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BY MESSENGER

Honorable William K. Suter
Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: U.S. Airways, Inc. v. McCutchen, No. 11-1285 (conferenced for June 21, 2012)

Dear General Suter:

I hereby attach as supplemental authority a Ninth Circuit decision issued today that recognizes—and deepens—the circuit split presented by the above-captioned petition for certiorari.

In its Brief in Opposition, Respondent argued (at 22) that the issue presented should percolate, and specifically that this Court should await a pending Ninth Circuit case, CGI Technologies & Solutions, Inc. v. Rose, No. 11-35128. That case was decided today, see Exh. A—and in a way that intensifies the split among the Circuits.

The Ninth Circuit's 2-1 decision began by reciting the split and recognizing that the Third Circuit's decision in McCutchen—the decision on review here—is part of that split:

> The Circuits have split on whether strict adherence to the terms of an ERISA plan that disclaims the application of traditional equitable defenses constitutes "appropriate equitable relief." Several circuits, and notably the Eleventh, Eighth, Seventh and Fifth Circuits, have stressed the primacy of an ERISA plan's express language, and have decided that . . . simple contract interpretation that provides for full reimbursement per the plain terms of a plan . . . constitutes "appropriate equitable relief" under § 502(a)(3). . . . By contrast, only the Third Circuit, in US Airways v. McCutchen, has concluded

> "that Congress intended to limit the equitable relief available under § 502(a)(3) through the application of equitable defenses and principles that were typically available in equity" despite the negation of such defenses and principles in an ERISA plan. [Exh. A at 15-17].

The Ninth Circuit sided with McCutchen: "We agree with the Third Circuit that under § 502(a)(3), the district court, in granting 'appropriate equitable relief,' may consider traditional equitable defenses notwithstanding express terms disclaiming their application." *Id.* at 17. This prompted a dissent which argued that the majority's result was reached "at the expense of the plain language of the Plan" and that "[s]uch an interpretation invites litigation and unnecessarily complicates management of these plans." *Id.* at 22-23 (Beistline, J., dissenting).

The decision in Rose deepens the split presented by our petition; the Circuits are now divided 5-2. Rose also recognizes that split, despite Respondents' attempts to explain it away. And the very fact that Rose has been decided eliminates Respondents' primary ground for opposing certiorari. The writ should be granted.

Sincerely,

Neal R. Katyal /DFP by permission

Neal K. Katyal

Counsel for Petitioner

Enclosures

cc: All Counsel