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9
10 **IN THE UNITED STATES DISTRICT COURT**
FOR THE DISTRICT OF ARIZONA

11
12 US Airways, Inc., a Delaware Corporation,

13 Plaintiff,

14 vs.

15 Don Addington, an individual, *et al*

16 and

17 US Airline Pilots Association,

18 Defendants.
19

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

NOTICE OF FILING

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1 Defendant, the US Airline Pilots Association (“USAPA”), files this Notice that the
2 attached, marked and labeled Attachment A, and entitled “PLAINTIFFS’ RULE 60(b)
3 MOTION FOR RELIEF FROM THE JUDGMENT DISMISSING FOR LACK OF
4 RIPENESS,” was filed on August 6, 2010, by the Addington defendants, in the docket of
5 Case 2:08-cv-01633-NVW (Doc. No. 645).

6
7 Dated: August 9, 2010

8 By: /s/ Nicholas Paul Granath

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18 **CERTIFICATE OF SERVICE**

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

20 I hereby certify that on this day of August 9, 2010, I electronically transmitted the
21 foregoing document to the U.S District Court Clerk’s Office using the ECF System for
22 filing and transmittal.

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

Attachment A

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Don ADDINGTON; John BOSTIC;
Mark BURMAN; Afshin IRANPOUR;
Roger VELEZ; and Steve
WARGOCKI, on behalf of themselves
and all other similarly-situated
individuals,

Plaintiffs,

vs.

US AIRLINE PILOTS ASS'N, an
unincorporated association,

Defendant.

Case No. 2:08-CV-01633

**PLAINTIFFS' RULE 60(b) MOTION FOR
RELIEF FROM THE JUDGMENT
DISMISSING 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 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.

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

12 Dated this 6th day of August, 2010.

13 **POLSINELLI SHUGHART, PC**

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MEMORANDUM OF POINTS AND AUTHORITIES

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BACKGROUND

1
2 The history of the underlying dispute is well known to the Court. US
3 Airways and America West merged in 2005. The two pilot groups, referred
4 to as the West Pilots and East Pilots, agreed to integrate their respective
5 seniority lists to complete the integration of airline operations. Nearly five
6 years later, they have not done so. The pilots agreed to use binding
7 arbitration conducted by George Nicolau to determine a method of
8 seniority integration. That result of that arbitration is referred to as the
9 Nicolau Award.

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

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

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

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

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

1 a non-Nicolau integrated seniority list; or (ii) litigation by the West
2 Pilots against USAPA and US Airways for USAPA’s alleged breach
3 of the duty of fair representation if it does agree to USAPA’s
4 requirements for a non-Nicolau integrated seniority list, exposing
5 US Airways to potentially tens of millions of dollars in litigation
6 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.

7 *Id.* at ¶ 4

8 In its declaratory action, US Airways claims it:

9 is entitled to a declaratory judgment to the effect that: (i) USAPA’s
10 continued insistence that US Airways accept a collective
11 bargaining agreement which does not incorporate the Nicolau
12 Award, but rather a seniority list based on “date-of-hire”
13 principles, violates USAPA’s duty under Section 2, First, of the
14 Railway Labor Act, to “exert every reasonable effort to make and
15 maintain agreements concerning rates of pay, rules, and working
16 conditions . . . , in order to avoid any interruption to commerce or
17 to the operation of any carrier,” and entry into a collective
18 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

19 *Id.* at ¶ 5.

20 **LEGAL ARGUMENT**

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

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

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

5 *Gould* also noted that it was unnecessary for the district court to
6 defer consideration of Rule 60(b) motions while a petition for certiorari is
7 pending. *Id.* (noting that “*Standard Oil* applies to preclude the necessity of
8 seeking leave of the Supreme Court”). Finally, the Ninth Circuit “review[s]
9 the grant or denial of Rule 60(b) motions for relief from judgment . . . for
10 abuse of discretion.” *California Dept. of Social Services v. Leavitt*, 523 F.3d
11 1025, 1031 (9th Cir. 2008).

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

15 It is also possible to move directly in the district court, pursuant to
16 FRCP 60 for relief from a judgment, **if the motion presents**
17 **matters not of record before the appellate court.** The
18 permission of the appellate court is not required before the district
19 court can hear the FRCP 60 motion. Furthermore, the district
20 court does not flout the mandate by considering the FRCP 60
21 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.

22 2A *Fed. Proc., L. Ed.* § 3:1017 (2010) (emphasis added).

