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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

US Airways, Inc., a Delaware Corporation,

Plaintiff,

v.

Don Addington, an individual; John Bostic, an individual; Mark Burman, an individual; Afshin Iranpour, an individual; Roger Velez, an individual; and Steve Wargocki, an individual, on behalf of themselves and all other similarly-situated individuals,

and

US Airline Pilots Association, an unincorporated association,

Defendants.

Case No. 2-10-cv-1570-PHX-ROS

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF US AIRWAYS, INC.'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(b)(6) -- BASED ON NEW DEVELOPMENTS

INTRODUCTION

Recent correspondence between defendants the West Pilot Class (the "West Pilots") and US Airline Pilots Association ("USAPA"), exchanged after the Court's summary judgment decision, demonstrates conclusively that there is no set of future circumstances under which the West Pilots would accept a collective bargaining agreement ("CBA") that did not incorporate the Nicolau Award and that there is no set of future circumstances under which USAPA would accept the Nicolau Award. Because the Ninth Circuit's ripeness decision in *Addington* was based, at least in part, on the assumption that one of these two contingencies might materialize during negotiations for a CBA, plaintiff US Airways, Inc. ("US Airways") respectfully submits that this case is factually distinguishable from, and not controlled by, the Ninth Circuit's decision. And, because this Court's summary judgment decision was expressly influenced in substantial part by its assessment of the applicability of *Addington*, the Court should vacate its prior decision/judgment pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure and definitively decide – once and for all – the merits of the seniority dispute between the West Pilots and USAPA. Doing so will enable US Airways to fulfill its immediate obligation under the Railway Labor Act to bargain for a CBA incorporating a lawful and enforceable seniority system and to extricate itself from the Hobson's choice created by the seniority dispute between the West Pilots and USAPA – a dispute which, as demonstrated by the new developments described herein, is impossible to resolve through the negotiation process.

FACTUAL AND PROCEDURAL BACKGROUND

On July 26, 2010, US Airways filed a Complaint for Declaratory Relief against the West Pilots and USAPA. As described by the Court, US Airways' lawsuit sought one of three judicial determinations:

(1) USAPA's seniority proposal (i.e., strict "date of hire") ***breaches*** its duty under the Railway Labor Act and its duty of fair representation and US Airways cannot adopt it (Doc. 1, Count I);

(2) USAPA's seniority proposal ***does not breach*** its duty under the Railway Labor Act and its duty of fair representation and US Airways must adopt it (Doc. 1, Count II); or

(3) US Airways will not be liable to the West Pilots regardless of which seniority proposal it adopts (Doc. 1, Count III).

(October 11, 2012 Order [Doc. No. 193] at 4:25-5:3 [emphasis in original].) After the defendants filed cross-motions for summary judgment, the Court issued a decision on October 11, 2012 which dismissed Counts I and III of US Airways' Complaint and ruled in USAPA's favor on Count II. (*See id.* at 9:1-4.) As to Count II, the Court's decision specified that USAPA was entitled to a judgment stating that "[its] seniority proposal does not breach its duty of fair representation provided it is supported by a legitimate union purpose." (*Id.* at 9:3-4.)

The Court's summary judgment decision was influenced, in substantial part, by its assessment of the applicability of the Ninth Circuit's ripeness decision from the *Addington* litigation involving the West Pilots and USAPA:

> ***In the end, the Court cannot provide as much guidance as it had hoped it could. Pursuant to the Ninth Circuit's decision, any claim for breach of the duty of fair representation will not be ripe until a collective bargaining agreement is finalized.*** *Addington v. U.S. Airline Pilots Ass'n*, 606 F.3d 1174, 1181-82 (9th Cir. 2010). In this case, that means even though an integrated seniority regime is an incredibly important issue, and USAPA appears totally committed to a particular seniority regime, it is not possible to determine the viability of any claim for breach of the duty of fair representation until a particular seniority regime is ratified. When the collective bargaining agreement is finalized, individuals will be able to determine whether USAPA's abandonment of the Nicolau Award was permissible, i.e. supported by a legitimate union purpose. Thus, the best "declaratory judgment" the Court can offer is that USAPA's seniority proposal does not automatically breach its duty of fair representation. (Doc. No. 193 at 7:20-8:7 [emphasis added].)

