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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

DEFENDANT USAPA'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT

I. SUMMARY

Following issuance of the Ninth Circuit decision on June 4, plaintiffs swung and missed three times in their attempts to have the Ninth Circuit clarify its decision, rehear the case *en banc* and stay issuance of the mandate. After striking out with the Ninth Circuit, plaintiffs came to this Court asking for, "relief from the judgment mandated by the Ninth Circuit." (Doc. # 645 at i). But plaintiffs' motion must be rejected because it merely asks this Court to overturn the decision of the Ninth Circuit Court of Appeals under the guise of Fed. R. Civ. P. 60(b). The motion is frivolous both procedurally and in substance. It attacked a judgment not yet entered. It points to no changed circumstance – merely allegations in a lawsuit. It fails to cite a single case that actually supports its arguments. And it gratuitously misrepresents the Ninth Circuit's holding on ripeness in *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174 (9th Cir. 2010).

II. PROCEDURAL POSTURE

On June 4, 2010, the Ninth Circuit 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." 606 F.3d at 1184. Subsequently, plaintiffs' petitions for clarification and *en banc* rehearing were denied, as was their motion to stay the mandate. On July 26, 2010, US Airways filed a complaint for declaratory relief against both USAPA and against the Addington plaintiffs.

On August 6, 2010 – before any mandate had issued – the plaintiffs applied to this Court for relief from the "judgment mandated by the Ninth Circuit." (Doc. # 645, p. 1). On August 10, 2010, the mandate of the Ninth Circuit issued. On August 13, 2010, this

Court ordered dismissal of the action and judgment was entered in favor of USAPA. (Doc. # 653).

III. CORRECTION OF THE FACTS

Response to plaintiffs' allegations contained in the "Background" section of their brief is necessary to correct the record:

First, plaintiffs continue to misrepresent that "the pilots" agreed to use binding arbitration. (Doc. # 645 at 6). Plaintiffs not only stipulated to the contrary,[1] but the Court of Appeals found otherwise. *See Addington*, 606 F.3d at 1177 (Nicolau arbitration was "between the US Airways Pilot Merger Representatives and the America West Pilot Merger Representatives."). Plaintiffs continue this misrepresentation (*See* Doc. # 642 at 2), as if repeating it long enough might make it true, which is indicative of the frivolous nature of their motion.

Second, there are no "findings" in this matter as claimed by plaintiffs. (Doc. # 645, p. 6). There is no judgment other than the one required by the Ninth Circuit for dismissal for lack of jurisdiction. Claims and mis-characterizations of the findings, whether of the jury or of this Court, may serve the plaintiffs' political and fundraising objectives, but legally they are immaterial. *See Kylleen Hargrave-Thomas v. Yukins*, 450 F. Supp. 2d 711, 720-721 (E.D. Mich. 2006) ("a judgment reversed by a higher court is 'without any validity, force or effect, and ought never to have existed'").

Third, as addressed herein below in more detail, it is misleading and inaccurate to

[1] Plaintiffs stipulated in the final pretrial order that the parties to the Nicolau Arbitration were "the US Airways Pilot Merger Representatives and the America West Pilot Merger Representatives." (Doc. # 417, p. 5, ¶ 14).

claim, as plaintiffs do, that the Ninth Circuit found a lack of ripeness *merely* because it found the district court could not "fashion a[n] injunctive remedy." (Doc. # 645 at 6). The inability to fashion a remedy, according to a fair reading of the decision, was merely symptomatic of a claim that was unripe because of: 1) the existence of "contingencies that could prevent effectuation of USAPA's proposal" 606 F.3d at 1179; and 2) plaintiffs' failure to identify "a sufficiently concrete injury." *Id*. at 1180.

Fourth, the claim that, "during the appeal, USAPA apparently avoided pressuring US Airways to implement date-of-hire seniority integration" (Doc. # 645 at 7) is misleading. The only material fact is that USAPA strictly complied with this Court's injunction even following the Ninth Circuit's June 4 decision, until such time as the mandate issued confirming that this Court never had jurisdiction to issue the injunction in the first place.