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

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

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

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

5 We agree with the parties that this change in circumstance has
6 substantially altered the posture of the case as regards the
7 maturity of the final-conveyance issues. Whatever may have been
8 the case at the time of the District Court decision, there can be
9 little doubt, for reasons to be detailed, that some of the
10 "conveyance taking" issues can and must be decided at this time.
11 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.**

12 419 U.S. 102, 139-40 (1974); *see also Buckley v. Valeo*, 424 U.S. 1, 13-14
13 (1976) (between the Court of Appeal's decision and Supreme Court
14 consideration of the case, agency action had been taken, making the claims
15 ripe for review); *Western Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186,
16 1204-05 (9th Cir. 2008) (“[R]ipeness is assessed based on the facts as they
17 exist at the present moment.”); *Assiniboine & Sioux Tribes v. Bd. of Oil & Gas*
18 *Conservation*, 792 F.2d 782, 788 & n.3 (9th Cir. 1986) (“[W]e look to the
19 facts as they exist today in evaluating whether the controversy before us is
20 sufficiently concrete”); *Am. Motorists Ins. Co. v. United Furnace Co.*, 876 F.2d
21 293, 302 n.4 (2d Cir. 1989) (“[I]t is irrelevant whether the case was ripe for
22 review when the complaint was filed”).

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

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

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

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

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

16 The obligation to exert every reasonable effort is central to the
17 effective working of the RLA. The strictest compliance with the
18 formal procedures of the Act is meaningless if one party goes
19 through the motions with a desire not to reach an agreement.

20 * * *

21 [T]he duty to exert every reasonable effort imposed by the RLA
22 requires at least the avoidance of bad faith as defined under the
23 NLRA, that is, going through the motions with a desire not to
24 reach an agreement.

25 *Ass’n of Flight Attendants, AFL-CIO v. Horizon Air Industries, Inc.*, 976 F.2d
26 541, 544 (9th Cir. 1992) (citations, quotation and alteration marks omitted).

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

1 Airways rightly seeks to ascertain that risk before it might incur liability.

2 To determine that risk:

3 US Airways seeks a declaratory judgment to the effect that: (a)
4 **USAPA is presently violating its duty** under Section 2, First, of
5 the Railway Labor Act “to exert every reasonable effort to make and
6 maintain agreements concerning rates of pay, rules, and working
7 conditions” by continuing to insist upon a “date-of-hire” integrated
8 seniority list that does not incorporate the Nicolau Award and is
9 not in accord with the requirements of the Transition Agreement;
10 **would constitute a breach of USAPA’s duty of fair**
11 **representation** to the West Pilots in violation of the Railway Labor
12 Act and therefore **US Airways is prohibited from accepting or**
13 **implementing a non-Nicolau seniority list.**

14 *Compl. for Decl. Relief* at ¶ 39 (emphasis added); *see also id.* at ¶ 5.²

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

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

21 ² Unfair labor practice and breach of the duty of fair representation are
22 closely intertwined. *See Breininger v. Sheet Metal Workers Int’l Ass’n*, 493
23 U.S. 67, 86 (1989) (noting *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962)
24 “determined that breaches of the duty of fair representation were also unfair
25 labor practices”). In addition, because the railroad in *Steele v. Louisville & N.*
26 *R. R.* was not “bound by or entitled to take the benefit of a contract which the
27 bargaining representative is prohibited by the statute from making,” 323
28 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.

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

5 *American Postal Workers Union, etc. v. American Postal Workers Union*, 665
6 F.2d 1096, 1104, n.18 (D.C. Cir. 1981) (citations omitted, emphasis added).
7 *But see, Davenport v. Int'l Broth. of Teamsters, AFL-CIO*, 166 F.3d 356, 361-
8 362 (D.C. Cir. 1999) (identifying but not deciding this issue).

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

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

23 The ripeness of the US Airways declaratory action is different than
24 the ripeness of Plaintiffs' duty of fair representation claim. Plaintiffs' claim
25 was not ripe, according to the Ninth Circuit, because a court "cannot
26 fashion a[n] [injunctive] remedy that will alleviate Plaintiffs' harm."
27

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

7 4. Changed circumstances here establish ripeness.

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

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

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

1 Moreover, it must be litigated by the two real parties in interest—Plaintiffs
2 and USAPA. *See United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 382
3 (1949) (holding that pleadings "should be made to reveal and assert the
4 actual interest of the plaintiff, and to indicate the interests of any others
5 in the claim"). To accomplish this procedurally, the Court should vacate
6 the judgment of dismissal that was predicated on a finding of lack of
7 ripeness. It can do this because that judgment of dismissal is invalid in
8 light of the current circumstances—circumstances that changed after the
9 Ninth Circuit decided the appeal.

10 CONCLUSION

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

21 Dated this 6th day of August, 2010.

22 POLSINELLI SHUGHART, PC

23 By /s/ Andrew S. Jacob

24 Marty Harper

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Attorneys for Plaintiffs

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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