The Ninth Circuit's decision, in turn, was premised, at least in part, on the assumption that a CBA ultimately might be finalized between US Airways and USAPA which either: (i) contained an integrated seniority list based on the Nicolau Award; or (ii) contained an integrated seniority list that did not follow the Nicolau Award but was nonetheless acceptable to the West Pilots. *See, e.g.*, *Addington,* 606 F.3d at 1179-80 ("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. . . . 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.").[1]

Following the Court's summary judgment decision, however, the West Pilots and USAPA have exchanged correspondence which makes it abundantly clear that there is no set of future circumstances under which the West Pilots would accept a CBA that did not incorporate the Nicolau Award, and that there also is no set of future circumstances under which USAPA would accept the Nicolau Award. More specifically,

- On October 12, 2012, Marty Harper (counsel for the West Pilots in this litigation) sent a letter to Patrick Szymanski (USAPA's general counsel) setting forth the West Pilots' position in light of the Court's summary judgment decision: "I urge you to make sure that USAPA and the East Pilots are fully and fairly informed of the current state of affairs. The Nicolau Award is the current pilot seniority list, because it was submitted by ALPA, USAPA's predecessor, to US Airways in December, 2007, which then accepted it. ***There is no 'legitimate union purpose' for deviating from the Nicolau Award. As noted above, there never has been nor will there ever be one.*** [¶] USAPA needs to put the Nicolau dispute aside once and for all by facing reality and accepting the fact that it cannot dishonor the Award because there is no 'legitimate union reason' for doing so." (October 12, 2012 Letter from Marty Harper to Patrick Szymanski [attached as Exhibit A-1 to the Declaration of Robert A. Siegel filed concurrently herewith ("Siegel Declaration")], at p. 3 [emphasis added].)

- On October 15, 2012, Mr. Szymanski sent his response to Mr. Harper, setting forth USAPA's position: "The Court therefore clearly declares that USAPA may

[1] *See also id.* at 1181 (stating that "USAPA's final proposal may yet be one that does not work the disadvantages Plaintiffs fear, even if that proposal is not the Nicolau Award."); *id.* at 1184 (stating that "[s]imilarly, in the context of negotiations toward a CBA, the parties could shift positions until negotiations are complete, and the final agreement could be acceptable to Plaintiffs").

pursue a seniority proposal that does not incorporate the Nicolau Award. ***And that is exactly what USAPA intends to do.***" (October 15, 2012 Letter from Patrick Szymanski to Marty Harper [attached as Exhibit A-2 to the Siegel Declaration], at p. 1 [emphasis added].)

- Mr. Harper replied to Mr. Szymanski on October 17, 2012. The following passage from his letter concisely captures the current state of affairs between the West Pilots and USAPA: "[T]here is not a lot to negotiate because ***USAPA insists it will never implement the Nicolau Award. Any date-of-hire seniority list (whatever conditions and restrictions it may have) is unacceptable.*** Implementation of any such seniority list would be a DFR breach." (October 17, 2012 Letter from Marty Harper to Patrick Szymanski [attached as Exhibit A-3 to the Siegel Declaration], at p. 1 [emphasis added].)

These three letters conclusively indicate that what the Ninth Circuit majority thought ***might*** happen will ***never*** happen. Almost two years and five months after the Ninth Circuit issued its decision, and almost three weeks after this Court issued its judgment, the West Pilots and USAPA have confirmed to each other that their seniority dispute will not be resolved in negotiations for a CBA. There is no possible path that leads, or will lead, to that result.

ARGUMENT

I. THIS CASE PRESENTS "EXTRAORDINARY CIRCUMSTANCES" WARRANTING RELIEF UNDER RULE 60(b)(6).

Under Federal Rule of Civil Procedure 60(b)(6), a court may relieve a party from a final judgment or order on "just terms" and for any reason justifying such relief that is not specified in Rule 60(b)(1)-(5). *See* Fed. R. Civ. P. 60(b)(6); *Delay v. Gordon*, 475 F.3d 1039, 1044 (9th Cir. 2007).[2] A motion under Rule 60(b)(6) is appropriate where

[2] Rule 60(b)(6) is applicable only if Rules 60(b)(1)-(5) are not. Although Rule 60(b)(2) applies to "newly discovered evidence," relief thereunder is only available if the evidence in question was in existence ***prior*** to the judgment sought to be vacated. *See Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878 (9th Cir. 1990) (ruling with respect to a Rule 59 motion, but acknowledging that the same standard and case law apply to Rule 59 and Rule 60(b)(2) motions premised on "newly discovered evidence"). Thus, Rule 60(b)(2) is inapplicable to the present motion and Rule 60(b)(6) is applicable.

"extraordinary circumstances" make relief necessary to accomplish justice. *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993); *see also Delay*, 475 F.3d at 1044. In order to establish "extraordinary circumstances," the movant should demonstrate both injury and circumstances beyond its control that prevented the movant from taking action earlier. *See Cmty. Dental Servs. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002); *Alpine Land*, 984 F.2d at 1049. "Extraordinary circumstances" are present in this case.