Fifth, the claim that USAPA's conduct "changed" after the decision (Doc. # 645 at 7) is similarly misleading. USAPA took no steps that would offend the injunction at anytime before it was dissolved by this Court. There has never been an allegation, let alone proof, otherwise. Plaintiffs' citation to the allegations in the Company's declaratory judgment action are no substitute, either, because even if true, those allegations merely echo USAPA's consistent position since certification, i.e that it was free to bargain for a contract that could be ratified notwithstanding any proposal by its predecessor, including the Nicolau list. This position is hardly new. Indeed, plaintiffs' damage theory claimed (impossibly) that USAPA's allegedly unlawful bargaining posture actually *pre-dated certification*.

Sixth, plaintiffs claim that "USAPA's insistence on date-of-hire seniority integration leaves the airline in an impossible predicament." (Doc. # 645 at 7). Aside from the legal infirmities in that claim (see below, herein), as a matter of fact this is merely re-alleging unproven allegations by US Airways in a complaint not yet tested by USAPA's forthcoming motion to dismiss. But even before dismissal, a fair reading of the Company's lawsuit shows that Count I seeks to address the legality of USAPA's current seniority integration proposal, about which plaintiffs now seek to litigate (the same as if the Ninth Circuit had not ordered dismissal), is entirely *independent* of the alternative relief the Company seeks for itself in Count III, which is immunity from liability irrespective of the seniority integration proposal incorporated in any final agreement. That is, Count III is not predicated on determination of any other count, notwithstanding plaintiffs' attempt to conjure up new evidence to suit their present motion designed to end-run the Ninth Circuit's dispositive determination that this federal court has no jurisdiction to adjudicate the lawfulness of USAPA's current bargaining proposal.

IV. LEGAL STANDARD FOR RULE 60(b)

Relief under Rule 60(b) is at the expense of the finality of judgments, hence relief is considered "extraordinary." *See Gonzalez v. Crosby*, 546 U.S. 524, 529 (2005) (noting that Rule 60(b)'s "whole purpose is to make an exception to finality"); *Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 126 (2d Cir. 2009) (relief under rule 60(b) is reserved for only exceptional circumstances).

Rule 60(b) contains six enumerated grounds for relief. Here, however, plaintiffs

failed to even indicate which ground in the rule they were proceeding under. Because plaintiffs assert only one event, the Company's lawsuit which they claim is a "changed circumstance," the only possible grounds implicated are Rule 60(b)(5) and 60(b)(6).

While the language of either provision 60(b)(5) or (6) is broad, neither presents the court with a "standardless residual discretionary power to set aside judgments." *Mayberry v. Maroney*, 558 F.2d 1159, 1163 (3d Cir. 1977). Instead, it is settled that such relief is extraordinary and may be granted only upon a showing of "exceptional circumstances." *Id*. In fact, only "substantial" changes in circumstances are relevant. *See U.S. v. Kayser-Roth Corp*., 272 F.3d 89, 95 (1st Cir. 2001); *Parton v. White*, 203 F.3d 552, 555 (8th Cir. 2000).

Moreover, relief under the "changed circumstances" category is only available where there is a "prospective" effect to the challenged judgment. *See Baum v. Blue Moon Ventures*, LLC, 513 F.3d 181, 190 (5th Cir. 2008); *Marazitti v. Thorpe*, 52 F.3d 252, 254 (9th Cir. 1995) (noting that nearly every court order causes some reverberations into the future and mere "continuing consequence" does not equate with "prospective application"). "[P]reclusive effects do not qualify as 'prospective applications' under Rule 60(b)(5), which is addressed to "executor" decrees or ones involving "the supervision of changing circumstances." *Hall v. Central Intelligence Agency*, 437 F.3d 94, 99 (D.C. Cir. 2006). There is no prospective effect to the challenged judgment at issue here.

Relief under Rule 60(b)(6) is "exceedingly rare." *See In re Guidant Corp. Implantable Defibrillators Products Liability Litigation*, 496 F.3d 863, 868 (8th Cir.

2007). Relief under Rule 60(b)(6) is also limited to setting aside a judgment and may not be used to grant affirmative relief. *Delay v. Gordon*, 475 F.3d 1039, 1044-45 (9th Cir. 2007). And, because relief under Rule 60(b) is not intended to be a substitute for appeal, the party seeking relief bears a particularly heavy burden. *See Info-Hold, Inc. v. Sound Merch, Inc*., 538 F.3d 448 (6th Cir. 2008).

