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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Don ADDINGTON, *et al.*, *Plaintiffs*, vs. US AIRLINE PILOTS ASSN., *et al.*, Defendants.	CASE NO. 08-CV-1633-PHX-NVW CASE NO. 10-CV-01570-PHX-ROS **REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO TRANSFER RELATED CASE, PURSUANT TO LRCIV 42.1**

REPLY MEMORANDUM

I. LEGAL ARGUMENT

A. The Arizona District Court routinely transfers cases to judges who have substantially related recently closed cases.

1. LRCiv 42.1 does not require an open transferor case.[1]

USAPA offers no authority holding that a transferor case must be "open" to have a proper LRCiv 42.1 transfer. Although the language in LRCiv 42.1 is consistent with USAPA's interpretation, it is also consistent with the interpretation that the transferee and transferor cases must be in that district and not somewhere else. None of the cases cited by USAPA even

[1] Plaintiffs use: "transferee case" to designate the case that is transferred in a LRCiv 42.1 transfer; "transferor court" to designate the court receiving the transferee case; and "transferor case" to designate the case in the "transferor court" that is substantially related to the transferee case.

address the status of the transferor case. Rather, these cases address problems with the transferee case. One found error because the transferee case was "yet to be filed." *Pan Am. World Airways, Inc. v. U.S. Dist. Court for Central Dist. of California*, 523 F.2d 1073, 1080 (9th Cir. 1975). The other case found error because the transferee case was "not properly before the district court." *Oregon Egg Producers v. Andrew*, 458 F.2d 382, 383 (9th Cir. 1972). USAPA cited no decision that found error because the transferor case closed before the transfer.

2. The District Court makes LRCiv 42.1 transfers where the transferor case was recently closed.

The District Court makes LRCiv 42.1 transfers without regard to whether the transferor case is open. *See, e.g., Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Com'n*, 366 F.Supp.2d 887, 893 (D. Ariz. 2005). The relevant procedural events underlying the transfer in *Arizona Minority Coalition* are set out below to show that its procedural posture was entirely analogous to the procedural posture at issue here.

In regard to the *Arizona Minority Coalition* transfer, the transferor case was *Navajo Nation v. Arizona Independent Redistricting Com'n*, 2:02-cv-0799-ROS, which was filed on May 1, 2002, and assigned to Judge Silver. Doc. # 1.[2] On October 7, 2003, after more than a year of litigation, Judge Silver dismissed *Navajo Nation*. Doc. # 174. On October 30, 2003, an appeal was properly noticed. Doc. # 178. The mandate, issued on April 15, 2004, directed the dismissal of the action. Doc. # 197. At that point, *Navajo Nation*

[2] "Doc." refers to the document number on the docket of Case 2:02-cv-00799-ROS-SRB, Exhibit A to the Jacob Declaration.

was closed. On April 15, 2004, therefore, *Navajo Nation* had the same procedural posture that *Addington* had on August 11, 2010.

The transferee case was *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Com'n*, 2:04-cv-0797, which was filed on April 23, 2004, and assigned to Judge Murguia. It also addressed redistricting. On April 28, 2004, 14 days after the *Navajo Nation* mandate issued, the Redistricting Commission filed a motion in *Navajo Nation* to transfer *Arizona Minority Coalition* to Judge Silver. Doc. ## 200, 202. At that point, *Arizona Minority Coalition* had the same procedural posture that the US Airways declaratory action has now.

Regardless that *Navajo* Nation was closed, Judge Silver granted the transfer motion and transferred *Arizona Minority Coalition* to her division. Doc. # 203. She did so on May 5, 2004, regardless that the mandate dismissing *Navajo Nation* issued 21 days before the transfer. *Id.* Judge Silver made this transfer pursuant to LR 1.2(g)(1) (2003), which had language identical to that used now in LRCiv 42.1 (2010).[3] If this language did not

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[3] The Arizona District Court renumbered its local rules for 2004-05 such that local rule 1.2(g)(1)(2003) became LRCiv 42.1 (2010). A copy of the relevant renumbering scheme is attached as Exhibit B to the Jacob Declaration. The pertinent language from local rule 1.2(g)(1) was as follows:

> Whenever two or more cases *are pending* before different District Judges and any party believes that such cases (A) arise form substantially the same transaction or event; (B) involve substantially the same parties or property; … (d) call for determination of substantially the same question of law; or (E) for any other reason would entail substantial duplication of labor if heard by different District Judges, any party may file a motion to transfer the case or cases involved to a single District Judge

LR 1.2 (g)(1) (2003) (emphasis added); *compare to* LRCiv 42.1(2010) (same).

preclude transferring *Arizona Minority Coalition* to Judge Silver, it does not preclude transferring the US Airways declaratory action to this Court.

