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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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21
22
23

1 Defendant, the US Airline Pilots Association (“USAPA”), files this Notice that
2 today, August 10, 2010, it filed the attached, marked and labeled Attachment A,
3 “DEFENDANT USAPA’S MEMORANDUM IN OPPOSITION TO THE *ADDINGTON*
4 PLAINTIFFS’ MOTION TO TRANSFER CASE” in District Court Case No. 2:08-cv-
5 01633-NVW, as Docket No. 648, and Supporting Declaration, as Docket No. 648.1,
6 marked and labeled Attachment B.

7
8 Dated: August 10, 2010

9 By: /s/ Nicholas Paul Granath

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CERTIFICATE OF SERVICE

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

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

By: /s/ Nicholas Paul Granath, Esq.

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Attachment A

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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

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

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

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I. SUMMARY

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2 The plaintiffs in this case (2:08-cv-01633) (defendants in the other) seek to
3 transfer to this Court, pursuant to Local Rule of Civil Procedure 42.1, a recent declaratory
4 judgment action filed by US Airways, Inc. (“US Airways” or “Company”) that was
5 assigned to the Honorable Roslyn O. Silver. (*See* 2:10-cv-01570 “US Airways action or
6 matter”). However, for the reasons set forth herein, there is no action currently
7 “pending” in this Court and therefore transfer pursuant to LRCiv 42.1 is improper. Even
8 assuming, *arguendo*, that there was an action currently “pending” in this Court, the new
9 lawsuit filed by US Airways is so akin to a remand on the merits of this case that given
10 the circumstances it must remain with Judge Silver in order to “preserve the appearance
11 of justice.” *Ellis v. United States*, 356 F.3d 1198, 1211 (9th Cir. 2004). Moreover, denial
12 is necessary to avoid unfair prejudice to USAPA, as well as further need for correction by
13 the Ninth Circuit Court of Appeals.
14

II. PROCEDURAL POSTURE

15
16 On June 4, 2010, the Ninth Circuit Court of Appeals ruled, in a published decision,
17 that this action was never ripe for adjudication and ordered that the matter be remanded
18 to this Court with “direction that the action be dismissed.” *Addington v. US Airline Pilots*
19 *Ass’n*, 606 F.3d 1174, 1184 (9th Cir. 2010). However, as a result of various post-
20 decision filings by plaintiffs-appellees, issuance of the Ninth Circuit’s mandate was
21 effectively delayed.
22

23 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

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

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

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

13
14 On July 26, 2010 – again, just before the impending Mandate of the Ninth Circuit
15 was to issue – US Airways filed a complaint for declaratory relief against both the US
16 Airline Pilots Association ("USAPA") and the six Addington plaintiffs, individually and
17 in their capacity as class representatives of the West Pilots.¹ The Company's complaint
18 purports to seek one of three alternative declaratory judgments:

19 1. A declaration that USAPA is violating its duty under the Railway Labor
20

21 ¹ However, because the Ninth Circuit ordered dismissal, US Airways is not entitled to a
22 presumption that a defendant class will be certified. *See Zimmerman v. Epstein Becker &*
23 *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).

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

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

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

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

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

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

1 cv-01570) to this Court.

2 **III. CORRECTION OF FACTS**

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

5 The parties to the arbitration, as found by the Ninth Circuit, were "the US Airways
6 Pilot Merger Representatives and the America West Pilot Merger Representatives."
7 *Addington*, 606 F.3d at 1177. These Merger Representatives were subject to expulsion
8 from ALPA if they resisted the ALPA-governed process or merger criteria. The
9 Arbitration Board was obligated to render a decision consistent with criteria set forth in
10 ALPA Merger Policy. Whereas these criteria had historically placed primary emphasis
11 on date-of-hire seniority, in 1991, ALPA Merger Policy had been amended (without a
12 vote of the rank-and-file pilots) to eliminate any reference to date-of-hire seniority. In
13 addition, no rank-and-file pilots ever voted on the Transition Agreement that references
14 ALPA Merger Policy. Nevertheless, plaintiffs now allege in their transfer motion that
15 the, "*pilots* agreed to use binding arbitration" (Doc. # 642 at p. 2) (emphasis added). That
16 is inaccurate, and willfully so. Plaintiffs not only *stipulated* to the contrary (Doc. # 417,
17 p. 5, at ¶ 14), but the Court of Appeals found otherwise. *See Addington*, 606 F.3d at
18 1177.
19

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

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

17
18 Finally, plaintiffs allege in their motion that, “negotiation of a new CBA faltered”
19 while USAPA “appealed.” (Doc. # 642 at 3). This disingenuous allegation was made
20 without even the pretense of any claim of factual support, apparently a self-serving
21 attempt to manufacture facts. The truth is that the Company has sought to deliberately
22 delay negotiations in order to promote its own economic gain by prolonging the pilots’
23 wage rates, which are currently the lowest among all major airline pilot groups.

