court's comment was made despite ALPA's manipulation of integration criteria (eliminating seniority/longevity as a criterion only to *restore this criterion **after** the Nicolau Arbitration*) and a pending federal lawsuit alleging that ALPA knowingly submitted an erroneous East seniority list. *Naugler v. Air Line Pilots Ass'n, Int'l*, 2008 U.S. Dist. LEXIS 25173 (E.D.N.Y. Mar. 27, 2008). This Court prohibited the jury from considering all such evidence, effectively characterizing the deficiencies of the ALPA seniority integration process as irrelevant despite case law permitting unions to act on principled objections to the results of even "final and binding" seniority integration results. *See Associated Transport*, *Inc*., 185 N.L.R.B. 631 (1970).
- The finding that, "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." (Doc. # 593, p. 23:13). As referenced immediately below, this Court only reached that result after barring any consideration of the labor movement's core interest in protecting seniority as a legitimate union objective;
- The conclusion that, "there is no merit to USAPA's argument that the pursuit of date-of-hire seniority principles automatically legitimates USAPA's actions because date-of-hire seniority is 'the gold standard' of integration methods." (Doc. # 593, p. 27:2). This finding was made by the Court despite it being presented with Ninth Circuit case law that expressly endorsed date-of-hire seniority integration as a legitimate union objective. *Laturner v. Burlington N., Inc.,* 501 F.2d 593, 599 (9th Cir. 1974), *cert. denied*, 419 U.S. 1109 (1975). Notwithstanding the clarity of this Ninth Circuit precedent, this Court forbade the jury from considering the concept of date-of-hire seniority integration as a legitimate union objective. The Court's stated intention was to "illegitimate that abstract argument." (Tr. May 8, 2009 at p. 1872).
- That, "any asserted impasse was a *pretext for bare favoritism* of the East Pilots." (Doc. # 593, p. 29:18) (emphasis added);
- That, "It is wholly speculative to say the East Pilots would vote against any single CBA incorporating the Nicolau Award no matter how long separate operations continued and no matter the cost to them." (Doc. # 593, p. 31:2);

- That, "It is clear that USAPA's conduct violates its duty as set forth in a special genre of fair representation cases." (Doc. # 593, p. 34:12);
- That, "This injunction and order also illuminates USAPA's untoward objectives ..." (Doc. # 593, p. 49:3);
- That, "the evidence shows not only USAPA's wrongful motives but also *willingness to conceal* those motives and to bring about its seniority objectives by subterfuge." (Doc. # 593, p. 50:5) (emphasis added).

In addition to the above are the Court's other findings of fact that were contrary to the parties' stipulations and, more recently, contradicted by the Ninth Circuit in its decision dismissing the case.

ii) The Case Must Remain With Judge Silver In Order To Preserve The Appearance Of Justice.

It is at least advisable, if not necessary, to deny transfer in order to preserve substantive justice, or, at minimum, the *appearance* of justice. Appearance alone, such as where a judge has expressed "strong views" apart from any actual demonstrated impartiality, not only warrants reassignment (here denying transfer) but it is grounds for USAPA to petition for a writ of mandamus.[6] *See In re Ellis*, 356 F.3d 1198, 1121 (9th Cir. 2004); *see also United States v. Atondo-Santos*, 385 F.3d 1199, 1201 (9th Cir. 2004) (case remanded based on "unusual circumstance" where district court clearly would have substantial difficulty in putting out of its mind repeatedly, previously expressed views).

In this case, the Court has repeatedly expressed its strong views on the issues and on the parties. It ruled decisively against USAPA in an intense case open to broad scrutiny by pilots, the company, and the media. The Court's impartiality has been made an issue of record by USAPA's public appeal. This Court has been overruled with a

[6] A course USAPA would no doubt be forced to take.

conclusion that it never had jurisdiction. Now, plaintiffs' motion to transfer inevitably invites 5,000 pilots to conclude that the outcome of the Company's action would be pre-ordained, were this Court to accept transfer. Moreover, the transfer would be done in the face of plaintiffs' expressed desire to have the case heard by a judge with whom, according to plaintiffs, USAPA has long had a relationship of "hostility." (*See* Doc. # 644-1). Plaintiffs' hostility perception constitutes direct evidence that the appearance of justice is not obtainable. Thus, any potential duplication of effort between courts as a result of denying the transfer motion cannot possibly outweigh the inevitable appearance that this case would become but a sham were transfer granted. No party has a legitimate interest in that outcome.