The recent correspondence between the West Pilots and USAPA, exchanged after the Court's summary judgment decision, makes it abundantly clear that the seniority dispute between USAPA and the West Pilots is intractable, and will not be resolved in the collective bargaining negotiations that have been conducted with USAPA for more than four years without success. The West Pilots' and USAPA's post-judgment correspondence has demonstrated that there is no set of future circumstances under which the West Pilots would accept a CBA that did not incorporate the Nicolau Award and that there is also no set of future circumstances under which USAPA would accept the Nicolau Award. The Ninth Circuit's ripeness decision, however, was based, at least in part, on the assumption that one of these two contingencies might materialize in negotiations for a CBA, and the seniority dispute between the West Pilots and USAPA would thereby be resolved. (*See supra* at 2:23-3:4.) US Airways respectfully submits that in light of the new evidence, which could not have been presented to the Ninth Circuit when it decided *Addington* or to this Court when it decided the defendants' cross-motions for summary judgment (i.e., because the correspondence did not yet exist), the instant case is factually distinguishable from, and not controlled by, the Ninth Circuit's decision in *Addington*. *See, generally, Thomas v. Bible*, 983 F.2d 152, 155 (9th Cir. 1993) (although law-of-the-case doctrine generally requires courts to not revisit previously-resolved questions, courts may reopen a previously resolved question where, *inter alia*, the evidence on remand is substantially different or there are other changed circumstances); *von Saher v. Norton Simon Museum of Art at Pasadena*, 862 F. Supp. 2d 1044, 1051 (C.D. Cal. 2012)

(concluding that "the evidence on remand is significantly different than on appeal and that it is permissible and appropriate to depart from the Ninth Circuit's determination that conflict preemption is inapplicable").

As the Court itself has recognized, and as the recent correspondence between USAPA and the West Pilots confirms, the "declaratory judgment" issued by the Court on October 11 in no way obviates the harms presently confronted by US Airways. (*See id.* at 8:5-8 ["Thus, the best 'declaratory judgment' the Court can offer is that USAPA's seniority proposal does not automatically breach its duty of fair representation. [¶] This conclusion places US Airways in a difficult position."].)[3] Accordingly, US Airways will suffer injury, satisfying the first prong of the "extraordinary circumstances" test under Rule 60(b)(6), unless the Court's October 11, 2012 summary judgment decision and judgment are vacated and replaced with a decision that definitively resolves the seniority dispute one way or the other. Moreover, US Airways could not have presented the evidence in question to the Court earlier, because the correspondence between USAPA and the West Pilots was generated between October 12 and 17, 2012; therefore, the second prong of the "extraordinary circumstances" test is also satisfied.

In sum, the Court should vacate its prior summary judgment decision/judgment and proceed to a consideration and decision on the merits of Counts I and II in US Airways' Complaint. *See, generally, Keeling v. Sheet Metal Workers Int'l Ass'n*, 937 F.2d 408, 410 (9th Cir. 1991) (finding "extraordinary circumstances" sufficient to grant relief under Rule 60(b)(6) in the event of repudiation of a settlement agreement that previously terminated the litigation); *In re Pac. Far E. Lines, Inc.*, 889 F.2d 242, 250 (9th Cir. 1989) (change in law that set a cap on the amount that could be paid under a specific bankruptcy provision, entitling debtor to a substantial refund).

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[3] *See also* June 1, 2011 Order [Doc. No. 85] at 8:4-10 ["[W]hile the precise nature of US Airways' injury is unknown, the fact of ***some*** injury appears certain. Regardless of the action taken by US Airways, serious injury will occur. The Nicolau Award will either be accepted or it will not. If it is accepted, USAPA has promised a work stoppage. If it is not accepted, the West Pilots will sue US Airways."] [emphasis in original].)

CONCLUSION

For the foregoing reasons, US Airways respectfully requests that the Court grant its motion under Rule 60(b)(6), and vacate its prior summary judgment order (Doc. No. 193) and judgment (Doc. No. 194).[4]

Dated: October 30, 2012.

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[4] On October 18, 2012, US Airways filed a motion to correct the judgment under Rule 60(a), which is pending before the Court. (*See* Doc. No. 195.) If that motion is granted, the instant motion would be equally applicable to the modified judgment entered in response to the motion to correct.

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2012, the foregoing document was electronically transmitted to the United States District Court Clerk's Office using the CM/ECF System for filing and transmittal.

/s/ Robert A. Siegel
Robert A. Siegel

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