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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Don Addington, *et. al.*,

Plaintiffs,

v.

US Airline Pilots Association, *et. al.*,

Defendants.

Case No.: CV-13-00471-PHX-ROS

US Airline Pilots Association's Motion for Reconsideration

Defendant US Airlines Pilots Association ("USAPA") requests that the Court reconsider its Orders dated July 19, August 16, and August 26, 2013 (Docs. 122, 160, and 174) and dismiss this case for lack of jurisdiction under Article III of the Constitution. In accord with Local Rule 7.2, USAPA further requests that the Court direct Plaintiffs to respond to this motion by September 9, 2013, and that the Court decide this motion expeditiously so as to avoid the unnecessary expenditure of resources by both the Court and the parties in preparing for the trial on the merits currently scheduled for October 22nd and 23rd.

The decision by the United States to file a lawsuit to stop the merger on August 13, 2013 worked a major change in jurisdiction. As discussed *infra*, a series of recent cases has made it blackletter law that standing does not exist when injury will occur only if the outcome of a lawsuit in a different forum comes out a certain way. This is because courts cannot permissibly speculate as to the outcome of that separate proceeding to decide whether injury is "certain and imminently pending". This principle is flatly dispositive here, since plaintiffs concede that they "have no case" if the U.S. wins the pending lawsuit in D.C. Although USAPA described this principle generally in its two-page submission filed on August 16, the absence of Article III jurisdiction can be raised at any time, and these recent authorities – and the categorical rule they articulate – require dismissal of the present action.

All parties agree that a merger between US Airways and American Airlines is a necessary precondition to plaintiffs' claims, that the merger must be approved by the bankruptcy court, and that the merger will go forward only if the United States loses the antitrust action in which it seeks to block the merger. Trial in the Government's antitrust action is now scheduled to begin on November 25, 2013, and is expected to take two weeks. As stated previously in USAPA's motion to dismiss, in the two-page statement of position submitted prior to the hearing on August 15, at the August 15 hearing, and as

explained more fully below, absent an approved merger this Court is without Article III jurisdiction as the Plaintiffs have suffered no injury in fact and the case is not ripe. Although USAPA supports the merger, under the present circumstances there is no case or controversy, and this case must be dismissed.

MEMORANDUM OF POINTS AND AUTHORITIES

By motion dated April 22, 2013 USAPA moved to dismiss the complaint on the grounds, *inter alia*, that the action was not ripe. (Doc. 44.) By Order dated July 19, 2013, the Court denied USAPA's motion to dismiss on ripeness grounds, finding that the matter is "prudentially ripe", and that withholding a decision "would introduce substantial uncertainty into the merger process. That uncertainty would frustrate a primary purpose of the merger: the immediate orderly integration of the two airlines' operations." (Doc. 122, at 5.)[1] At the time of that ruling, US Airways had represented that it expected the merger to close at the end of the third quarter of 2013.

On August 13, 2013, the United States Department of Justice ("DOJ") and the Attorneys General of six states[2] and the District of Columbia filed a complaint in the United States District Court for the District of Columbia under federal antitrust laws to enjoin the planned merger of US Airways and American Airlines. While documents filed in the bankruptcy court and in the antitrust action suggest that this development should not have been a surprise to US Airways,[3] it was an unexpected turn of events for the other parties in this action and for the Court. This new development means that the proposed merger is contingent on the outcome of the antitrust action, the trial of which is not

[1] Although USAPA raised Article III grounds for dismissal, (Doc. 44, pp. 13-16) the Court ruled that it had asserted only prudential ripeness.

[2] Arizona, Florida, Pennsylvania, Tennessee, Texas, and Virginia.

