Marty Harper (#003416)
mharper@polsinelli.com
Kelly J. Flood (#019772)
kflood@polsinelli.com
Andrew S. Jacob (#022516)
ajacob@polsinelli.com
POLSINELLI SHUGHART, PC
Security Title Plaza
3636 N. Central Ave., Suite 1200
Phoenix, AZ 85012
Phone: (602) 650-2000
Fax: (602) 264-7033

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Don ADDINGTON, *et al.*, Plaintiffs, vs. US AIRLINE PILOTS ASSN., *et al.*, Defendants.	CASE NOS. 2:08-CV-1633-PHX-NVW 2:08-CV-1728-PHX-NVW (Consolidated) **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES AND RELATED NON-TAXABLE EXPENSES**
Don ADDINGTON, *et al.*, Plaintiffs, vs. Steven H. BRADFORD, *et al.*, Defendants.	

Plaintiffs file this Memorandum, pursuant to Local Rule 54.2(b), in support of their motion for an award of attorneys fees and related non-taxable expenses filed July 30, 2009. Doc. # 600. Based on the substantial service provided to the entire bargaining unit, the extent of bad faith that preceded and continued during this litigation, and basic principles of equity, Plaintiffs' reasonable attorneys' fees and related non-taxable expenses should be borne by the entire bargaining unit. Awarding Plaintiffs' fees and related non-taxable expenses against USAPA will spread these fees and expenses over the entire bargaining unit, which is the correct result in this

case. This Memorandum is supported by the Affidavit of Marty Harper, including Exhibits thereto, filed contemporaneously herewith.

MEMORANDUM OF POINTS AND AUTHORITIES

I. ELIGIBILITY STATEMENT

Plaintiffs move for attorneys' fees and related non-taxable expenses incurred obtaining the Partial Judgment and Permanent Injunction in this matter dated July 17, 2009. Doc. # 594. The table below lists the claims and defenses raised in the two cases consolidated in this litigation and identifies the prevailing party and the document number of the Court's relevant ruling(s).

Claim or Defense	Prevailing Party	Doc. #
Case 08-1633 (*USAPA defendant)*		
Stay to appeal injunction	Plaintiffs	610
Breach of duty of fair representation	Plaintiffs	593, 594
Stay to appeal class certification	Plaintiffs	288
Disgorgement of dues and agency fees	Defendants	287
Class certification	Plaintiffs	248
Expiration statute of limitations	Plaintiffs	84
Lack of subject matter jurisdiction	Plaintiffs	84
Lack of ripeness	Plaintiffs	84, 253
Failure to exhaust admin. procedures	Plaintiffs	84
Violation of Norris-LaGuardia Act	Plaintiffs	84
RLA preemption	Plaintiffs	84
Case 08-1728 (*individual defendants)*		
Breach of contract	-------	
RLA preemption	Defendants	118
Lack of personal jurisdiction	Plaintiffs	118
Violation Rule 19	Plaintiffs	21
Improper venue	Plaintiffs	21
Lack of subject matter jurisdiction	Plaintiffs	20

Plaintiffs are entitled to an award of attorneys' fees and other litigation related expenses pursuant to common benefit doctrine when considered in the context of intra-litigation and pre-litigation bad faith. *See*, *generally*, *Hall v. Cole*, 412 U.S. 1, 6 (1973) (applying common benefit doctrine to union); *Rodriguez v. United States*, 542 F.3d 704, 712 (9th Cir. 2008) (pre-litigation bad faith relevant but should not be relied upon excessively to justify an award); *Int'l. Union of Petroleum & Indus. Workers v. Western Indus. Maintenance, Inc.*, 707 F.2d 425, 428 (9th Cir. 1983) (awarding fees where "defendant's obstinancy in granting a plaintiff his clear legal rights necessitated resort to legal action with all the expense and delay entailed in litigation").

II. ENTITLEMENT STATEMENT

A. Unless the Court makes a fee award, the prevailing West Pilots, who bear no responsibility for this litigation or its expense, will inequitably bear a disproportionate share of the attorneys' fees and litigation expenses.