IV. LEGAL STANDARD

1
2 A transfer pursuant to LRCiv 42.1 is not automatic. To the contrary, “district
3 courts have broad discretion in determining whether to grant [or deny] such motions.”
4 *Pangerl v. Ehrlich*, 2007 U.S. Dist. LEXIS 19502, at *5 (D. Ariz. Mar. 2, 2007) (citing
5 *Investors Research Co. v. U.S. Dist. Ct. for Cent. Dist. of California*, 877 F.2d 777
6 (1989)). “The standard for transfer [under LRCiv. 42.1] is similar to the standard for
7 consolidation under Rule 42(a) of the Federal Rules of Civil Procedure.” *Pangerl*, 2007
8 U.S. Dist. LEXIS 19502, at *5.

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

18 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.

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

23 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

1 Judges and any party believes that such cases: (1) arise from substantially
2 the same transaction or event; (2) involve substantially the same parties or
3 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].

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

7
8 If **actions before the court** involve a common question of law or fact, the
9 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].

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

15
16 Both LRCiv 42.1 and Fed. R. Civ. P. 42 are each prefaced by the requirement that a
17 case be pending before a transfer or consolidation take place. For purposes of Federal
18 Rule 42, if a court does not have jurisdiction over one of the two actions sought to be
19 consolidated, Rule 42 cannot be properly invoked. This is no mere technicality, it is
20 jurisdictional:

21 Not only does a cursory review of the plain language of Rule 42(a) indicate
22 that **both cases must be pending** before the same court in order for
23 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.

1 643, 647 (7th Cir. 1987) (holding that federal case could not be
2 consolidated with improperly removed state case because state case was not
3 “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) ...

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

7
8 On August 3, 2010, the Ninth Circuit Court of Appeals denied plaintiffs’ motion
9 to stay issuance of the Mandate.⁴ The Mandate remands the case back to this Court but
10 only with directions from the Ninth Circuit that the entire action be dismissed.
11 *Addington*, 606 F.3d at 1184. Complying with the instructions of the Mandate is not
12 optional for this Court and the Mandate becomes the “law of the case” for all parties and
13 this Court:

14 When a case has been once decided by this Court on appeal, and remanded
15 to the [lower] court, whatever was before this court, and disposed of by its
16 decree, is considered as finally settled. The [lower] court is bound by the
17 decree as the law of the case; and must carry it into execution, according to
18 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.

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

22 _____
23 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).

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

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

8
9 The language of our mandate directed the district court to dismiss this case
10 for lack of subject matter jurisdiction and, on its face, does not authorize
11 the district court to open the case for further adjudication. **Because our
12 order stated that the district court lacked jurisdiction, the court was
13 not free to do anything else but to dismiss the case.** As we have
14 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.

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

20 **B. Denial Is Also Warranted In Order To “Preserve The Appearance Of**
21 **Justice.”**

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

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

7
8 “The requirement that a case or controversy exist under the Declaratory Judgment
9 Act is identical to Article III’s constitutional case or controversy requirement.” *Principal*
10 *Life Ins. Co. v. Petula Associates, Ltd.*, 394 F.3d 665, 669 (9th Cir. 2005). “If a case is
11 not ripe for review, then there is no case or controversy, and the court lacks subject-
12 matter jurisdiction.” *Id.* The same contingent events that deprived this matter of ripeness
13 deprive the US Airways matter of ripeness, i.e., negotiation, tentative agreement, and
14 ratification. *See* 606 F.3d at 1180. As the Ninth Circuit observed, the *Addington*
15 plaintiffs could not claim to be injured by non-implementation of the Nicolau Award
16 because “[f]orced to bargain for the Nicolau Award, any contract USAPA could negotiate
17 would undoubtedly be rejected by its membership.” 606 F.3d at 1180, n.1.⁵

18
19 Moreover, while the Ninth Circuit ultimately remanded this case in order to direct
20 that it be dismissed, for example, if the Appeals Court had instead remanded in a manner
21 that called for this Court to retain jurisdiction and conduct a new trial, then USAPA had

22
23 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.