V. ARGUMENT

1) <u>Plaintiffs' Motion Was Filed Prematurely Because It Preceded The Judgment It Seeks Relief From.</u>

Plaintiffs filed their 60(b) motion for relief from judgment prematurely on August 6, 2010, an entire week before any judgment had even issued. At the time of filing, plaintiffs' motion to stay the mandate had been denied by the Ninth Circuit, but in accordance with Fed. R. App. P. 41, the Ninth Circuit's mandate had yet to issue. Therefore, at the time plaintiffs filed the present motion, jurisdiction over this case remained with the Ninth Circuit:

> The relationship between district court jurisdiction and the issuance of the appeals court mandate is clear and well-known: The filing of a notice of appeal, including an interlocutory appeal, "confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co*., 459 U.S. 56, 58 (1982) (per curiam). **The district court does not regain jurisdiction over those issues until the court of appeals issues its mandate**.

United States v. Defries, 129 F.3d 1293, 1302 (D.C. Cir. 1997) (emphasis added). *See also Thorp v. Thorp*, 655 F.2d 997, 998 (9th Cir. 1981) ("district court is divested of authority to proceed … until the mandate has been issued by the court of appeals"). Therefore, since jurisdiction remained with the Ninth Circuit, this Court was not even

empowered to grant plaintiffs' motion at the time it was filed. *See Baum*, 513 F.3d at 190 n.2 ("district court … may not grant a Rule 60(b) motion if it has been divested of jurisdiction by the filing of a notice of appeal.").

Given the unexplainable timing of plaintiffs' filing, it was unclear from which judgment they were seeking 60(b) relief. Plaintiffs later clarified, albeit in an unrelated filing, that "their Rule 60(b) motion … ask[s] this Court to reopen the *Addington* judgment after it is dismissed." (Doc. # 649 at 4). However, even this clarification came *before* any such judgment was issued by this Court. A request for relief from judgment filed before a judgment has even issued is improper and should not be considered by this Court. *See Hargrave-Thomas*, 450 F. Supp. 2d 711 at 722 (denying 60(b) motion as premature noting that the "Court will not consider a motion for relief from judgment filed before such a judgment has issued.").

In addition, because plaintiffs filed their motion prematurely *prior to judgment*, it was pending with this Court after issuance of the Ninth Circuit mandate but prior to this Court's dismissal of the entire action for lack of subject matter jurisdiction. Therefore, as a pending motion, it was dismissed along with the rest of the case and rendered moot. This is so, because any further action taken on a pending motion would constitute an exercise of jurisdiction, which the Mandate specifically ordered this Court to relinquish:

> Compliance with an order to relinquish jurisdiction necessarily precludes the lower court from taking any further action other than dismissal, for to do so would involve retaining jurisdiction. …
>
> Once an order to dismiss is received, any action by the lower court other than immediate and complete dismissal is by definition inconsistent with – and therefore a violation of – the order.

Stamper v. Baskerville, 724 F.2d 1106, 1108 (4th Cir. 1984); *Invention Submission Corp. v. Dudas*, 413 F.3d 411, 415 (4th Cir. 2005) ("because our order stated that the district court lacked jurisdiction, the court was not free to do anything else but to dismiss the case").

In inexplicable fashion, even by plaintiffs' standards, they requested 60(b) relief from a judgment that had yet to issue, and that request was pending at the time this Court dismissed the entire action. Consequently, plaintiffs' current motion for relief should be denied as premature, or in the alternative, rendered moot by the dismissal of the action.

2) **The Mere Filing Of The Company's Lawsuit Is Not A Changed Circumstance Justifying 60(b) Relief.**

i) No Changed Circumstances Exist in Fact or Law.

The only change plaintiffs rely upon – the Company commencing a lawsuit – is no grounds for relief under Rule 60(b). All that has happened is that US Airways filed a suit purportedly seeking a declaration of rights. Nothing has been proven, nothing has been ruled upon, and USAPA will shortly bring a motion to dismiss on jurisdictional and other grounds. "[A] mere demand for declaratory relief does not by itself establish a case or controversy necessary to confer subject matter jurisdiction." *S. Jackson & Son, Inc. v. Coffee, Sugar & Cocoa Exchange Inc.*, 24 F.3d 427, 431 (2d Cir. 1994) (*citing Skelly Oil Co. v. Phillips Petroleum Co*., 339 U.S. 667 (1950)).