This litigation would not have occurred but for the fact that East Pilots refused to abide by an arbitrated integrated seniority list (the "Nicolau Award"). Going into the arbitration, the East Pilots agreed that the arbitrated award would be final and binding and would be used in Operational Pilot Integration. Coming out of the arbitration, the East Pilots unjustifiably refused to abide by that agreement. Instead, they took many actions to prevent Operational Pilot Integration using the Nicolau Award, culminating in the creation of USAPA for that purpose.

After shopping several law firms, a group of East Pilots found a law firm willing to guide, indeed *promote*, a scheme of advancing East Pilot seniority rights to the detriment of West Pilot seniority rights. This law firm, Seham, Seham, Meltz & Petersen, LLP, advised the East Pilots that,

with majority status, they could create USAPA and use it to promote their seniority interests in disregard of the Nicolau Award. Mr. Seham told them, relying on his tortured reading of *Rakestraw*, that USAPA could advance East Pilot interests to the detriment of West Pilot interests so long as there was any rational relation to a legitimate union objective, regardless of USAPA's actual motives.

USAPA, while guided by its legal advisor, left quite an evidentiary trail of bad faith. Much of that trail was apparently created to garner political support among East Pilots who wanted a union that would advance their majority interests over those of the West Pilot minority. USAPA, with legal guidance, acted while motivated by that bad faith. It drafted a constitution intended to create a pretext defining a duty to disregard the Nicolau Award. It made campaign promises to disregard the Nicolau Award. Once elected, it embarked on a preordained course to disregard the Nicolau Award. It did all these things solely for illegitimate motives.

USAPA left the West Pilots no option but to institute this litigation. Plaintiffs filed this action after the Airline announced plans to reduce service in a manner that would burden West Pilots far more than they would have been burdened if the transition to Operational Pilot Integration had occurred as intended. USAPA selected the Seham law firm to handle its defense. In essence, therefore, the Seham law firm was put in a position of defending both itself for advising USAPA to take the actions that led to this lawsuit and USAPA for following that advice.

It was apparent early on that this lawsuit would determine just two material issues: (1) whether, as a matter of law, liability attached if USAPA's only actual motivation in adopting and presenting its seniority

proposal was to benefit East Pilots at the expense of West Pilots; and (2) whether, as a matter of fact, this was USAPA's only actual motivation. Early in this litigation, the Court held, in regard to the first issue, that "the union's position flies against the headwind of cases from other circuits." *Order*, 9:27 to 9:28 (Nov. 20, 2008). Doc. # 84. At that point, because USAPA and its legal advisors knew their actual motivation, they surely knew that USAPA would not prevail on the merits of the second, factual issue.

It was also apparent early on that USAPA had a strategy to delay decision on the second, factual issue as long as possible and to run up the costs of the litigation as much as possible in a needless and improper "war of attrition." The vigor with which this case was defended, obviously based on this strategy, far exceeded what was needed. Perhaps this was in part because the defense team was defending itself as well as its client. Perhaps it was a coldly calculated attempt to outspend and exhaust Plaintiffs before they could obtain a verdict. What matters is that the costs were huge.

With a degree of bad faith that mirrored USAPA's pre-litigation bad faith, USAPA took advantage of every possible legal maneuver to delay a decision on the merits and to expand the costs of the litigation. As a consequence, the litigation costs far exceeded what should have been necessary to resolve the case on the merits. USAPA, through its defense team, demanded substantial amounts of irrelevant discovery, filed unnecessary motions repeatedly raising the same issues, engaged in hostile and abusive practice against Plaintiffs personally, and repeatedly tried legal maneuvers to stay or continue these proceedings. USAPA is, therefore, not

only responsible for creating the need for this litigation, but it is also responsible for causing it to be so expensive.