1 requested of the Appeals Court that the case be *reassigned*. (Main brief at DktEntry:
2 7074777, p. 75: “In the alternative, USAPA requests this Court order a new trial, remand,
3 and order that the case be reassigned to a new judge”). The basis for this request was
4 argued to the Ninth Circuit in briefing, namely that the, “district court demonstrated a
5 lack of impartiality that unfairly prejudiced USAPA.” (Main brief at DktEntry: 7074777,
6 p. 68). Now, the recently filed US Airways action presents the same or a similar
7 scenario. Consequently, whether or not this Court could be impartial in actuality, the US
8 Airways matter should remain with Judge Silver to whom it was randomly assigned “in
9 order to preserve the appearance of justice” as that phrase has been construed by a long
10 line of controlling cases.

11
12 When presented with a request to reassign a case upon remand, the Ninth Circuit
13 makes two initial inquiries. First, it “ask[s] whether the district court has exhibited
14 personal bias requiring recusal from a case.” *Ellis*, 356 F.3d at 1211 (*citing United Nat’l*
15 *Ins. Co. v. R&D Latex Corp.*, 242 F.3d 1102, 1118 (9th Cir. 2001)). But “second, in the
16 absence of a showing of personal bias, [the Ninth Circuit] look[s] to whether ‘unusual
17 circumstances warrant reassignment.’” *Id.* The “unusual circumstances” inquiry focuses
18 on the following three factors:

19
20 (1) whether the original judge would reasonably be expected upon remand
21 to have substantial difficulty in putting out of his or her mind previously
22 expressed views or findings determined to be erroneous or based on
23 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

1 supports remand to a different district court judge.” *United States v. Alberto*, 385 F.3d
2 1199, 1201 (9th Cir. 2004) (citing *State of California v. Montrose Chemical Corp. of*
3 *California*, 104 F.3d 1507, 1521 (9th Cir. 1997)) (emphasis added). Under the unusual
4 circumstance doctrine reassignment does not require a finding of bias. *Jefferson v. Budge*,
5 419 F.3d 1013, 1017 (9th Cir. 2005); *Montiel v. City of Los Angeles*, 2 F.3d 335, 344 (9th
6 Cir. 1993) (remanding to a different judge where, although original judge’s remark did
7 not constitute plain error or deny the plaintiff a fair trial on his claims, they reasonably
8 could have led plaintiff to believe that judge was biased).

9
10 An examination of these factors supports a finding that the US Airways
11 declaratory judgment action must remain with Judge Silver if the appearance of justice is
12 to be preserved, because whether this Court can be impartial or not, it cannot reasonably
13 be expected to put out of mind its prior strongly expressed views, findings and orders.

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

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

23 [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

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

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

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

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

11 606 F.3d at 1180, n.1. A further sampling of the Court's strongly expressed views
 12 include:

- 13 • Expression mid-trial that, "there is a unique quality about the Nicolau Award that
 14 established both a legal and an *honorable obligation* to go forward with it." (Trial,
 May 5, 2009, p. 1117:24) (emphasis added);
- 15 • The Court's declaration, at the outset of litigation, that USAPA's seniority
 16 proposal was, "a 100 percent victory for the East Pilots and a 100 percent defeat
 17 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
 18 to the start of trial, October 28, 2008, Tr. 45:19);
- 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,
 20 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
 21 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
 22 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*
 23 *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);

