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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Don ADDINGTON; *et al.*, *Plaintiffs*, vs. US AIRLINE PILOTS ASS'N, *Defendant*.	Case No. 2:08-CV-01633 **PLAINTIFFS' REPLY IN SUPPORT OF RULE 60(b) MOTION FOR RELIEF FROM THE JUDGMENT DISMISING FOR LACK OF RIPENESS** (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 Reply in support of their Rule 60(b) motion.[1] Courts address Rule 60(b) motions, without regard to whether they were filed before entry of the judgment. The ripeness of the US Airways action (*US Airways*) is a "later event" that ensures the ripeness of this action (*Addington*). The Court, therefore, should consider the merits of Plaintiffs' Rule 60(b) motion and the present ripeness of *Addington* when it determines the ripeness of *US Airways*.

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

I. The Court should consider Plaintiffs' Rule 60(b) motion.

A. A "prematurely" filed post-judgment motion is timely.

The Court should consider Plaintiffs' Rule 60(b) motion because, when the motion was filed, only ministerial actions remained to finalize the judgment. In similar circumstances, another district court treated a post-judgment motion filed prior to final judgment as timely, explaining that "not every motion must fit within some neat pigeonhole." *Putnam Resources v. Pateman*, 757 F. Supp. 157, 170 (D.R.I. 1991). *Putnam* went on to explain:

> The adoption of the Rules has not completely displaced a trial court's inherent power to correct interlocutory decrees. [For example, the] **district court has discretion to consider issues raised in premature Rule 60 motion**. Where, as here, the parties have extensively briefed the motion and deference to form would unreasonably delay a decision to the detriment of all parties, the issue will be decided.

Id. (citations and quotation and parenthetical marks omitted, emphasis added).

Treating Rule 60(b) motions filed before final judgment as timely is not precluded by the rule itself. The language of Rule 60 does expressly require that such motions be filed after final judgment. Rather, the rule merely provides that certain motions must be made "no more than a year after the entry of judgment." Rule 60(c)(1).

Rule 60 is analogous to Rule 52, which provides for a motion to change findings of fact and conclusions of law. Rule 52(b) states that such motions must be filed "no later than 28 days after the entry of judgment." *Id.* The Ninth Circuit holds that this language "suggests that a motion made after the court has indicated the action that it will take but before entry of the judgment embodying that action is timely." *Calculators Hawaii, Inc. v. Brandt Inc.*, 724 F.2d 1332, 1335 (9th Cir. 1983) (quotation marks omitted). *See also Lewis v. U.S. Postal Service*, 840 F.2d 712, 713-14 (9th Cir. 1988) (holding that

Calculators established a rule that applies to post-judgment motions and notices of appeal).

The result here should be analogous to the result in *Calculators*—the Court should treat Plaintiffs' Rule 60(b) motion as timely. This is because Plaintiffs filed their motion after the Ninth Circuit left no doubt that its mandate would issue directing this Court to enter judgment dismissing *Addington* for lack of ripeness.

B. No authority presented precludes consideration of this motion.

Hargrave-Thomas v. Yukins, 450 F. Supp. 2d 711 (E.D. Mich. 2006), does not stand for a contrary proposition. Indeed, that court did not find that the Rule 60(b) motion was procedurally invalid. It held that it could not provide relief before it entered the judgment mandated by the court of appeals, not that it lacked authority to consider the merits of a Rule 60(b) motion after it implemented the mandate. *Id.* at 721. In fact, after it entered the judgment mandated by the court of appeals, *Hargrave-Thomas* did consider the merits of the Rule 60(b) motion. *See id.* at 723. In so doing, it distinguished *Standard Oil Co. of California v. United States*, 429 U.S. 17 (1976), to explain why it was denying relief on the merits:

> Here, 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. Consequently, *Standard Oil* provides no rationale that would permit this Court to deviate from the mandate of the Sixth Circuit. Furthermore, *Standard Oil* does not support any claim that this Court may now consider Petitioner's 60(b) claim. Instead, this Court finds that, contrary to Petitioner's application of the case, Standard Oil supports the proposition that given the lack of "later events" presenting changed circumstances not considered by the Sixth Circuit, an order deviating from the Court of Appeals decision would be "flouting the mandate."

Id.

C. The Court should consider Plaintiffs' Rule 60(b) motion.

As shown above, Rule 60(b) does not constrain this Court from considering the merits of Plaintiffs' motion. Rather, under established Ninth Circuit doctrine, the district court should treat a prematurely filed post-judgment motion such as this as timely. The Court, therefore, should consider the merits of Plaintiffs' Rule 60(b) motion and determine whether events that occurred after the Ninth Circuit issued its decision sufficiently changed the ripeness analysis to merit reopening the judgment.

II. Later events sufficiently changed the ripeness analysis.

A. *Addington* is ripe if *US Airways* is ripe.

Plaintiffs do not argue that the mere filing of *US Airways* is a "later event" that makes *Addington* ripe. Rather, the "later events" that changed the ripeness analysis enough to justify reopening the judgment are the vacation of the July 2009 judgment and injunction and the response thereto by USAPA and the West Pilots. These events made the claims in *US Airways* ripe. The claims in *US Airways* require a decision on issues central to *Addington*. The need to decide issues central to *Addington* removes any concern that *Addington* lacks prudential ripeness.

