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9 **IN THE UNITED STATES DISTRICT COURT**  
10 **FOR THE DISTRICT OF ARIZONA**

11 Don ADDINGTON; John BOSTIC; Mark  
12 BURMAN; Afshin IRANPOUR; Roger  
13 VELEZ; and Steve WARGOCKI,

14 Plaintiffs,

15 vs.

16 US AIRLINE PILOTS ASSOCIATION,  
17 US AIRWAYS, INC.,

18 Defendants.

19 Case No. 2:08-cv-1633-PHX-NVW  
(consolidated)

20 **SECOND JOINT WRITTEN**  
21 **SUMMARY OF**  
22 **DISCOVERY DISPUTE**  
23 **BY DEFENDANT**  
24 **IN DAMAGES TRIAL**

25 Don ADDINGTON; John BOSTIC; Mark  
26 BURMAN; Afshin IRANPOUR; Roger  
27 VELEZ; and Steve WARGOCKI,

28 Plaintiffs,

vs.

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

Defendants.

CV08-1728-PHX-NVW

**ISSUE:**

Whether, pursuant to Rule 26(c)(1)(D), Defendant should be granted a Protective Order forbidding Plaintiffs from any discovery inquiry into the matter of “calculation of germane versus non-germane expenses and the analysis and auditing of those calculations by an outside accounting firm;” Or in the *alternative*, whether Defendant should be granted leave to file a written motion to argue for the same remedy?

**MOVANT’S (DEFENDANT’S) POSITION:**

Plaintiffs’ Rule 26(a)(1) damage-trial disclosures indicate that an individual they name as likely to have discoverable information, Rob Streble, is relevant for his knowledge of “the calculation of germane versus non-germane expenses and the analysis and auditing of those calculations by an outside accounting firm” (“Plaintiffs’ Supplemental Disclosure Statement For Damage Trial” June 15, 2009, § A. 2. ¶ 35). Plaintiffs seek, or on information and belief shall seek, discovery into this matter. Such inquiry exceeds the scope of discovery allowed under Fed. R. Civ. P. 26(b)(1). Disputes over expenses chargeable to non-members will be arbitrated later this year and have nothing to do with this case and discovery is not reasonably calculated to lead to admissible evidence. This Court specifically ruled in Defendant’s favor on the issue of dues and fees rejecting the remedy of disgorgement. (Doc. # 287). The Court later commented, “... this Court has now granted Defendant USAPA’s Rule 12(c) motion for judgment on the pleadings on that claim” (Doc. # 288 at 2:18) and termed its ruling “... USAPA’s entire victory on the issue of refunding dues and fees.” (*Id* at 3:14). Hence, discovery into this area is a revival of Plaintiffs’ rejected and irrelevant “dues restitution claim” and should be prohibited to avoid undue expense and unnecessarily expanding the damages trial.

**RESPONDING PARTY’S (PLAINTIFFS’) POSITION:**

Part of DFR damages are “the attorney’s fee which [the plaintiff] incurred as a result of the union’s breach.” *Del Casal v. Eastern Airlines, Inc.*, 634 F.2d 295, 301-02 (5th Cir. 1981). Courts recognize only one exception to this rule—fees incurred litigating against the union. *Zuniga v. United Can Co.*, 812 F.2d 443, 454-55 (9th Cir. 1987). Such fees are not recoverable because that “would penalize the union for litigating the issue of whether it breached its duty of fair representation.” *Id.* at 453. The fees at issue here are USAPA’s fees defending the litigation. These fees do not fall under this exception. To the extent that USAPA pays these fees as a germane expense, the fees pass through *pro rata* to the West Pilots. Had there been no DFR breach, there would have been no litigation and no fees would have passed through to the West Pilots. These fees, therefore, were incurred as a result of the union’s breach. The remedy for these fees is to award damages to Plaintiffs equal to their *pro rata* share of the fees USAPA paid as a germane expense. The Court, therefore, should deny the protective order sought here by USAPA.

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**JOINT CERTIFICATION**

Pursuant to LRCiv 7.29(j), the parties jointly agree and state that both have made sincere efforts through consultation to resolve this dispute and have now reached impasse.

For Moving Party:

For Responding Party:

**/s/ Nicholas P. Granath, Esq.**

**/s/ Don Stevens, Esq.**

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Respectfully submitted on:

Dated: June 30, 2009

By: /s/ Nicholas P. Granath

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**CERTIFICATE OF SERVICE**

This is to certify that on the date indicated herein below true and accurate copies of the foregoing documents and their attachments, *to wit*,

- SECOND JOINT WRITTEN SUMMARY OF DISCOVERY DISPUTE BY DEFENDANT IN DAMAGES TRIAL
- Certificate of Service

were electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all admitted counsel who have registered with the ECF system, including but not limited, to:

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Further, I certify that paper hard copies shall be provided to The Honorable Neil V. Wake, District Court Judge, 401 W. Washington Street, SPC 52, Phoenix, AZ 85003.

On June 22, 2009, by:

*/s/ Nicholas P. Granath, Esq.*