- 1 • The Court’s comment that, USAPA was, “created and selected by express
2 campaign promises to disregard the interests of the West pilots.” (Made prior to
the start of trial, October 28, 2008, Tr. 57:20);
- 3 • In reference to USAPA’s position that it is not bound by Nicolau because it
4 constituted a predecessor’s bargaining proposal created pursuant to ALPA’s own
5 manipulated and changing criteria, this Court noted that “This argument offends
6 common sense, the evidence, and fundamental principles of law. In the context of
7 labor rights, it is both discordant and irrelevant.” (Doc. # 593, p. 17:13). This
8 Court’s comment was made despite ALPA’s manipulation of integration criteria
9 (eliminating seniority/longevity as a criterion only to *restore this criterion after*
10 *the Nicolau Arbitration*) and a pending federal lawsuit alleging that ALPA
11 knowingly submitted an erroneous East seniority list. *Naugler v. Air Line Pilots*
12 *Ass’n, Int’l*, 2008 U.S. Dist. LEXIS 25173 (E.D.N.Y. Mar. 27, 2008). This Court
13 prohibited the jury from considering all such evidence, effectively characterizing
14 the deficiencies of the ALPA seniority integration process as irrelevant despite
15 case law permitting unions to act on principled objections to the results of even
16 “final and binding” seniority integration results. *See Associated Transport, Inc.*,
17 185 N.L.R.B. 631 (1970).
- 18 • The finding that, “Liability attached because USAPA’s only actual motivation in
19 adopting and presenting its seniority proposal was to benefit East Pilots at the
20 expense of West Pilots.” (Doc. # 593, p. 23:13). As referenced immediately
21 below, this Court only reached that result after barring any consideration of the
22 labor movement’s core interest in protecting seniority as a legitimate union
23 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);

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

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

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

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

21 In this case, the Court has repeatedly expressed its strong views on the issues and
22 on the parties. It ruled decisively against USAPA in an intense case open to broad
23 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.

1 conclusion that it never had jurisdiction. Now, plaintiffs' motion to transfer inevitably
2 invites 5,000 pilots to conclude that the outcome of the Company's action would be pre-
3 ordained, were this Court to accept transfer. Moreover, the transfer would be done in the
4 face of plaintiffs' expressed desire to have the case heard by a judge with whom,
5 according to plaintiffs, USAPA has long had a relationship of "hostility." (See Doc. #
6 644-1). Plaintiffs' hostility perception constitutes direct evidence that the appearance of
7 justice is not obtainable. Thus, any potential duplication of effort between courts as a
8 result of denying the transfer motion cannot possibly outweigh the inevitable appearance
9 that this case would become but a sham were transfer granted. No party has a legitimate
10 interest in that outcome.

11
12 **C. Denial Is Required To Avoid Actual Prejudice To USAPA And The Extra
13 Cost And Time Of A Writ Of Mandamus To Cure Such Prejudice.**

14 Respectfully, and for the record should it be needed, USAPA maintains its
15 position that this Court is not impartial, that it could not be impartial towards USAPA in
16 any further proceedings, and that such impartiality will unfairly prejudice USAPA by
17 depriving it of constitutional and other rights. Curing the risk of that prejudice, or to
18 avoid it, may well necessitate the additional cost and time of a writ of mandamus. (Such
19 a petition would likely be heard by the same panel. See General Order 3.7; see also
20 *Vizcanios v. United States Dist. Court for W. Dist. of Wash.*, 173 F.3d 713, 719 (9th Cir.),
21 *amended and pet. for reh'g en banc denied*, 184 F.3d 1070 (9th Cir. 1999), *cert. denied*,
22 528 U.S. 1105 (2000)).

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

1 Addington DFR claim was not ripe and thus the Court had no jurisdiction, USAPA has,
2 to date, suffered needless cost and delay (and the proper resolution of the underlying
3 seniority merger issue at the bargaining table has also been needlessly delayed).⁷ This
4 harm will only be compounded by the need to return to the Ninth Circuit to avoid a
5 partial court, or the appearance of partiality, or to enforce the Mandate. *See generally*
6 *Brown v. Baden*, 815 F.2d 575 (9th Cir.) (per curiam), *cert. denied sub nom., Real v.*
7 *Yagman*, 484 U.S. 963 (1987) (if the district court refuses to follow a mandate on
8 remand, the proper method of enforcing compliance with that mandate is to petition the
9 Ninth Circuit for a writ of mandamus). *See also United States v. Thrasher*, 483 F.3d 977,
10 981-82 (9th Cir. 2007) (if district court errs by violating the rule of mandate, the error is
11 jurisdictional).
12

13 **VI. CONCLUSION**

14 Respectfully, USAPA requests that this Court deny plaintiffs' motion to transfer.
15 In the alternative, USAPA respectfully requests that the Court recuse itself from
16 consideration of this motion in favor of disposition by the Chief Judge of the District.
17 *See* 28 U.S.C. § 137.
18
19

20 ⁷ Verifying its subject matter jurisdiction is a federal court's "first duty" in every case.
21 *McCready v. White*, 417 F.3d 700, 702 (7th Cir. 2005). Prior to trial in this action, the
22 Western District of North Carolina did exactly this and dismissed an unripe lawsuit that
23 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).

