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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Don Addington; John Bostic; Mark)  
Burman; Afshin Iranpour; Roger Velez;)  
9 Steve Wargoeki,

No. CV-08-01633-PHX-NVW  
(consolidated)

10

Plaintiffs,

**ORDER**

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vs.

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US Airline Pilots Association; US)  
Airways, Inc.,

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Defendants.

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Don Addington; John Bostic; Mark)  
Burman; Afshin Iranpour; Roger Velez;)  
16 Steve Wargoeki, et al.,

CV-08-01728-PHX-NVW

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Plaintiffs,

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vs.

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Steven Bradford; Paul Diorio; Robert)  
20 Frear; Mark King; Douglas Mowery; John)  
Stephan, et al.,

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Defendants.

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Before the Court is Plaintiffs' Rule 60(b) Motion for Relief from the Judgment

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Dismissing for Lack of Ripeness (Doc. 645), the Response, and the Reply. The Court

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heard oral argument on the Motion on October 12, 2010.

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1 **I. Background**

2 On July 17, 2009, the Court ordered partial judgment and a permanent injunction  
3 in this matter. (Doc. 594.) The Court retained jurisdiction to enforce, modify, or dissolve  
4 the permanent injunction and jurisdiction to adjudicate the named Plaintiffs’  
5 unadjudicated claims for damages and any claims for attorney fees. (*Id.*) On July 23,  
6 2009, USAPA filed a notice of appeal to the Court of Appeals for the Ninth Circuit from  
7 the partial judgment and permanent injunction, findings of fact and conclusions of law,  
8 and related orders. (Doc. 595.) On June 4, 2010, the Court of Appeals held that  
9 Plaintiffs’ claim for breach of the duty of fair representation was not ripe and remanded  
10 the case with directions that the action be dismissed. (Doc. 647-1.) On August 6, 2010,  
11 Plaintiffs moved for relief under Fed. R. Civ. P. 60(b) from the judgment mandated by the  
12 Court of Appeals. (Doc. 645.) On August 10, 2010, the mandate from the Court of  
13 Appeals issued. (Doc. 647.) On August 13, 2010, pursuant to the mandate, the Court  
14 vacated the partial judgment and permanent injunction and ordered entry of judgment  
15 dismissing this action for lack of subject matter jurisdiction. (Doc. 650).

16 In their Rule 60(b) motion, Plaintiffs seek “relief from the judgment mandated by  
17 the Ninth Circuit, dismissing this case for lack of ripeness,” because US Airways filed a  
18 declaratory action related to Plaintiffs’ claims in this action. (Doc. 645.)

19 **II. Jurisdiction**

20 Plaintiffs filed their Rule 60(b) motion after the Court of Appeals issued its  
21 opinion ordering remand of this action, but before the mandate issued. The filing of a  
22 notice of appeal generally divests the district court of subject matter jurisdiction over  
23 those aspects of the case involved in the appeal. *Stein v. Wood*, 127 F.3d 1187, 1189 (9<sup>th</sup>  
24 Cir. 1997); *see also Gould v. Mutual Life Ins. Co.*, 790 F.2d 769, 772 (9<sup>th</sup> Cir. 1986).  
25 Although the general rule has exceptions, it seeks to avoid confusion and serve judicial  
26 economy:

27 The rationale for this general rule is that it avoids the confusion and waste  
28 of time that might flow from putting the same issues before two courts at  
the same time. This general rule is thus a rule of judicial economy. It does

1 not rest on a statute and should not be employed to defeat its purposes nor  
2 to induce needless paper shuffling.

3 *Stein*, 127 F.3d at 1189 (internal quotation marks and citations omitted).

4 For consideration of a Rule 60(b) motion during an appeal, the proper procedure is  
5 to ask the district court whether it wishes to entertain the motion, or to grant it, and then  
6 move the appellate court to remand the case. *Gould*, 790 F.2d at 772. However, once the  
7 appellate mandate has issued, the Ninth Circuit does not require leave of the appellate  
8 court for district court consideration of a Rule 60(b) motion. *Id.* at 773 (relying on  
9 *Standard Oil Co. v. United States*, 429 U.S. 17, 17, 97 S. Ct. 31, 31 (1976) (per curiam)).  
10 By deciding the motion after the mandate has issued, the Court is not acting outside of its  
11 jurisdiction to decide the Rule 60(b) motion without leave of the Court of Appeals.