C. Denial Is Required To Avoid Actual Prejudice To USAPA And The Extra Cost And Time Of A Writ Of Mandamus To Cure Such Prejudice.

Respectfully, and for the record should it be needed, USAPA maintains its position that this Court is not impartial, that it could not be impartial towards USAPA in any further proceedings, and that such impartiality will unfairly prejudice USAPA by depriving it of constitutional and other rights. Curing the risk of that prejudice, or to avoid it, may well necessitate the additional cost and time of a writ of mandamus. (Such a petition would likely be heard by the same panel. *See* General Order 3.7; *see also Vizcanios v. United States Dist. Court for W. Dist. of Wash*., 173 F.3d 713, 719 (9th Cir.), *amended and pet. for reh'g en banc denied*, 184 F.3d 1070 (9th Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000)).

Given that this Court rejected USAPA's early and oft repeated objection that the

Addington DFR claim was not ripe and thus the Court had no jurisdiction, USAPA has, to date, suffered needless cost and delay (and the proper resolution of the underlying seniority merger issue at the bargaining table has also been needlessly delayed).[7] This harm will only be compounded by the need to return to the Ninth Circuit to avoid a partial court, or the appearance of partiality, or to enforce the Mandate. *See generally Brown v. Baden*, 815 F.2d 575 (9th Cir.) (per curiam), *cert. denied sub nom*., *Real v. Yagman*, 484 U.S. 963 (1987) (if the district court refuses to follow a mandate on remand, the proper method of enforcing compliance with that mandate is to petition the Ninth Circuit for a writ of mandamus). *See also United States v. Thrasher*, 483 F.3d 977, 981-82 (9th Cir. 2007) (if district court errs by violating the rule of mandate, the error is jurisdictional).

VI. CONCLUSION

Respectfully, USAPA requests that this Court deny plaintiffs' motion to transfer. In the alternative, USAPA respectfully requests that the Court recuse itself from consideration of this motion in favor of disposition by the Chief Judge of the District. *See* 28 U.S.C. § 137.

[7] Verifying its subject matter jurisdiction is a federal court's "first duty" in every case. *McCready v. White*, 417 F.3d 700, 702 (7th Cir. 2005). Prior to trial in this action, the Western District of North Carolina did exactly this and dismissed an unripe lawsuit that was based on the exact same seniority integration proposal at issue in this case. *Breeger v. US Airline Pilots Ass'n*, 2009 U.S. Dist. LEXIS 40489 (W.D.N.C. May 12, 2009). The *Breeger* decision was brought to this Court's attention by USAPA prior to trial in an effort to avoid litigation of an unripe matter (doc. # 401). Nevertheless, this Court discounted the *Breeger* decision as inapplicable to this case. (*See* Doc. # 593 at 40-41).

Respectfully Submitted,

Dated: August 10, 2010

By: ***/s/ Nicholas P. Granath***

Nicholas P. Granath, Esq. (*pro hac vice*)
ngranath@ssmplaw.com
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
2915 Wayzata Blvd.
Minneapolis, MN 55405
Tel. 612 341-9080; Fax 612 341-9079

Lee Seham, Esq. (*pro hac vice*)
Lucas K. Middlebrook, Esq. (*pro hac vice*)
Stanley J. Silverstone, Esq. (*pro hac vice*)
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
445 Hamilton Avenue, Suite 1204
White Plains, NY 10601
Tel. (914) 997-1346; Fax (914) 997-7125

Nicholas J. Enoch, State Bar No. 016473
nick@lubinandenoch.com
Lubin & Enoch, PC
349 North 4th Avenue
Phoenix, AZ 85003-1505

CERTIFICATE OF SERVICE

I hereby certify that on this day of 10 August, 2010, I electronically transmitted the foregoing document, and its attachments, to the U.S District Court Clerk's Office using the ECF System for filing and transmittal.

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