1 Respectfully Submitted,

2 Dated: August 10, 2010

3 By: /s/ Nicholas P. Granath

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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.

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Attachment B

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11 LUBIN & ENOCH, PC
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14 Tel: 602 234-0008; Fax: 602 626 3586

15 **IN THE UNITED STATES DISTRICT COURT**
16 **FOR THE DISTRICT OF ARIZONA**

17 Don ADDINGTON; John BOSTIC; Mark
18 BURMAN; Afshin IRANPOUR; Roger
19 VELEZ; and Steve WARGOCKI,

Case No. 2:08-cv-1633-PHX-NVW
(Consolidated)

20 Plaintiffs,

21 vs.

**DECLARATION OF
NICHOLAS PAUL GRANATH, ESQ.
IN OPPOSITION TO
MOTION TO TRANSFER**

22 US AIRLINE PILOTS ASSOCIATION,
23 US AIRWAYS, INC.,
Defendants,

Don ADDINGTON; John BOSTIC; Mark
BURMAN; Afshin IRANPOUR; Roger
VELEZ; and Steve WARGOCKI,

Case No. 2:08-cv-1728-PHX-NVW

Plaintiffs,

vs.

Steven H. BRADFORD, Paul J. DIORIO,
Robert, A. FREAR, Mark. W. KING,
Douglas L. MOWERY, and John A.
STEPHAN,

Defendants.

1 I, Nicholas Paul Granath, Esq., declare as follows:

2 1. I am attorney of record for defendant USAPA in this matter as well as for
3 all named defendants in the matter of Addington *et al* v. Bradford *et al*, Case No. 2:08-
4 cv-01728-NVW and for USAPA in US Airways vs. Addington *et al*, Case No. 2:10-cv-
5 01570-ROS. I make this Declaration of my own free will and based on my personal,
6 first-hand knowledge, unless otherwise specifically indicated.

7 2. This Declaration is submitted in opposition to the Addington plaintiffs'
8 motion to transfer and in support of "Defendant USAPA's Memorandum In Opposition
9 To The Addington Plaintiff's Motion To Transfer Case."

10 3. Attached and marked and labeled as Exhibit A is a true and correct copy of
11 the July 8, 2010, order of the Ninth Circuit Court of Appeals.

12 4. Attached and marked and labeled as Exhibit B is a true and correct copy of
13 plaintiffs' motion to stay, to the Ninth Circuit Court of Appeals, dated July 14, 2010.

14 5. Attached and marked and labeled as Exhibit C is a true and correct copy of
15 the August 3, 2010, order of the Ninth Circuit Court of Appeals.

16 6. Attached and marked and labeled as Exhibit D is a true and correct copy of
17 the Mandate issued on August 10, 2010, by the Ninth Circuit Court of Appeals.

18 Further your Declarant sayeth not.

19 Pursuant to 29 USC § 1746, I declare under penalty of perjury that the foregoing is
20 true and correct.
21

22 Executed on: August 9, 2010

23 /s/ NICHOLAS PAUL GRANATH

FILED

JUL 08 2010

NOT FOR PUBLICATION

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Exhibit A

DON ADDINGTON, individual resident of the State of Arizona, formerly employed by America West Airlines, Inc. and presently employed by its successor after merger, US Airways, Inc.; JOHN BOSTIC, individual resident of the State of Arizona formerly employed by America West Airlines, Inc. and presently employed by its successor after merger, US Airways, Inc.; MARK BURMAN, individual resident of the State of Arizona, formerly employed by America West Airlines, Inc. and presently employed by its successor after merger, US Airways, Inc.; AFSHIN IRANPOUR, individual resident of the State of Arizona, formerly employed by America West Airlines, Inc. and presently employed by its successor after merger, US Airways, Inc.; ROGER VELEZ, individual resident of the State of Arizona, formerly employed by America West Airlines, Inc. and presently employed by its successor after merger, US Airways, Inc.; STEVE WARGOCKI, individual resident of the State of Arizona, formerly employed by America West Airlines, Inc. and presently employed by its successor after merger, US Airways, Inc.,

Plaintiffs - Appellees,

No. 09-16564

DC No. 2:08-CV-01633 NVW
D. Ariz.