### 12 **III. The Mandate Precludes the Rule 60(b) Relief Sought.**

13 A district court must comply with a mandate from the Court of Appeals as to all  
14 matters expressly or impliedly decided by the appellate court:

15 When a case has been decided by an appellate court and remanded, the  
16 court to which it is remanded must proceed in accordance with the mandate  
17 and such law of the case as was established by the appellate court.  
18 Although this doctrine is not totally inflexible, this court has held that a  
19 mandate is controlling as to all matters within its compass, while leaving  
20 any issue not expressly or impliedly disposed of on appeal available for  
21 consideration by the trial court on remand.

22 *Firth v. United States*, 554 F.2d 990, 993-94 (9<sup>th</sup> Cir. 1977) (citations and footnote  
23 omitted). Further:

24 When a case has been decided by this court on appeal and remanded to the  
25 District Court, every question which was before this court and disposed of  
26 by its decree is finally settled and determined. The District Court is bound  
27 by the decree and must carry it into execution according to the mandate. It  
28 cannot alter it, examine it except for purposes of execution, or give any  
further or other relief or review it for apparent error with respect to any  
question decided on appeal, and can only enter a judgment or decree in  
strict compliance with the opinion and mandate . . . (The District Court) is  
without power to do anything which is contrary to either the letter or spirit  
of the mandate construed in the light of the opinion of this court deciding  
the case.

*Id.* at 994 n.3 (quoting *Thornton v. Carter*, 109 F.2d 316, 319-20 (8<sup>th</sup> Cir. 1940)).

1 Plaintiffs' Rule 60(b) motion expressly asks the Court to vacate the judgment  
2 mandated by the Court of Appeals on the very issue disposed of by the Court of Appeals.

3 The Court of Appeals held:

4 We conclude that this case presents contingencies that could prevent  
5 effectuation of USAPA's proposal and the accompanying injury. . . .  
6 Because these contingencies make the claim speculative, the issues are not  
7 yet fit for judicial decision.

8 We also conclude that withholding judicial consideration does not  
9 work a direct and immediate hardship on the West Pilots. . . . That the  
10 court cannot fashion a remedy that will alleviate Plaintiffs' harm suggests  
11 that the case is not ripe.

12 . . . .

13 Although we do not hold that a DFR claim based on a union's  
14 promotion of a policy is never ripe until that policy is effectuated, we  
15 conclude that, in this case, there is too much uncertainty standing in the way  
16 of effectuation of Plaintiffs' harm to warrant judicial intervention at this  
17 stage. . . .

18 For the foregoing reasons, we hold that Plaintiffs' DFR claim is not  
19 ripe; therefore, the case is REMANDED to the district court with directions  
20 that the action be DISMISSED. No costs to either side.

21 (Doc. 647-1.) Vacating the order of dismissal based on ripeness would violate the  
22 unconditional mandate for dismissal for lack of ripeness.

23 Cases finding ripeness on appeal based on circumstances that occurred after the  
24 district court's initial decision do not apply here where the alleged change in  
25 circumstances occurred after the appellate decision, which ordered dismissal and left  
26 nothing to be decided by the district court. *See, e.g., Regional Rail Reorganization Act*  
27 *Cases*, 419 U.S. 102, 139-40, 95 S. Ct. 335, 356-57 (1974); *Assiniboine & Sioux Tribes v.*  
28 *Bd. of Oil & Gas Conservation*, 792 F.2d 782, 788 & n.3 (9<sup>th</sup> Cir. 1986). It is true that a  
court assesses ripeness based on the facts as they exist at the "present moment," *Western*  
*Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186, 1205 (9<sup>th</sup> Cir. 2008). That principle  
applied to the ripeness decisions made in this action, and it would apply to any future  
action Plaintiffs may bring. But it does not empower the Court to revive an action that  
the Court of Appeals ordered to be dismissed.

1 This ruling requires no exegesis of the Court of Appeals' opinion for its  
2 precedential force, and this Court makes none. It is enough that this Court has been  
3 directed to dismiss this case for lack of ripeness.


4 IT IS ORDERED that Plaintiffs' Rule 60(b) Motion for Relief from the Judgment  
5 Dismissing for Lack of Ripeness (Doc. 645) is denied.

6 The Court has also reviewed Plaintiffs' Motion to File Supplemental Briefing  
7 (Doc. 659) and Defendant USAPA's response.

8 IT IS FURTHER ORDERED that Plaintiffs' Motion to File Supplemental Briefing  
9 (Doc. 659) is granted.

10 The Clerk shall file Plaintiffs' Lodged Supplemental Briefing on the Issue of Strict  
11 Compliance with Local Rules (Doc. 660).

12 DATED this 13<sup>th</sup> day of October, 2010.

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16 Neil V. Wake  
17 United States District Judge  
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