Both sides incurred substantial litigation expenses. USAPA's 2009 LM-2 filed with the Department of Labor shows that it paid $718,474.00 in attorneys' fees allocated to this matter (not including related matters litigated in North Carolina) between October 17, 2008 and February 13, 2009. That comes out to approximately $180,000 a month for the first four months of the litigation.[1] What USAPA paid the Seham law firm for the remainder of this representation, including the motion seeking a stay of the permanent injunction, is yet to be reported but will also be part of the public record.

USAPA will pay the attorneys' fees and other litigation expenses incurred in defending this action from membership dues and agency fees. By operation of the RLA, USAPA can assess membership dues or agency fees against the entire bargaining unit. In effect, therefore, the entire bargaining unit (including West Pilots) must share the burden of USAPA's attorneys' fees and other litigation expenses.

In pursuing this action, Plaintiffs incurred attorneys' fees and other litigation expenses comparable to those incurred by USAPA. In contrast to USAPA, however, Plaintiffs cannot assess the members of the entire bargaining unit to pay those fees and expenses. They can pay only from voluntary donations, largely made by West Pilots. Hence, absent a fee and expense award by this Court, West Pilots will bear a share of the attorneys' fees and expenses from both sides while East Pilots will bear only a share of

[1] Plaintiffs reserve the right to raise at a later date whether it is proper for Mr. Seham's law firm to retain those fees.

the attorneys' fees and expenses from the defense of USAPA. West Pilots, therefore, would bear a substantially **greater** burden than East Pilots. Surely, as the prevailing parties, as parties who bear no responsibility for this litigation or for its excessive expense, West Pilots ought not to bear a greater burden than the East Pilots.

If the Court awards Plaintiffs their attorneys' fees and other litigation expenses, the burden will be **evenly** distributed among all members of the bargaining unit. West Pilots will bear no greater or lesser burden than East Pilots. Attorneys' fees and other expenses from both sides will be paid from membership dues and agency fees assessed by USAPA. That is surely an equitable result.

B. Common benefit doctrine provides a sound basis to obtain the more equitable result wherein fees and expense are borne equally by both sides.

Common benefit doctrine provides a sound basis for the Court to reach the equitable result of spreading the costs of this litigation to the entire bargaining unit. Under common benefit doctrine, courts award attorneys' fees to a prevailing member of a bargaining unit where litigation against a union provides a substantial benefit to the entire bargaining unit. Because the litigation here provided such a benefit, the Court should apply the doctrine and make such an award.

The litigation here provided two substantial services (or benefits) to the entire bargaining unit. First, the Court's injunctive remedy will move the bargaining unit substantially closer to achieving its goal of negotiating, ratifying and implementing a new CBA that would allow completion of the transition to Operational Pilot Integration. Second, the Courts' legal rulings ensure that, in a future merger with a larger bargaining unit, this

bargaining unit will be protected from the kind of misconduct at issue here. Each benefit alone and surely both together support application of common benefit doctrine. The Court, therefore, should award Plaintiffs their reasonable attorneys' fees and related non-taxable expenses, as set out in the accompanying Affidavit of Marty Harper and Exhibits attached thereto.

III. LEGAL ARGUMENT

A. Common benefit doctrine supports awarding Plaintiffs their litigation expenses.

1. Common benefit doctrine is applied to DFR cases.

The Ninth Circuit applies common benefit doctrine to "permit[ ] successful plaintiffs to recover attorney's fees" against a union "where . . . the litigation performed a valuable service for the union and its members." *Murray v. Laborers Union Loc. No. 324*, 55 F.3d 1445, 1453 (9th Cir. 1995).[2] Explaining the rationale for common benefit doctrine, the Supreme Court stated: "To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 392 (1970). The Supreme Court also explained that the doctrine can be applied without regard to whether the lawsuit "produce[d] a monetary recovery." *Id.*

Most Ninth Circuit cases applying common benefit against a union defendant are LMRDA cases. It is generally recognized, however, that "[a]pplication of the common benefit doctrine is not predicated upon the type of action sustained, but depends instead on the equitable circumstances of

