Docket Nos. 14-15757, 14-15874, 14-15892

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Don Addington, et al.,

Plaintiffs-Appellants-Cross-Appellees

v.

US Airline Pilots Association,

Defendant-Appellee-Cross-Appellant

US Airways, Inc.,

Intervenor-Cross-Appellant

On appeal from The United States District Court
for the District Of Arizona, Case No. 10-1570-Phx-ROS
Judge Roslyn O. Silver

DEFENDANT - APPELLEE -CROSS-APPELLANT US AIRLINE PILOTS ASSOCIATION'S CORRECTED RESPONSE TO US AIRWAYS, INC.'S SECOND BRIEF ON CROSS APPEAL AND CROSS-APPEAL REPLY BRIEF

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US Airline Pilots Association ("USAPA") submits this Brief in Response to the Cross-Appeal filed by US Airways and Reply with respect to the responding brief filed by the Addington Plaintiffs on USAPA's Cross-Appeal. The jurisdictional statements and arguments are stated separately.

USAPA'S RESPONSE TO US AIRWAYS, INC.'S BRIEF ON ITS CROSS-APPEAL

I. JURISDICTION

USAPA agrees that the Court has jurisdiction over the cross-appeal filed by Intervenor and Cross-Appellant US Airways, Inc., but, as shown below, the cross-appeal should be dismissed for failure to comply with Rules 28.1(c)(2) and 28(a) of the Federal Rules of Appellate Procedure and Circuit Rule 28-1.

II. ARGUMENT

The cross-appeal filed by US Airways should be dismissed for failure to comply with Rules 28.1(c)(2) and 28(a) of the Federal Rules of Appellate Procedure and Circuit Rule 28-1.

US Airways filed a cross-appeal (No. 14-15892). Pursuant to Rule 28.1(c)(2), US Airways was required to file "a principal brief in [its] cross- appeal" and "in the same brief, respond to the principal brief in the appeal." Rule 28.1(c)(2) goes on to state: "[T]hat . . . brief must comply with Rule 28(a)." Rule 28(a) requires that a principal brief must include "argument" in support of the cross-appeal and "must contain . . . [cross-appellant's] contentions and the reasons

for them, with citations to the authorities and parts of the record on which the appellant relies . . . .”

The brief filed by US Airways (Dkt. 21) fails to include any argument or statement of the reasons why the US Airways cross-appeal should be granted. Indeed, with respect to the one issue stated in the brief, US Airways “takes no position”. (US Airways Br., at 4) It is appellate practice 101 that an appellant is required to explain the reasons for its appeal in its principal/opening brief. Neither the Court nor the other parties are required to guess at the arguments or reasoning prompting the appeal. In the absence of any such argument or statement of reasons for granting the US Airways cross-appeal, that cross-appeal (No. 14-15892) should be dismissed:

> Federal Rule of Appellate Procedure 28 and our corresponding Circuit Rules 28–1 to –4 clearly outline the mandatory components of a brief on appeal. These rules exist for good reason. . . . . When writing a brief, counsel *must* provide an argument which *must* contain “appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.” Fed. R. App. P. 28(a)(9)(A).

Sekiya v. Gates, 508 F.3d 1198, 1200 (9th Cir. 2007). *See In re O'Brien*, 312 F.3d 1135, 1136 (9th Cir. 2002) (“The rule is quite clear, and is written in mandatory terms. The ‘appellant's brief *must* contain’ certain information, in appropriate sections, and in the order indicated. FRAP 28(a) (emphasis added).”).

The suggestion by US Airways that the issue identified in its brief might become moot at some point in the future does not excuse the failure to set forth argument in support of its cross-appeal and also violates this Court's Rules by making reference to matters outside the record without leave of Court. *See United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2006) ("Appellate courts 'generally will not consider facts outside the record developed before the district court,' but 'may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.'") (quoting *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992)). Even as presented by US Airways (Dkt. 21, US Airways Br., at 1-2), the suggestion of mootness based on possible future events is purely speculative, and is disputed by Appellant West Pilots. (Dkt. 28, West Pilots Third Cross-Appeal Br., at 11-12). The Court cannot make any determination of mootness based on future events that may or may not occur.[1]

[1] Although the suggestion of mootness is premature and not properly presented, USAPA nevertheless disagrees with the West Pilots' argument on this point. (Dkt. 28, West Pilots Third Cross-Appeal Br., at 11-12) In any event, as USAPA fully explained in its Principal and Response Brief (Dkt. 22-1), the district court correctly determined that the McCaskill-Bond Amendment does not give the West Pilots any right to separate representation in the seniority integration proceeding resulting from the merger of American Airlines and US Airways.