Plaintiffs' 60(b) motion fails to cite a single case in support of its claim that the *mere filing* of the declaratory judgment action somehow results in a ripe case notwithstanding the Ninth Circuit's recent decision in *Addington*. Plaintiffs also fail to

cite to any case holding that mere speculation raised by an allegation, by a company against a union of a refusal to exert every reasonable effort to negotiate a CBA, makes an airline's action ripe for review. To the contrary, courts have *rejected* employer's allegations claimed to constitute changed circumstance when such allegations were available to the employer previously in the litigation. *See e.g., Int'l Bhd. of Elec. Workers v. Hope Elec. Corp.*, 293 F.3d 409 (8th Cir. 2002).

Remarkably, but not surprisingly, plaintiffs' argument that, "[t]he First Claim in US Airways' declaratory action is ripe" (Doc. # 645 at 6-9), that "[c]hanged circumstances here establish ripeness" (*Id.* at 9), and that '[t]he Court should vacate the dismissal" (*Id.* at 9-10) – does not contain citation to a single case which even mentions either the word "ripe" or "ripeness." The cases they do cite provide no support for their argument.

Association of Flight Attendants v. Horizon Air Industries, Inc., 976 F.2d 541 (9th Cir. 1992), cited by plaintiffs, does not support Rule 60(b) relief and is inapposite in that the Court of Appeals affirmed the district court's findings of fact that the carrier violated the RLA. But here there are no such findings of fact.

In *American Postal Workers Union v. American Postal Workers Union*, 665 F.2d 1096, 1109 (D.C. Cir. 1981), the D.C. Circuit Court, in relevant part, affirmed the dismissal of the employer because in the absence of some indication that an employer acted impermissibly against union members, for example by violating contractual or statutory responsibilities – it may not be charged with a union's breach of duty of fair representation or fiduciary duty. *Id.* at 1110. The words "ripe" and "ripeness" do not

exist in this decision.

Plaintiffs also cite *Davenport v. Int'l Bhd. of Teamsters*, 166 F.3d 356 (D.C. Cir. 1999), which is not a declaratory judgment action and therefore is inapposite. Again, ripeness was not addressed in this decision. Finally, plaintiffs' citation to *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366 (1949) is misplaced. That case does not address Rule 60(b), does not concern changed circumstances, and does not analyze the issue of ripeness.

ii) Plaintiffs Misrepresent The Ninth Circuit Decision On Ripeness.

In an effort to contrive a Rule 60(b) argument, plaintiffs misrepresent the Ninth Circuit's decision on ripeness. But even under plaintiffs' tortured reading, their 60(b) argument holds no water.

Plaintiffs' motion rests entirely on the claim that the *mere filing* of the US Airways declaratory judgment action somehow constitutes changed circumstances sufficient to immediately *make this case ripe.* Plaintiffs contend that the Ninth Circuit "held that the case was not ripe for decision because the district *court cannot fashion an injunctive remedy* that will alleviate Plaintiffs' harm." (Doc. # 645 at 1) (*citing Addington*, 606 F.3d at 1180) (emphasis added). But this was not the Ninth Circuit's holding or rationale as to why this case was never ripe and still is not ripe. The language mis-quoted by plaintiffs was actually made by the Ninth Circuit only after it had fully explained the reasons as to why the case was not ripe. This must be read in whole and in context:

> We conclude that this case presents contingencies that could prevent effectuation of USAPA's proposal and the accompanying injury. At this point, neither the West Pilots nor USAPA can be certain what seniority

> proposal ultimately will be acceptable to both USAPA and the airline as part of a final CBA. Likewise, it is not certain whether that proposal will be ratified by the USAPA membership as part of a new, single, CBA. Not until the airline responds to the proposal, the parties complete negotiations, and the membership ratifies the CBA will the West Pilots actually be affected by USAPA's seniority proposal – whatever USAPA's final proposal ultimately is. Because these contingencies make the claim speculative, the issues are not yet fit for judicial decision.
>
> We also conclude that withholding judicial consideration does not work a direct and immediate hardship on the West Pilots. … Plaintiffs correctly note that certain West Pilots have been furloughed, whereas they would still be working under a single CBA implementing the Nicolau Award. It is, however, at best, speculative that a single CBA incorporating the Nicolau Award would be ratified if presented to the union's membership. **ALPA had been unable to broker a compromise between the two pilot groups, and the 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.** That the court cannot fashion a remedy that will alleviate Plaintiffs' harm suggests that the case is not ripe.