[3] *See* Statement of the United States of America, Doc. 9923, filed 8/23/13 in Case No. 11-15463-shl (Bankr. S.D.N.Y.); Memorandum of the United States and Plaintiff States in Opposition to Defendants' Proposed Scheduling Order, Doc. 37, filed 8/27/13 in Case No. 1:13-cv-01236-CKK (D. D.C.).

scheduled to start until November 25, 2013. The antitrust action undercuts the core finding on which the Court's decisions ordering immediate trial of this matter are based; namely the imminent approval and consummation of the merger between US Airways and American that is a necessary precondition to the MOU. On August 13, the Court directed the parties to indicate by 10:00 a.m. on August 15, in no more than two pages, whether the case should be dismissed without prejudice in light of the antitrust action. By orders dated August 16 and August 26, 2013, the Court thereafter directed the parties to proceed with this case. Given the absence of an opportunity by the Court to consider thorough briefing on this subject, the important Constitutional issues implicated in proceeding in the absence of jurisdiction and the manifest injustice to USAPA in being compelled for the third time to incur the expenditure of time and resources to defend claims that are indisputably contingent upon future events and decisions by other courts, USAPA moves for reconsideration of this Court's prior Orders and submits that upon reconsideration, USAPA's motion to dismiss for lack of jurisdiction should be granted.

POINT I

DEFENDANT USAPA SATISFIES GROUNDS FOR A MOTION FOR RECONSIDERATION

"The objection that a federal court lacks subject-matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment. Rule 12(h)(3) instructs: 'Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.'" *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506-07 (2006) (citing Fed. R. Civ. P. 12(b)(1); *Kontrick v. Ryan,* 540 U.S. 443, 455(2004)). As the Court emphasized:

> [S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived.' *United States v. Cotton,* 535

> U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002). Moreover, courts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party…
>
> [W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety.

Arbaugh, 546 U.S. at 514 (citations omitted).

Reconsideration of the orders denying USAPA's motion to dismiss and ordering the case to expedited trial is appropriate. As Judge McNamee stated in granting reconsideration after denial of a motion to dismiss:

> [T]he Court finds that to compel the parties in this case to incur the expense of discovery without resolution of this issue could result in a manifest injustice. *See Alexander,* 106 F.3d at 876; *see also* Fed.R.Civ.P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). Accordingly, the Court will exercise its discretion and grant Defendants' Motion for Reconsideration…

Council for Endangered Species Act Reliability v. Jackson, CV-10-8254-SMM, 2011 WL 5882192 (D. Ariz. Nov. 23, 2011). The instant application also meets the requirements of Local Rule 7.2(g) because, as set forth below, proceeding under the present circumstances would constitute manifest error and facts have occurred — the Government's antitrust lawsuit and delay by the bankruptcy court in approving any plan of reorganization -- following the order denying USAPA's motion to dismiss that warrant plenary review and consideration by the Court.

POINT II
UPON RECONSIDERATION, THE REMAINING CLAIMS, WHICH ARE ALL DEPENDENT ON THE MERGER, SHOULD BE DISMISSED

All parties agree that plaintiffs are not currently suffering any "injury-in-fact" sufficient to create standing under Article III. Plaintiffs allege that they *may* suffer harm if the contingent MOU becomes effective. But they also concede that before that happens, at least two conditional future events must transpire: (1) the bankruptcy court

must approve the pending plan of reorganization, and (2) the DOJ must lose its pending antitrust lawsuit that seeks to permanently enjoin the merger.

Plaintiffs have conceded that these contingent events are the essential predicates of their complaint and that they have no case if the merger is not approved:

> THE COURT: If there's no merger, what case do you have in front of me?
>
> MR. HARPER [Counsel for Plaintiffs]: Candidly, probably none.
>
> . . . .
>
> MR. HARPER: If – if there is no merger, then the MOU probably is null and void, and therefore we don't have a claim under the DFR for a null and void MOU.
>
> . . . .
>
> **THE COURT: [I]f there were no merger, then you don't have a case, am I right?**
>
> **MR. HARPER: I – I would agree with that.**

RT (Aug. 15, 2013) at 13:19-21, 14:11-13 & 16:12-14 (emphasis supplied).

The Supreme Court and the United States Court of Appeals for the Ninth Circuit hold that, as a matter of law, standing under Article III does not exist when an alleged injury will arise only if an independent judicial proceeding decides a pending lawsuit in a given way. The Supreme Court has "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact' and that 'allegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1147 (2013) (emphasis in original) (citations omitted). In *Clapper,* the Supreme Court addressed a lawsuit that alleged that the NSA's widespread, highly-publicized interception of hundreds of thousands of telephone calls and e-mails was illegal. Plaintiffs in that case were numerous attorneys, human rights advocates, and others with extensive contacts with accused terrorists and others, each of whom alleged that there was "an objectively reasonable likelihood" the NSA would in the future "acquire" at least some of their communications. *Id.* at 1143. The Supreme Court nonetheless held that none of the

plaintiffs had standing, because any such interceptions would require approval of the FISA court, and plaintiffs could not prove in advance the outcome of those proceedings. The Supreme Court held:

> [E]ven if respondents could show that the Government will seek the Foreign Intelligence Surveillance Court's authorizations to acquire the communications of respondents' foreign contacts under § 1881a, respondents can only speculate as to whether that court will authorize such surveillance. In the past, we have been reluctant to endorse standing theories that require guesswork as to how independent decision makers will exercise their judgment. . . . We hold that respondents lack Article III standing because they cannot demonstrate that the future injury they purportedly fear is certainly impending.

Id. at 1149-50 and 1155.[4]

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[4] The Supreme Court's holding in this regard is fully consistent with the strict limitations on Article III standing articulated by both that Court and the Ninth Circuit. Both courts have repeatedly found Article III standing absent in cases in which injury was far more "certain" than here:

- Plaintiff subjected to a chokehold by the LAPD five months previously had no standing to challenge LAPD policy of "routinely" applying chokeholds to nonviolent offenders because he could not "prove" he would be subjected to a future chokehold. *City of Los Angeles v. Lyons*, 461 U.S. 95, 97-112 (1983).
- Plaintiff repeatedly charged with drunk driving and denied counsel, along with 229 others, lacked standing to challenge City policy of not providing indigent defendants with counsel because he could not prove he would be arrested or continue to be poor in the future. *Eggar v. City of Livingston*, 40 F.3d 312, 312-17 (9th Cir. 1994).
- Plaintiff previously sentenced to alcohol treatment center had no standing to challenge center's conditions because he could not "prove" he would be returned there notwithstanding evidence that 75% of center residents returned. *Nelsen v. King County*, 895 F.2d 1248, 1249-54 (9th Cir. 1990).
- Plaintiff who was 58 years old and in good health had no standing to challenge retirement plan because plan only allowed retirement at age 60 and plaintiff might perhaps die or be fired before he turned 60 and retired. *Stewart v. M.M.&P. Pension Plan*, 608 F.2d 776, 784-85 (9th Cir. 1979).

See also Spinedex Physical Therapy, U.S.A., Inc. v. United Healthcare of Arizona, Inc., CV-08-00457-PHX-ROS, 2012 WL 8169880, at *4 (D. Ariz. Oct. 19, 2012) ("'[a]llegations of possible future injury do not satisfy the requirements of [Article III].") (quoting *Whitmore*, 495 U.S. 149, 158 (1990) (alterations in original).

That controlling principle is dispositive here. Just as the plaintiffs in *Clapper* could "only speculate" about the outcome of any proceeding in the FISA court, so too plaintiffs here can only speculate about the eventual outcome of the judicial proceedings in the DOJ's antitrust action. Because the outcome of the DOJ's case is necessarily uncertain, Article III standing does not exist as a matter of law.

As the *Clapper* decision makes clear, the Supreme Court has repeatedly "decline[d] to abandon our usual reluctance to endorse standing theories that rest on speculation about the decision of independent actors." *Id.* at 1150. To this point, the Court stated:

> In *Whitmore*, for example, the plaintiff's theory of standing hinged largely on the probability that he would obtain federal habeas relief and be convicted upon retrial. In holding that the plaintiff lacked standing, we explained that "[i]t is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in his case." 495 U.S., at 159–160, 110 S.Ct. 1717; see *Defenders of Wildlife,* 504 U.S., at 562, 112 S.Ct. 2130.

Id. at 1150.

Nor can one court permissibly assess as part of a standing inquiry the "likely" or "certain" result to be reached by another tribunal. When, as here, injury depends on the future outcome of a judicial proceeding, there is no constitutional injury and therefore no standing and no jurisdiction under Article III.