[2] In this context, the Ninth Circuit "uses 'valuable service' as a synonym for 'substantial benefit.'" *Southerland v. Int'l Longshoremen's & Warehousemen's Union, Loc. 8*, 845 F.2d 796, 800 (9th Cir. 1987).

each case." *Polonski v. Trump Taj Mahal Assocs.*, 137 F.3d 139, 145 (3d Cir. 1998) (alteration and quotation marks omitted). Hence, courts "have not hesitated to summon this authority where overriding considerations indicate the need for such a recovery." *Id.* at 146 (internal quotation marks omitted). Federal courts have recognized that the requisite overriding considerations could exist in a variety of contexts involving union defendants. *E.g.*, *Hall*, 412 U.S. at 6 (LMRDA violation); *Murray*, 55 F.3d at 1453 (same); *Southerland*, 845 F.2d at 800 (same); *Western Indus. Maintenance, Inc.*, 707 F.2d at 428 (confirmation and enforcement of arbitration award); *Polonski*, 137 F.3d at 146 (DFR violation); *Local 4076, United Steelworkers of America v. United Steelworkers of America, AFL-CIO*, 338 F.Supp. 1154, 1164 (D.C. Pa. 1972) (same). All of these authorities, then, support applying common benefit to appropriate DFR cases.

2. The Ninth Circuit makes a two-part inquiry to decide what cases are appropriate for applying common benefit.

The Ninth Circuit makes a two-part inquiry to decide where to apply common benefit doctrine This inquiry asks: (1) whether "the litigation conferred a substantial benefit on the members of an ascertainable class;" and (2) whether "the court's jurisdiction over the subject matter makes possible an award that will operate to spread the costs proportionately among the class." *Southerland*, 845 F.2d at 799.[3] The second part is

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[3] The Ninth Circuit does not use the *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), in union cases:

> [T]his court has continued to use the two-factor test of *Hall*, even after *Alyeska*. Appellant has not shown any reason why that test should be changed now.

Southerland, 845 F.2d at 799.

generally always satisfied for RLA union defendants because RLA unions have a statutory right to spread costs, through membership dues and agency fees, to all members of the bargaining unit. In RLA cases, therefore, the focus is on the first element—whether there is a common benefit to the entire bargaining unit.

3. Establishing or clarifying legal principles that protect the entire bargaining unit is sufficient common benefit.

The Third Circuit's decision in *Polonski* is instructive as to how a court should determine what constitutes a sufficient common benefit. That decision explained, "What is of utmost importance . . . is the nature and quality of the common benefits attained from litigation." *Polonski*, 137 F.3d at 146. The analytic framework applied by the Third Circuit shows that common benefit can flow directly from the remedy obtained by the plaintiff or can flow from principles of law that were established or clarified in the litigation.

The dispute in *Polonski* was whether the union improperly reopened a final and binding seniority arbitration. Although the plaintiffs prevailed in their objection to reopening the arbitration, the court determined that there was not a sufficient benefit common to the entire bargaining unit to support an attorneys' fees award. The court looked at both bases to find common benefit (effect of remedy and effect of law) and found that both were lacking.

First, the *Polonski* court noted that the remedy itself, because it merely affected the seniority of one group of union members over another did not provide a substantial benefit to all union members. *Id.* at 148. Only those whose seniority would have been impaired by reopening the arbitration derived a direct benefit. *Id.*

Second, the *Polonski* court considered whether the legal outcome of the litigation had some benefit to the entire union membership and found that lacking also. It explained, for example, that the outcome of a litigation benefits an entire bargaining unit where it "impacts the future conduct of the defendant's affairs." *Id.* at 147. In general, this occurs where the litigation "establish[es] significant new principles of law beneficial to all Union members." *Id.* at 148 (internal quotation marks omitted). It does not occur in litigations that are "[s]imple 'generalized lessons' of well-established law." *Id.* at 147.