Addington, 606 F.3d at 1180 (emphasis added). The same contingencies described by the Ninth Circuit in its June 4th decision continue to exist today. Plaintiffs' alleged harm remains as wholly speculative now as it did then. Therefore, under the law of this case, "a [DFR] claim can be brought only after negotiations are complete and a 'final product' has been reached." *Id*. at 1182 (*citing Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65, 78 (1991)).[2] Until then, there is not even the possibility of showing injury, which precludes Rule 60(b) relief. *Lehman v. United States*, 154 F.3d 1010 (9th Cir. 1998) *cert.*

[2] The Ninth Circuit's conclusion in this case that "there is too much uncertainty standing in the way of effectuating of Plaintiffs' harm to warrant judicial intervention" has not changed, and the CBA at issue has not been negotiated or ratified. 606 F.3d at 1181. Conspicuously absent from Plaintiffs' Rule 60(b) motion is any specific reference to the Ninth Circuit's discussion of the absence of ripeness, and the future contingencies that must occur in order to make their DFR claim ripe for review. This silence is deafening.

denied, 526 U.S. 1040 (to receive relief under Rule 60(b) a moving party must show injury).

In addition to the above, plaintiffs carefully plucked Ninth Circuit language from its context by contending that the "Ninth Circuit 'left 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.'" (Doc. # 645 at 2) (*citing* 606 F.3d at 1180).[3] When this language is reunited with the rest of the footnote that it was so carefully carved out of, it becomes apparent why plaintiffs have chosen to cite only a single portion taken wholly *out of context*:

> The dissent asserts that "nothing would be gained by postponing a decision, and the parties' interest would be well served by a prompt resolution of the West Pilots' claim." To be sure, the parties' interest would be served by prompt resolution of the seniority dispute, but that is not the same as prompt resolution of the DFR claim. 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**. By deferring judicial intervention, we leave 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.

606 F.3d at 1180, n.1 (emphasis added). The Ninth Circuit specifically recognized that the inclusion of Nicolau in any CBA would produce a tentative agreement that "would undoubtedly be rejected by [USAPA] membership." *Id*. The Ninth Circuit therefore left USAPA to negotiate a CBA that could be ratified, and noted that the final product "may yet be one that does not work the disadvantages Plaintiffs fear, *even if that proposal is*

[3] Despite its purported "neutral" position, the Company also chose to pluck this exact language out of context in its Complaint for declaratory relief. (10-cv-01579, Doc. # 1 at ¶ 2).

not the Nicolau Award." *Id*. at 1181 (emphasis added). Any final CBA is obviously subject to the duty of fair representation – which attaches to any contract once it has been negotiated, ratified and implemented. The mere filing of US Airways' declaratory action changes none of this. If neither the law supporting an original decision in a litigation nor the facts have changed, there is no need to decide the propriety of a Rule 60(b)(5) motion. *Agostini v. Felton*, 521 U.S. 203, 216 (1997).

iii) Plaintiffs' Motion Abuses Rule 60(b) And Invites This Court To Flout The Ninth Circuit's Mandate.

Rule 60 is not a vehicle to attack appellate rulings, but plaintiffs' motion does just that. Therefore, it necessarily invites this Court to flout the mandate in violation of the settled principles of *res judicata* and the mandate rule.[4] This is a blatant misuse of Rule 60(b):

> The orderly administration of justice in the federal courts requires, *a fortiori*, that the district court not use its broad, usually discretionary, power under this provision to relieve a party from the effect of the judgment of a higher court that the district court thinks erroneous.