USAPA'S REPLY
TO ADDINGTON PLAINTIFFS' RESPONDING BRIEF
ON USAPA'S CROSS-APPEAL

I. JURISDICTION

The Addington Plaintiffs ("West Pilots") do not contest the Court's jurisdiction over the cross-appeal filed by appellee and cross-appellant USAPA. Dkt. 28, West Pilots Third Cross-Appeal Br., at 1. *See* Circuit Rule 28-2.2.

II. ARGUMENT

Despite arguing that "[t]his Court . . . should not decide the issues raised in USAPA's cross-appeal" (Dkt. 28, at 21), West Pilots nevertheless do not dispute the crux of USAPA's cross-appeal – that certain statements made in the decision below were "irrelevant to deciding the issues and parties properly before the court below and before this Court" and thus "should not constitute any part of the reasoning for affirming the judgment and therefore have no precedential effect." Dkt. 22-1, at 60. Indeed, West Pilots concede this point as demonstrated by the statement that "USAPA's participation in the McCaskill-Bond process here was not at issue. Any statement by the District Court in that regard, therefore, was not necessary to the judgment." Dkt. 28, at 20-21. Given this concession, there is no harm or prejudice to West Pilots in this Court granting the relief USAPA seeks in its cross-appeal.

Moreover, West Pilots' past reliance on statements that are *dictum* belie their argument that there is no need for USAPA's cross-appeal to be considered. Dkt. 28, at 20-21. In the action below, West Pilots (and US Airways) relied on statements that were *dictum* made by the same District Court judge in other proceedings involving the same parties as if they had precedential effect.[2] Although the West Pilots argue that "[t]his Court . . . should not decide the issues raised in USAPA's cross-appeal" (Dkt. 28, at 21), this Court should grant the relief sought by USAPA given the agreement by the West Pilots that USAPA's participation in the McCaskill-Bond process was never at issue in this case and in light of USAPA's showing that the challenged statements are incorrect as a matter of law and fact. USAPA Br., Dkt. 22-1, at 52-66, 68-69.

The mischief resulting from *obiter dictum* has been noted by Judge Pierre N. Leval of the Second Circuit Court of Appeals:

> [W]hen courts declare rules that have no consequence for the case, their cautionary mechanism is often not engaged. They are far more likely in these circumstances to fashion defective rules, and to assert misguided propositions, which have not been fully thought through.

[2] The West Pilots and US Airways have a penchant for citing manifest *dicta* and even the decision vacated by this Court in *Addington I* as precedent for their claims and actions both in court and in their communications to US Airways pilots. *See, e.g.*, West Pilots First Amended Complaint, ER 048, ¶67 (referring to rulings by Judge Wake vacated by this Court's order), ER 049, ¶¶74-75 (*dicta*); *Addington II*, US Airways Memorandum of Points and Authorities, Doc. 156, at 9, 11 (district court decision in *Addington I*); *Addington II*, West Pilots Response to Statement of Facts, Doc. 159, at 5, n.10 (same).

Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1261-63 (2006).

A ruling by this Court that the statements at issue in USAPA's cross-appeal (Dkt. 22-1, Section E, at 59) are irrelevant to the issues before the court below and thus have no precedential effect will help ensure that those statements will not be misused in future proceedings.

CONCLUSION

For the reasons set forth herein and in the brief previously filed by USAPA (Dkt. 22-1), this Court should affirm the district court's judgment dismissing Counts I, II, and IV of the Amended Complaint and should expressly note that the statements of the District Court set forth in Dkt. 22-1, Section E, at 59 do not constitute any part of the basis for such affirmance and are without precedential effect. The appeal of Intervenor-Cross Appellant US Airways in No. 14-15892 should be dismissed.

Respectfully submitted this 31st day of December 2014.

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IV. CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Ninth Circuit 32-1, I certify that Defendant-Appellee-Cross-Appellant US Airline Pilots Association's Corrected Response to US Airways, Inc.'s Second Brief on Cross-Appeal and Cross-Appeal Reply Brief is proportionally spaced, has a typeface of 14 points and contains 1,472 words.

Dated this 31st day of December 2014

/s/Susan Martin

Attorney for Defendant-Appellee-Cross-Appellant USAPA

V. CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2014, I electronically filed Defendant-Appellee-Cross-Appellant US Airline Pilots Association's Corrected Response to US Airways, Inc.'s Second Brief on Cross-Appeal and Cross-Appeal Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that the following participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system:

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