The United States Court of Appeals for the Ninth Circuit has similarly repeatedly applied this principle. For example, just last year, the court held in *Alcoa v. Bonneville Power Administration*, 698 F.3d 774 (9th Cir. 2012), that plaintiff lacked Article III standing because the alleged injury would arise only if the Ninth Circuit held that the BPA was not required to adhere to a standard of equivalent benefits. *Id.* at 793. Because that decision would be made in a future case, the court held that the "alleged injury is too speculative to give rise to a case or controversy as required by Article III." *Id.*

Alcoa and other cases make clear that Article III jurisdiction simply cannot rest on

the predicted or probable outcome of other independent judicial proceedings. *See id.* ("We lack a basis for predicting whether there will be such a ruling in the future."). Because it is not possible to determine what another court might do, standing does not exist for injuries that arise – as here – only if a judicial proceeding comes out a certain way. *See also Whitmore v. Arkansas*, 495 U.S. 149, 157-60 (1990) (holding that Article III standing did not exist because plaintiff would be injured only if he was able to file a successfully habeas petition in the future).

Not only do plaintiffs lack Article III standing, but for similar reasons, their claims are also not ripe. Ripeness and "injury-in-fact" standing inquiries are interrelated. *Montana Sulfur & Chem. Co. v. EPA*, 666 F.3d 1174, 1183 (9th Cir. 2012). The Supreme Court has held that "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (2009). That principle is squarely applicable here, as the merger is clearly a contingent future event that may or may not transpire. The Ninth Circuit held that the claim in *Bora v. City of Medford*, 564 F.3d 1093 (9th Cir. 2009) was not ripe until plaintiff actually retired because, in the meantime, he might "change jobs, be terminated, or die (though we hope not) before retiring." *Id*. at 1096-97. Plaintiffs' claims here are similarly not ripe, at a bare minimum, until the merger is actually approved and the MOU becomes effective.[5] The complaint thus fails to satisfy either the constitutional or prudential ripeness requirements, and must be dismissed.

What at this point amounts to a request for an advisory opinion in the present case is equally (indeed, more) unripe than the complaint in *Addington I*. The district court

[5]USAPA likewise respectfully asserts that the Court erred in rejecting the arguments in its motion to dismiss, based on the Ninth Circuit's ruling in *Addington I,* that plaintiffs' claims are not ripe and that there can be no injury unless and until the McCaskill- Bond process provided for under the MOU is completed and a final integrated seniority list is determined.

issued an opinion in that case, but the Ninth Circuit reversed, holding that the case was not ripe. *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1074 (2010). The Ninth Circuit noted that a case is ripe only "when it can be decided without considering contingent future events that may or may not occur as anticipated, or indeed may not occur at all." *Id*. at 1179. That holding is dispositive here. The merger may not occur as anticipated, or (in light of the pending lawsuit in D.C.) may not occur at all. The case is thus not ripe.

Plaintiffs will not be prejudiced by a dismissal. If the Government and the airlines settle the antitrust action, the Tunney Act provides for a sixty day notice period before the settlement becomes final, and plaintiffs will have the opportunity to re-file and seek a preliminary injunction before the merger is approved and the MOU becomes effective. Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b). If the Government prevails in the antitrust action, there is no merger, no MOU and therefore no claim nor any basis for any claim by plaintiffs. If the airlines prevail in the antitrust action, experience shows that the district court in such a situation will customarily delay the effective date of its dismissal to allow the Government to seek a stay from the court of appeals, and, in fact, the proposed scheduling order in the antitrust case explicitly provides that any decision will not become effective until seven days after it is issued.[6] The delay will allow the losing party in the antitrust action to seek relief from the court of appeals and will allow the plaintiffs in this case to re-file and seek preliminary relief in the event the government is unsuccessful. The plaintiffs therefore will not be deprived of a reasonable opportunity to reassert their claim if this case is dismissed.

[6] The proposed Case Management Plan in the DOJ action provides as follows at paragraph 3: "**Completion of Transaction**. Defendants have agreed that they will not consummate or otherwise complete their planned merger until seven days after this Court enters a final and appealable order from the trial commencing November 25, 2013." 13-cv-01236-CKK, Doc. 67-1, p. 3.

CONCLUSION

For the foregoing reasons, USAPA respectfully requests that the Court reconsider its prior Orders and dismiss this case. USAPA further requests that this Court decide this motion expeditiously to avoid the enormous expenditure of the parties' and the Court's resources entailed in requiring the parties to continue with discovery, motions and the trial on the merits scheduled for October 22, 2013.

Respectfully submitted this 5th day of September 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2013, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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