Lapiczak v. Zaist, 54 F.R.D. 546, 549 (D. Vt. 1972); *Hargrave-Thomas*, 450 F. Supp. 2d at 720 ("this Court has no authority to reconsider the judgment of an appellate court."). Similar to the present motion, a misuse of Rule 60(b) was presented to a federal court sitting in the Sixth Circuit, and was rejected for what it was – an attempted end-run around an appellate ruling.

In *Hargrave-Thomas*, the Eastern District of Michigan was presented with a

[4] The doctrine of *res judicata* "ensures the finality of decisions." *Americana Fabrics, Inc. v. L & L Textiles, Inc.*, 754 F.2d 1524, 1528-1529 (9th Cir. 1985) (*citing Brown v. Felsen*, 442 U.S. 127, 131 (1979)). The doctrine applies to jurisdictional issues as well as substantive issues. *Id* (*citing Durfee v. Duke*, 375 U.S. 106 (1963)).

defective 60(b) request strikingly similar to that currently advanced by plaintiffs. 450 F. Supp. 2d 711. In that case, the petitioner had been granted a writ of habeas corpus by the district court, but that decision was appealed to the Sixth Circuit. On appeal, similar to this case, the Sixth Circuit reversed and remanded with a specific limited instruction "for an entry of an order dismissing the petition." *Id*. at 721. Following the Sixth Circuit's decision, but *prior to issuance of the mandate*, the petitioner filed a Rule 60(b) request with the district court seeking relief from judgment.

The district court first explained that the motion was premature and therefore improper because it was filed before the district court entered judgment in accordance with the mandate. *Id*. at 722 (describing the timing of the filing as "highly imprudent."). Thereafter, the district court, although openly sympathetic to petitioner's case, explained at length why it was without authority to grant 60(b) relief in the face of a Circuit Court decision that remanded with the limited instruction to dismiss:

> The Sixth Circuit, in its July 6, 2004 opinion, reversed this Court and remanded the case "for entry of an order dismissing the petition." … A failure to follow the Sixth Circuit's order scrupulously and fully would not only subject this Court to further review by the Court of Appeals but would also frustrate the judicial interest in proceeding toward finality. It follows that because the Sixth Circuit remanded the case to this Court with the limited remand "for entry of an order dismissing the petition," any action other than a dismissal of Ms. Hargrave-Thomas's petition at this time would be inconsistent with this Court's authority. **Consequently, to the extent that Petitioner's Rule 60(b) motion now asks this Court to grant relief via an order deviating from the Court of Appeals mandate … this Court is unable to do so**. … **This Court has no authority to reconsider the judgment of a superior, reviewing court**.

Id. (emphasis added). The petitioner in *Hargrave-Thomas*, similar to plaintiffs here, also attempted to rely on the Supreme Court's decision in *Standard Oil Co. v. United States*,

429 U.S. 17 (1976), to support the argument that the district court "has the authority to grant 60(b) relief contrary to an appellate court mandate." 450 F. Supp. 2d at 722. The *Hargrave* district court quickly disposed of that argument – as this Court should do with plaintiffs' misplaced reliance on *Standard Oil*.

First, the *Hargrave* court noted that *Standard Oil* was "readily distinguishable" because in that case "the district court issued a ruling that was *affirmed* by the United States Supreme Court." *Id*. (emphasis added). This was in stark contrast to the remand with instructions to *dismiss* handed down by the Sixth Circuit in *Hargrave*. The same distinguishing factor persists here.

Second, the *Hargrave* court explained that "unlike the situation in *Standard Oil*, Petitioner does not demonstrate any 'later events' that the Sixth Circuit's mandate did not purport to deal with." *Id*. Therefore, *Standard Oil* "provides no rationale that would permit this Court to deviate from the mandate of the Sixth Circuit." *Id*. The same holds true here. Plaintiffs come to this Court asking it to deviate from the Ninth Circuit's mandate based on nothing more than the mere filing of a declaratory action by US Airways. *Standard Oil* provides absolutely no support for such an outlandish request.

Plaintiffs' obvious recourse here, after unsuccessfully exhausting their post-decision options with the Ninth Circuit, is to appeal to the U.S. Supreme Court – a course of action that plaintiffs have vowed to take.[5] Motions to vacate under Rule 60(b) are not a substitute for appeal. *Gould v. Mutual Life Ins. Co. of New York*, 790 F.2d 769 (9th Cir.