ORDER

v.

US AIRLINE PILOTS ASSOCIATION,
an unincorporated association representing
the pilots in the employment of US
Airways, Inc., a Delaware corporation,

Defendant - Appellant,

and

US AIRWAYS, INC., a Delaware
corporation; STEPHAN BRADFORD;
ROBERT DAVISON; DOUGLAS L.
MOWERY,

Defendants.

Before: TASHIMA, GRABER and BYBEE, Circuit Judges.

The panel voted to deny the petition for clarification and said petition is denied.

Judge Graber votes to deny the petition for rehearing en banc, Judge Bybee votes to grant the petition for rehearing en banc, and Judge Tashima recommends that the petition for rehearing en banc be denied. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f).

The petition for rehearing en banc is denied.

Exhibit B

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 09-16564

Don ADDINGTON, John BOSTIC, Mark BURMAN,
Afshin IRANPOUR, Roger VELEZ, and Steve
WARGOCKI, individually and representing a class
of persons similarly situated,

Plaintiffs-Appellees

v.

US AIRLINE PILOTS ASSOCIATION, an
unincorporated association representing the
pilots in the employment of US Airways Inc.,

Defendant-Appellant

**MOTION TO STAY THE MANDATE PENDING FILING
PETITION FOR WRIT OF CERTIORARI
FRAP RULE 41(d)(2)**

POLSINELLI SHUGHART, P.C.
MARTY HARPER (SBN 003416)
ANDREW S. JACOB (SBN 022516)
3636 N. Central Avenue, Suite 1200
Phoenix, Arizona 85012
Telephone: (602) 650-2008
Facsimile: (602) 264-7033

MOTION

Pursuant to the provisions of 28 U.S.C. § 2101(f), and Fed. R. App. P. Rule 41(d)(2)(B), the above-named Appellees respectfully move the Court to enter an order staying issuance of the mandate in the above-entitled appeal. Appellees make this motion with bona fide intention to make proper and timely application to the Supreme Court of the United States for a writ of certiorari.

This Court denies a motion for a stay of the mandate if it “determines that the application for certiorari would be frivolous or is made merely for delay.” Circuit Rule 41-1, adv. committee n. The Court should grant this motion because neither of these concerns applies here.

First, the application for certiorari would not be frivolous. Indeed, ripeness was a close decision here, as evidenced by the fact that two Article III judges were on each side of the issue. Not only was the issue close, but it is reasonably likely to be reviewed by the Supreme Court because any one of three grounds to be raised in the application merit the attention of the Court. These grounds are as follows:

- (1) If allowed to stand, this case will encourage other unions to refuse, in bad faith, to implement an arbitrated seniority

integration following an airline merger. This would allow other majority groups in airline mergers to improperly thwart important federal labor policy—evidenced by the 2007 passage of the McCaskill-Bond Bill.¹

- (2) This case affords an opportunity to properly distinguish bad faith representation from arbitrary representation. The latter, by definition, requires a final product of bargaining to prove breach of DFR. *ALPA v. O’Neill*, 499 U.S. 65, 78 (1991). The former does not. *Amalgamated Motor Coach Emp. v. Lockridge*, 403 U.S. 274, 301 (1974).
- (3) This decision must be reversed or reconciled with a number of decisions from other circuits. *E.g., Ramey v. Dist. 141, Int’l Ass’n of Machinists & Aerospace Workers*, 378 F.3d 269, 279 (2d Cir. 2004) (“The duty of fair representation owed by a union to its members is similar to a contractual duty, and the union’s announcement of its intent to advocate against its members’ interests may be compared to a party’s anticipatory repudiation of a contractual duty. In some anticipatory repudiation cases the aggrieved party may sue immediately after the repudiation is

¹ McCaskill-Bond Bill provides that when an airline “merger affects the seniority rights of the carriers employees, . . . provisions shall be made for the integration of seniority lists in a fair and equitable manner” and, if needed, referred to arbitration where “[t]he decision of the arbitrator shall be final and binding on the parties.” 121 Stat. 2383, Div. K, Title I, § 117 (Dec. 26, 2007).