This Court should follow the analytic framework used in *Polonski* because it is well-reasoned, was applied to somewhat related facts, and was derived from the Supreme Court's application of common benefit doctrine in *Mills*. 396 U.S. at 396. To apply common benefit doctrine here, therefore, the Court should look for one of two kinds of benefits: (1) whether the remedy attained in this litigation directly benefits the entire bargaining unit; and/or (2) whether legal principles established or clarified by the Court in this litigation will protect the entire bargaining unit. Plaintiffs will address the latter kind of benefit first.

4. The Court clarified a legal principle that will protect the entire bargaining unit.

In contrast to *Polonski*, the Court established and/or clarified principles of law in this litigation that will protect the entire bargaining unit. In *Polonski,* this was not the case because the trial court merely applied "well-established law"—"that an arbitrator may not reconsider the merits of a final arbitration award." *Polonski,* 137 F.3d at 147. This principle of law existed before the *Polonski* case. *See Code Prof. Resp, Arbs of Labor-Management Disputes Nat'l Acad. Arbs. Amer. Arb. Ass'n Fed. Mediation &*

Conciliation Svc. § VI(D)(1) (As amended and in effect May 29, 1985) ("No clarification or interpretation of an award is permissible without consent of both parties.").[4] As evidence that it was made no stronger by *Polonski*, no court has cited *Polonski* for this principle. The members of the bargaining unit in *Polonski*, therefore, were no more protected after that lawsuit than they were before. Merely enforcing the principle to the facts of that dispute did not add to the protection that already existed. *See Polonski*, 137 F.3d at 146.

In contrast, the Court here applied a different legal principle than what was applied in *Polonski*—that a union "violates its duty of fair representation by adopting and promoting a certain integrated seniority list for no reason other than to favor one group of employees at the expense of another." *See* doc. # 593 at 16:24 to 16:26. The Court also applied the principle that a successor union cannot abandon a seniority compromise arbitrated under the governance of the predecessor union without a valid union purpose. *See id.* at 18:21 to 19:15. In more specific terms, the Court held: "There is no merit to USAPA's argument that the pursuit of date-of-hire seniority principles automatically legitimates USAPA's actions because date-of-hire seniority is 'the gold standard' of integration methods." *Id.* at 24:2 to 24:4. The Court applied legal principles as matters of first impression in the Ninth Circuit (although it had substantial support in precedents from other circuits). *See id.* at 11 to 31.

The Court applied the principles set out above to a factual context that had previously been addressed only in dicta. *See Air Wisconsin Pilots*

[4] Available on line at http://www.ilr.cornell.edu/alliance/resources/Guide/code_prof_responsibility_arb.html.

Protection Committee v. Sanderson, 909 F.2d 213, 215 (7th Cir. 1990) (Posner, CJ) (disapproving conduct that was remarkably similar to that here). Given that no court in the Ninth Circuit had previously applied many of the legal principles applied here and that no court in any circuit had addressed similar facts as part of a legal holding, this litigation established and/or clarified important principles of law. In that key respect, this case is distinguishable from *Polonski* and this bargaining unit (unlike that in *Polonski*) is better protected from union misconduct now than it was prior to this litigation. This litigation establishes precedent that will protect all the members of this bargaining unit in the event that US Airways were to merge with a larger airline such as United, Delta/Northwestern, or American Airlines. This litigation, therefore, establishes legal precedent that protects everyone in the bargaining unit. The costs of establishing this precedent, therefore, should be spread over the entire bargaining unit.

5. The injunctive remedy itself also provides a direct benefit to the entire bargaining unit.

The injunctive remedy itself also provides a direct benefit to the entire bargaining unit, apart from its affect on seniority order. By requiring USAPA to negotiate a single CBA that would use the Nicolau Award, the injunction eliminated much of the uncertainty that contributed to the alleged "stalemate" and "logjam" in CBA negotiations. As a result of the injunction, pilots on both sides will get an opportunity to vote on ratifying a single CBA using the Nicolau Award. Because this may finally lead to Operational Pilot Integration and its associated benefits, the injunction provides a direct benefit to all members of the bargaining unit.

6. The Court should award Plaintiffs' reasonable attorneys' fees and related non-taxable expenses based on common benefit doctrine.