[5] In their failed motion to stay the mandate, plaintiffs expressed to the Ninth Circuit their "bona fide intention to make proper and timely application to the Supreme Court of the United States for a writ of certiorari." (*See* Doc. # 648-1 at 6). Their internet solicitations boast the same.

1986); *Hess v. Cockrell*, 281 F.3d 212 (5th Cir. 2002). While "[r]eview of a Rule 60(b) motion may encompass a claim that the district court acted in excess of its jurisdiction ..." *id*. at 771, the Ninth Circuit has already held that this district court "never had jurisdiction" in the first place. 606 F.3d at 1184.

iv) Plaintiffs Continue To Cite Irrelevant Case Law.

While the Supreme Court found a change in circumstance in *Regional Rail Reorganization Cases*, 419 U.S. 102, 139-140 (1974) that resulted in substantially altering the posture of that case (as it regarded maturity of final-conveyance issues), no similar assertion of ripeness has been asserted here by plaintiffs.[6]

In addition, plaintiffs' reliance on *Guaranty National Ins. Co. v. Gates*, 916 F.2d 508 (9th Cir. 1990) is misplaced. Unlike in *Gates*, there is no statute implicating any constitutional issue in this case. Furthermore, plaintiffs' reference on page 8 of their motion to *Gates* is false and misleading. Plaintiffs claim that *Gates* stands for the proposition that a court "determines the ripeness of a declaratory action by looking at the ripeness of the corresponding coercive action." (Doc. # 645 at 8). The *Gates* decision says no such thing. In fact, a simple reading of *Gates* reveals that the word "ripeness," is not mentioned once in the entire decision.

3) <u>This Court May Impose Sanctions.</u>

This Court is empowered by Rule 11, on its own initiative, to impose sanctions

[6] Plaintiffs do not assert any factual circumstances concerning agency action, as they cannot, giving rise to an issue of ripeness as in *Buckley v. Valeo*, 424 U.S. 1, 13-14 (1976), or as in *W. Radio Serv. Co. v. Qwest Corp.*, 530 F.3d 1186 (9th Cir. 2008), or as in *Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation*, 792 F.2d 782 (9th Cir. 1986), or *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009).

after issuance of an order directing plaintiffs to show cause why they have not violated Rule 11(b) with the filing of the current motion. *Jones v. United Parcel Service, Inc.*, 460 F.3d 1004, 1008 (8th Cir. 2006) ("district court may impose Rule 11 sanctions on its own initiative"). The "central purpose of Rule 11 is to deter baseless filings in the district court and streamline the administration and procedure of the federal courts." *New York News, Inc. v. Kheel*, 972 F.2d 482, 488 (2d Cir. 1992) (citations omitted).

Here, the one thing plaintiffs correctly note in their motion is that a district court is well equipped to "recognize a frivolous [Rule 60(b)] motion." (Doc. # 645 at 4). This Court need not delve deep to recognize the frivolity of the current motion. Plaintiffs' motion constitutes an improper use of Rule 60(b), thrusts unnecessary costs upon USAPA and should be denied forthwith, if considered at all. Plaintiffs' motion is frivolous because the filing of allegations, even if presumed true, by a third party, here the Company, seeking a declaration of their rights, is not even close to a colorable basis to ask for relief from the judgment dismissing plaintiffs' DFR claim. The calculated effect of plaintiffs' motion is to avoid the Ninth Circuit mandate, and seek, yet again, to needlessly entangle the federal courts with on-going collective bargaining. The unavoidable effect is to burden USAPA, and this Court, needlessly and for improper purposes.

VI. RELIEF REQUESTED.

Respectfully, USAPA requests that this Court dismiss as premature or moot, or alternatively deny plaintiffs' motion (Doc. # 645) for relief from judgment. USAPA further requests an award of costs and fees incurred in responding to this baseless motion.

Respectfully submitted:

Dated: August 23, 2010 By: ***/s/ Nicholas Paul Granath***

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CERTIFICATE OF SERVICE

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

I hereby certify that on this day of August 23, 2010, I electronically transmitted the foregoing document and all its attachments to the U.S District Court Clerk's Office using the ECF System for filing and transmittal.

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