B. The Court would not violate the mandate if it transferred the US Airways declaratory action.

USAPA's contention that this Court would violate the mandate by transferring the US Airways declaratory action is based on a false premise because it is not true that the Court must delay dismissing *Addington* to transfer the US Airways declaratory action pursuant to LRCiv 42.1. As demonstrated above, a LRCiv 42.1 transfer can be based on a recently closed substantially related transferor case. It is unnecessary, therefore, to delay the dismissal of *Addington* to transfer the US Airways declaratory action.

Plaintiffs have not asked this Court to delay the dismissal of *Addington*, neither in this motion nor in their Rule 60(b) motion. Rather, in their Rule 60(b) motion, Plaintiffs ask this Court to reopen the *Addington* judgment after it is dismissed. Plaintiffs make this request so that this Court can determine whether *Addington* became ripe when US Airways filed its action.[4] Reopening *Addington* to make this inquiry would not violate the mandate because the Ninth Circuit did not address this inquiry. *See Gould v. Mutual Life Ins. Co. of New York*, 790 F.2d 769, 772-73 (9th Cir. 1986).

C. The Court should disregard USAPA's allegations of judicial hostility as untimely, insubstantial, and irrelevant to this motion.

USAPA's allegations challenging the fitness of this Court have no relevance to Plaintiffs' motion to transfer. Indeed, we find them to be entirely unseemly. Fitness of the transferor court is not an element of the analysis

[4] Indeed, because the predicate of a Rule 60(b) motion is a final judgment, the motion will not be ripe until the Court enters final judgment dismissing *Addington*.

under LRCiv 42.1. If USAPA wants to challenge the fitness of the Court, it can do so directly in the *Addington* case or it can do so when the US Airways declaratory action is in front of this Court. USAPA cannot do so, however, based on events that occurred more than a year ago.

If USAPA believes that this Court manifested hostility during *Addington*, USAPA should have moved for recusal then. "[R]ecusal issues must be raised at the earliest possible time after the facts are discovered." *First Interstate Bank of Arizona, N.A. v. Murphy, Weir & Butler*, 210 F.3d 983, 989 (9th Cir. 2000). USAPA did not move for recusal then because it had no basis to do so. And it has none now, either.

USAPA did not move for recusal during *Addington* because there is no merit to its contention that this Court is unfit on the basis of manifest hostility. USAPA points only to the Court's judicial rulings as evidence of hostility. "[R]ulings alone almost never constitute a valid basis for a bias or partiality motion." *United States v. Sutcliffe*, 505 F.3d 944, 958 (9th Cir. 2007). "Even hostile judicial remarks made during the course of a trial will not ordinarily support a challenge to the judge's partiality." *Id.*; *see also Liteky v. United States*, 510 U.S. 540, 555 (1994) (same). *Clemens v. U.S. Dist. Court for Central Dist. of Cal.*, 428 F.3d 1175, 1178 (9th Cir. 2005). This Court, therefore, should reject USAPA's allegations of judicial hostility as untimely, insubstantial, and irrelevant.

Indeed, it appears like USAPA has taken a few pages from Andrew Thomas' and Sheriff Arpaio's playbook—sue judges for RICO conspiracy when they rule against them. If so, counsel may have forgotten that "once a lawyer is admitted to the bar, although he does not surrender his freedom of expression, he must temper his criticisms in accordance with professional

standards of conduct." *U.S. Dist. Court for Eastern Dist. of Washington v. Sandlin*, 12 F.3d 861, 866 (9th Cir. 1993).

II. CONCLUSION

The District Court routinely transfers newly filed matters if a judge, other than the assigned judge, has substantial familiarity with the subject matter from a related case. It does so, without regard to whether that related case is open or recently closed. The Court has sound reason to transfer the US Airways declaratory action. Plaintiffs, therefore, respectfully ask the Court to grant their motion to transfer.

Dated this 12th day of August, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on August 12th, 2010 I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to CM/ECF registrants.

s/ *Andrew S. Jacob*