Both bases by which litigation can provide a substantial service to a bargaining unit are present here. First, the litigation established and/or clarified principles of law that will protect the interests of all members in the event of future mergers. Second, the litigation makes it more likely that the pilots can obtain the benefits of Operational Pilot Integration. This provides a compelling basis to award attorneys' fees under common benefit doctrine. Plaintiffs demonstrate below that bad faith considerations make the basis for such an award even more compelling.

B. USAPA's bad faith supports an attorneys' fees award.

Although the Court cannot award fees relying solely on pre-litigation bad faith, it can take it (as well as intra-litigation bad faith) into account as "one of several grounds" when applying common benefit doctrine. The Ninth Circuit explains this as follows:

> [A]n award of attorney's fees is not appropriate when it is based *solely* upon a finding of bad faith in the conduct underlying the lawsuit. In *Association of Flight Attendants,* this court noted no circuit court has shifted attorney fees based "*solely* upon a finding of bad faith as an element of the cause of action presented in the underlying suit," but recognized a possibility that "prelitigation conduct might be relevant to an award of fees for bad faith conduct during the litigation." We have previously approved of district courts considering the "totality of the circumstances," including conduct "*prelitigation* and during trial," when making bad faith determinations. In this case, the pre-litigation conduct was only one of several grounds on which the district court granted attorney's fees. As a result, we conclude that the district court did not excessively rely on the government's pre-litigation conduct.

Rodriguez, 542 F.3d at 712 (citations omitted, emphasis and quotation marks as in original).

1. Pre-litigation bad faith has heightened significance because it was bad faith refusal to honor a final arbitration.

Pre-litigation bad faith has heightened significance where the defendant refused, without justification, to recognize clear legal rights established by an arbitration award.

> Bad faith may be demonstrated by showing that a defendant's obstinancy in granting a plaintiff his clear legal rights necessitated resort to legal action with all the expense and delay entailed in litigation. The award of attorneys' fees in the latter context satisfies a dual purpose-deterrence and compensation. The threat of an award of attorneys' fees tends to deter frivolous dilatory tactics. The award also compensates a plaintiff for the added expense of having to vindicate clearly established rights in court.

Int'l Union of Petroleum & Indus. Workers v. Western Indus. Maintenance, Inc., 707 F.2d 425, 428 (9th Cir. 1983) (citations, alteration and quotation marks omitted, emphasis added).

The Ninth Circuit recognizes that bad faith is particularly significant where the defendant refuses to abide by an arbitration award. "[A]n unjustified refusal to abide by an arbitrator's award may equate with an act taken in bad faith, vexatiously or for oppressive reasons." *Phoenix Newspapers, Inc. v. Phoenix Mailers Union Loc. 752, Int'l Bhd. of Teamsters*, 989 F.2d 1077, 1084 (9th Cir. 1993) (alteration and quotation marks omitted).

> [I]t is generally recognized that labor arbitration advances the goal of industrial stabilization.... Engaging in frivolous dilatory tactics not only denies the individual prompt redress, it threatens the goal of industrial peace. Therefore, the deterrence aspect of an award of attorneys' fees is particularly served where a party, without justification, refuses to abide by an arbitrator's award.

United Food & Commercial Workers Union, Locs. 197, etc., by United Food & Commercial Workers Intern. Union, AFL-CIO v. Alpha Beta Co., 736 F.2d 1371, 1382 (9th Cir. 1984).

Other circuits have done the same. *Int'l Assoc. Machinists & Aerospace Workers, Dist. 776 v. Texas Steel Co.*, 538 F.2d 1116, 1122 (5th Cir. 1976) (approving award of fees if "refusal to abide by [an] arbitration award [creating a compromise integration of seniority lists] was without justification"); *cf. United Food & Commercial Workers, Loc. 400 v. Marval Poultry Co., Inc.*, 876 F.2d 346, 350 (4th Cir. 1989) (approving award to defendant where there was an unjustified challenge to arbitration award).