announced. However, the statute of limitations ordinarily does not begin to run, and the cause of action does not accrue, until the date of the actual breach; that is, until the date on which performance is due.”); *Air Wisconsin v. Sanderson*, 909 F.2d 213, 217 (7th 1990) (“[A]n attempt by a majority of the employees in a collective bargaining unit to gang up against a minority of employees in the fashion apparently envisaged by the plaintiffs could itself be thought a violation of the duty of fair representation by the union that the majority used as its tool.”); *Santos v. Dist. Council of New York City & Vicinity of United Brotherhood of Carpenters and Joiners of Am., AFL-CIO*, 619 F.2d 963, 970-71 (2d Cir. 1980) (holding that a union breached its duty of fair representation, and a DFR claim began to accrue, at the time “appellants were aware that the [union] was not proceeding in good faith to seek enforcement of [an arbitration] award”).

Second, this motion is not made to delay; it is made to protect the West Pilots from needless hardship. A stay of the mandate would leave the injunction in place and protect West Pilot interests without causing cognizable hardship to USAPA. Hardship analysis should focus on the first 90 days of a stay because, as a general rule, once a stay is in place, it continues after a petition is filed until the Supreme Court’s final disposition. *See* Fed. R. App. P. Rule 41(d)(2)(B). Hardship should not be a

problem over the next 90 days because USAPA can freely negotiate a new CBA while the injunction stays in effect, leaving the seniority provision for later. If, by some chance, USAPA completes all other negotiations while the stay of the mandate is in effect, it can move the district court to stay the injunction.

In contrast, if the mandate is not stayed and the injunction is vacated, USAPA will be completely unconstrained. It might put a date of hire seniority list in place before the Supreme Court can address certiorari. That would be difficult to undo if the Supreme Court were to reverse this Court on ripeness. Surely, it would be much harder to protect West Pilots interests in that situation than it would be to protect USAPA's interests if the mandate were stayed.

Wherefore, Appellees respectfully move the Court for an order staying the issuance of the mandate pending their filing a petition for writ of certiorari in the Supreme Court of the United States.

DATED this 14th day of July, 2010.

POLSINELLI SHUGHART, P.C.

By: s/ Andrew S. Jacob
Marty Harper
Andrew S. Jacob
Attorneys for Appellees

CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket No. 06-16417

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 14, 2010.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. Participants who are not registered as shown on the Service List will be served by U.S. Mail.

/s/

Andrew S. Jacob

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)

X Proportionately spaced, has a typeface of 14 points or more and contains 875 words (petitions and answers must not exceed 4,200 words).

or

 Monospaced, has 10.5 or fewer characters per inch and contains words or lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

or

 In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

/s/

Andrew S. Jacob

FILED

NOT FOR PUBLICATION

AUG 03 2010

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

Exhibit C

DON ADDINGTON, individual resident of the State of Arizona formerly employed by America West Airlines, Inc. and presently employed by its successor after merger, US Airways, Inc.; et al.,

Plaintiffs - Appellees,

v.

US AIRLINE PILOTS ASSOCIATION, an unincorporated association representing the pilots in the employment of US Airways Inc., a Delaware corporation,

Defendant - Appellant,

and

US AIRWAYS, INC., a Delaware corporation; et al.,

Defendants.

No. 09-16564

DC No. 2:08 cv-1633 NVW
D. Ariz., Phoenix

ORDER

Before: TASHIMA, GRABER, and BYBEE, Circuit Judges.

Plaintiffs-appellees' motion to stay issuance of the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court is denied.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

AUG 10 2010

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Exhibit D

DON ADDINGTON, individual resident of the State of Arizona, formerly employed by America West Airlines, Inc. and presently employed by its successor after merger, US Airways, Inc.; et al.,

Plaintiffs - Appellees,

v.

US AIRLINE PILOTS ASSOCIATION, an unincorporated association representing the pilots in the employment of US Airways, Inc., a Delaware corporation,

Defendant - Appellant,

and

US AIRWAYS, INC., a Delaware corporation; et al.,

Defendants.

No. 09-16564

D.C. No. 2:08-cv-01633-NVW
U.S. District Court for Arizona,
Phoenix

MANDATE

The judgment of this Court, entered June 04, 2010, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court

Gabriela Van Allen
Deputy Clerk