In other words, *Addington* is ripe if *US Airways* is ripe and *US* Airways is ripe because of events that occurred after the July 2009 judgment and injunction were vacated. *US Airways* requires a determination of USAPA's breach of the duty of fair representation. That determination in *US Airways* will have preclusive effect in *Addington*. As such, both the West Pilots and USAPA would be precluded from contesting that issue in *Addington*. *See Montana v. United States*, 440 U.S. 147, 153 (1979). The factual dispute at the core of *Addington* would be subject to issue preclusion. At that point, there will be no prudential reason to delay a decision for lack of ripeness.

B. US Airways is ripe.

The West Pilots do not presume to argue the ripeness of *US Airways* on behalf of the airline. Rather, they preview arguments that the airline could make to demonstrate the soundness of the underlying premises to Plaintiffs' motion. These premises are: (1) that *US Airways* will decide the central issue of *Addington*; and (2) that the Ninth Circuit's opinion does not foreclose finding that *US Airways* is ripe.

US Airways is based on unfair labor practice liability. It is well-established that such liability can arise during collective bargaining, before there is any final product of negotiation. For example, addressing a declaratory action seeking to define such liability, the Fourth Circuit "conclude[d] that the controversy over how to resolve existing labor disputes presents us with a live case in the constitutional sense and that the declaratory judgment remedy invoked by both parties was an appropriate exercise by the district court of its Article III power." *Norfolk & W. Ry. Co. v. Bhd. of R.R. Signalmen*, 164 F.3d 847, 856 (4th Cir. 1998).

For another example addressing liability in the context of bargaining disputes, the D.C. Circuit recognized that ripeness of declaratory actions hinges on the immediacy of litigation between the carrier and union. Because, in theory, litigation over unfair labor practices is always possible, ripeness requires more than a mere possibility of such litigation. The inquiry into ripeness, therefore, "is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy." *Federal Exp. Corp. v. Air Line Pilots Ass'n*, 67 F.3d 961, 964 (D.C. Cir. 1995).

Federal Exp. Corp. illustrates situations at both ends of the ripeness inquiry. It held, as one example, that a statement by a union negotiator to a company negotiator that the union would "take all appropriate action" did not

support ripeness because it was not "a direct threat to file a lawsuit in the immediate future." *Id.* at 965. In contrast, it offered a second example to explain that similar "threats" between counsel could support the immediacy needed for ripeness. *See id.*

> Had there been a letter from ALPA's legal department that specifically posed the threat of a lawsuit, a different situation might be presented. But the letter here was not a communication from one legal counsel to another—it was an exchange between negotiators. It may be that in some circumstances, a threat to take "all appropriate action" may be interpreted as including an imminent threat to sue, so as to render declaratory relief appropriate. But FedEx has not made out such a case here. Against the background of ongoing negotiations, such a generalized and hedged statement—phrased as a threat to take "all appropriate action" (with no suggestion that legal action would be appropriate)—does not create a case or controversy.

Id.

US Airways is more like the second situation addressed in *Federal Exp. Corp.* This is because, after the injunction was vacated and USAPA announced its intention to proceed to bargain for a date-of-hire seniority list, counsel for the West Pilots communicated to counsel for US Airways that the West Pilots "will challenge in future litigation" any implementation of a non-Nicolau seniority list. *Complaint* at ¶ 3. The immediacy of this "threat" is established by USAPA's recent publication of a date-of-hire seniority list, its announcement that this list is its "current proposal to the company" and its explanation that it proposes that all "[f]urloughs will be administered on a date-of-hire basis." *See* Copy of USAPA Q & A attached hereto as exhibit. The airline, therefore, truly faces litigation with either the West Pilots, if it acquiesces to USAPA's proposal, or with USAPA, if it refuses to acquiesce.

C. The Ninth Circuit did not address these "later events."

All current circumstances must be considered when determining ripeness of *US Airways. See Regional Rail Reorganization Act Cases,* 419 U.S. 102, 139-40 (1974) ("[S]ince 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."). As the airline states in its complaint:

> [The Ninth Circuit] did not discuss 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.

Complaint at ¶ 2. The Ninth Circuit did not address the ripeness of an unfair labor practices claim. It did not address how circumstances would change for the airline when the July 2009 judgment and injunction were no longer in effect. Because the Ninth Circuit did not (and could not) address these circumstances, its ruling on ripeness cannot control now. Its ruling does not determine whether *US Airways* is ripe.

III. Conclusion

The Court should: (1) grant Plaintiffs' Rule 60(b) motion; (2) reopen the *Addington* judgment; and (3) determine whether, as a consequence of "later events," *Addington* now is ripe. The Court should do this in a manner consistent with its determination of whether *US Airways* is ripe.

Dated this 27th day of August, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th 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*