In *Polonski*, the union's bad faith was far more circumscribed than it was here. The union recognized its obligation to abide by an arbitration award and, rather than ignore the award, attempted to get the arbitration reopened to get a different result. In this case, USAPA gave no such recognition to the Nicolau Award. It outright declared the award a nullity. By such action, USAPA compelled Plaintiffs to institute this litigation.

One difference between this case and *Alpha Beta Co.* is in the status of the parties. The Nicolau arbitration was an intra-union arbitration. The arbitration in *Alpha Beta Co.* was between a union and an employer. The analytical framework applied in *Alpha Beta Co.* to decide whether to award attorney's fees should apply just the same because it was based on the policy disfavoring bad faith, not on the status of the parties.

> We believe that the policy concerns raised by frivolous or bad faith refusals to arbitrate or appeals of district court orders compelling arbitration are the same as those raised by frivolous or bad faith refusals to comply with an arbitration award. Accordingly, the award of fees is appropriate when a party frivolously or in bad faith refuses to submit a dispute to arbitration or appeals from an order compelling arbitration.

Alpha Beta Co., 736 F.2d at 1383.

Because this lawsuit enforced an arbitration award and arose from USAPA's bad faith, the outcome of the Court's application of the Ninth Circuit's *Alpha Beta Co.* analytic framework should be to award Plaintiffs their reasonable attorneys' fees and related non-taxable expenses. Surely, therefore, it also weighs heavily in favor of an award based on common benefit doctrine.

2. Intra-litigation bad faith has heightened significance because it was manifested by intentional delay that increased the expense of the litigation.

Federal courts have the power to award attorneys' fees against a party who litigates in bad faith.[5] The Supreme Court explained as follows:

> [A] court may assess attorneys' fees . . . when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons….' These exceptions are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations . . . .

Alyeska Pipeline, 421 U.S. at 258-59 (citation omitted). "[N]either is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991).

A court's analysis of intra-litigation bad faith for purpose of awarding attorneys' fees should focus on delay. The Ninth Circuit states that "filing solely for purposes of delay constitutes bad faith." *United States v. Blodgett*, 709 F.2d 608, 610 (9th Cir. 1983); *see also In re Zelis*, 66 F.3d 205,

[5] "Any attorney … in any court of the United States …who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927.

207 (9th Cir. 1995) (referring to "a shameless effort to unjustifiably prolong litigation"). This focus is logical because it treats attorneys' fees resulting from delaying tactics as a component of damages caused by those tactics. Applying such reasoning, one court imposed sanctions for a party's bad-faith delay of class certification. *Williams v Lane*, 96 F.R.D. 383 (ND Ill. 1982).

The record here is replete with instances where USAPA shamelessly delayed the litigation—particularly in the context of opposing class certification. The Court recognized these tactics on the record as follows:

> THE COURT: Well, let me tell you, candidly, when I read the class certification motions, it was an eye opener for me. I saw there has been significant unnecessary discovery, likely costly and attenuated, or what to me are matters that were highly attenuated and expensive. And I recognize my responsibility to bring that kind of discovery practice to an end. This is not relevant. This is expensive, you – everyone needs to focus on the discovery that matters rather than a fishing expedition. I remind you all this is an injunction case, and we have to focus on priorities and timing. And so I'm – thank you, but I am not persuaded. This is just far too attenuated and expensive. It's just a little more – maybe nothing more than a fishing expedition.

RT 12:21 to 13:8 (03/16/09).

USAPA repeatedly made arguments that had no apparent purpose other than to cause delay. *See* docs. # 270 at 4:20 to 5:7 (enumerating thirteen USAPA filings that appeared primarily intended to delay the litigation). It frivolously argued, for example, that Plaintiffs brought their claim too early and too late, that the district courts lack jurisdiction to enjoin breach of the duty of fair representation, and that both the NMB and the System Board have jurisdiction to remedy breach of that duty. As explained in the Entitlement Statement section, this delay was intended to prevent this litigation from ever reaching the merits, perhaps hoping that

such tactics would cause either Plaintiffs or their counsel to throw in the towel. The wrongfulness of trying to prevent a decision on the merits is heightened by the fact that, as their bargaining representative, USAPA owed Plaintiffs a duty to protect their legal rights.

USAPA's bad faith conduct did not end once it was too late to prevent a trial on the merits. Throughout the trial, Mr. Seham and other defense counsel advanced pretextual arguments on behalf of USAPA. The Court made direct findings in this regard, such as: "The evidence of a supposed impasse requiring sacrifice of the West Pilots to angry East Pilots was pretextual." Doc. # 593 at 26:11 to 26:12. "The evidence well supports the conclusion, implicit in the verdict and persuasive to the Court, that any asserted impasse was a pretext for bare favoritism of the East Pilots." *Id.* at 26:17 to 26:18.

Advancing pretextual arguments is not a valid litigation tactic. Pretext is dishonest because, by definition, it is an intentional effort to hide actual motive.[6] As such, a lawyer violates ER 3.3(a)(4) by presenting evidence, such as a client's testimony, in an effort to advance a pretextual motive. *See* ER 3.3 comment [8] ("A lawyer's knowledge that evidence is false . . . can be inferred from the circumstances.").

There is surely sound basis here to find intra-litigation bad faith. USAPA's witnesses, with the aide of defense counsel, repeatedly, advanced what were plainly pretextual explanations. Taken as a whole, the extent of this intra-litigation bad faith supports an attorneys' fees award. Surely, it weighs heavily in favor of an award when taken in the context of the pre-

[6] "**pretext** . . . A false or weak reason or motive advanced to hide actual or strong reason or motive." BLACK'S LAW DICTIONARY, 1206 (7th ed. 1999).

litigation bad-faith, the rationale for applying common benefit doctrine, and the inequity that would result—were there no fee award—if the prevailing West Pilots alone had to bear a share of the attorneys' fees and litigation expenses for both sides.

IV. REASONABLENESS STATEMENT

The Affidavit of Marty Harper, attached hereto as Exhibit "A," provides the information required by Local Rule 54.2(c)(3). The Affidavit and exhibits set forth the type of legal services performed, the attorney providing the service, the time spent in providing the service, and the rates charged. *See id.* Plaintiffs' application for fees, and counsel's affidavits and billing statements, set forth plain, complete statements of services rendered that are demonstrably connected to the matter for which fees are recoverable here. *See, e.g., City of Prescott v. Town of Chino Valley*, 163 Ariz. 608, 623, 790 P.2d 263, 278 (App. 1990). It includes costs for computerized legal research, which are recoverable as attorneys' fees. *See, e.g., Ahwatukee Custom Estates v. Bach*, 193 Ariz. 401, 404, 973 P.2d 106, 108-09 (1999). Plaintiffs have not included a formal statement of consultation because the Court recognized at the August 20, 2009, hearing that it would be necessary for the parties to resolve their fee dispute by motion. Doc. # 606.

The total reasonable fees incurred by Plaintiffs for work performed by Polsinelli Shughart is $1,678,300.50. The total reasonable related non-taxable expenses incurred by Plaintiffs is $93,428.78. The costs incurred by Plaintiffs for computerized legal research are $49,500.59. The total of these sums is $1,821,229.87.

V. CONCLUSION

Common benefit doctrine in the context of pre-litigation and intra-litigation bad faith substantially weigh in favor of awarding Plaintiffs their reasonable attorneys' fees and related non-taxable expenses. Plaintiffs, therefore, respectfully ask the Court to enter an Order making such an award as set out in the schedule attached hereto.

Dated this 4th day of September, 2009.

POLSINELLI SHUGHART PC

By: */s/ Andrew S. Jacob*

Marty Harper
Kelly J. Flood
Andrew S. Jacob
Security Title Plaza
3636 N. Central Ave., Suite 1200
Phoenix, AZ 85012

CERTIFICATE OF SERVICE

I hereby certify that on September 4th, 2009, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to CM/ECF registrants.

/s/ Andrew S. Jacob