LEE SEHAM, Esq. *pro hac vice*
LUCAS K. MIDDLEBROOK, Esq. *pro hac vice*
NICHOLAS P. GRANATH, Esq., *pro hac vice*
STANLEY J. SILVERSTONE, Esq., *pro hac vice*
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
445 Hamilton Avenue, Suite 1204
White Plains, NY 10601
Tel: (914) 997-1346; Fax: (914) 997-7125

NICHOLAS J. ENOCH, Esq., State Bar No. 016473
LUBIN & ENOCH, P.C.
349 North 4th Avenue
Phoenix, AZ 85003-1505
Tel: (602) 234-0008; Fax: (602) 626-3586

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI, Plaintiffs, v. US AIRLINE PILOTS ASSOCIATION, US AIRWAYS, INC., Defendants,	Case No. 2:08-cv-1633-PHX-NVW (Consolidated) **DEFENDANT USAPA'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND EXPENSES**
Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI, Plaintiffs, v. Steven H. BRADFORD, Paul J. DIORIO, Robert A. FREAR, Mark. W. KING, Douglas L. MOWERY, and John A. STEPHAN, Defendants.	Case No. 2:08-cv-1728-PHX-NVW

I. SUMMARY

Defendant, US Airline Pilots Association ("USAPA"), submits this memorandum in opposition to Plaintiffs' motion for attorneys' fees and related non-taxable expenses. (Dkt. Nos. 600, 613). As confirmed by this Court, the only issue to be decided at this time is whether the Plaintiffs have any legal entitlement to recover their attorneys' fees.[1]

As Plaintiffs' counsel advised the Court, the legal theory for the recovery of attorneys' fees that Plaintiffs are "going to rely on the most" is the common benefit doctrine. (Tr. 8/20/09 at 36:20-21). Nevertheless, the Court has already effectively rejected any common benefit argument when, in the context of its denial of Plaintiffs' motion to compel production of USAPA's attorney-client privileged documents under the *Garner* exception, the Court held that "[t]he West Pilots (including the proposed Plaintiff class) do not represent all, close to all, or even most of the union membership," and that "[t]heir action is not one on behalf of the union or its membership." (Dkt. No. 185 at 3:12-15). Consistent with the Court's prior determination, it cannot be concluded that this litigation has performed a valuable service or substantial benefit for the Union and its members, which is the focus of the common benefit analysis.

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[1] THE COURT: "I am wondering whether it might be more economical for everyone if before undertaking the laborious process of submitting proof of fees and quantification it would be beneficial to address first the legal basis to see whether there is even a legal entitlement or a basis to assess fees." (Tr. 8/20/09 at 34:24 – 35:3). "If [USAPA] want[s] to quarrel over [Plaintiffs'] time entries, I don't want to make them do it at this time." (Tr. 8/20/09 at 41:15-17). Thus, this memorandum only addresses entitlement to fees, and USAPA does not waive its right to challenge Plaintiffs' fee application based on lack of reasonableness of the requested fees, the inclusion of fees for claims as to which Plaintiffs did not prevail, and failure to satisfy the requirements of LRCiv 54.2. USAPA also reserves its right to seek discovery, if necessary, pursuant to LRCiv. 54.2(g).

Plaintiffs' secondary basis for seeking attorneys' fees – "bad faith" – must also be rejected because there is no evidence supporting Plaintiffs' claim of intra-litigation bad faith, and pre-litigation bad faith cannot be the sole basis for an award of attorneys' fees.

II. ARGUMENT

A. Plaintiffs Are Not Entitled to Attorneys' Fees Under the Common Benefit Exception to the American Rule

It is well-established that under the American Rule, a prevailing litigant is not entitled to collect attorneys' fees from his adversary absent a statute or enforceable contract.[2] *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 257 (1975) (citations omitted). Plaintiffs seek attorneys' fees under the common benefit exception to the American Rule, which provides that attorneys' fees may be awarded at the discretion of the district court upon a finding that "the litigation performed a valuable service for the union and its members." *Ross v. Int'l Bhd. of Electrical Workers*, 544 F.2d 1022, 1025 (9th Cir. 1976). By definition, the common benefit exception "requires that the benefit received by the prevailing plaintiff and the benefit received by the group to which fees are shifted be 'common' to both." *Aguinaga v. United Food and Commercial Workers*, 993 F.2d 1480, 1483 (10th Cir. 1993). However, as Plaintiffs' counsel has already acknowledged, seniority-based litigation does not result in a common benefit to the union membership because, in Mr. Jacob's words, "[w]hen you have a seniority dispute, the nature of it is some people win, some people lose." (Tr. 8/20/09 at 37:2-3). Indeed, Plaintiffs have persistently characterized this case as an effort to champion minority

[2] THE COURT: "The starting point is we don't shift fees." (Tr. 8/20/09 at 35:7-8).

interests over those of a majority seeking seniority integration on a date-of-hire basis. Moreover, this Court already effectively ruled that this litigation has not performed a valuable service or a substantial benefit for the Union and its members when it ruled that Plaintiffs' "action is not one on behalf of the union or its membership." (Dkt. No. 185 at 3:12-15).

Despite Plaintiffs' counsel's claim that the common benefit exception "has been applied to a duty of fair representation claim" (Tr. 8/20/09 at 36:21-22),[3] Plaintiffs have not cited a single DFR case in which a plaintiff succeeded in recovering attorneys' fees based on the common benefit exception. Plaintiffs' common benefit argument is supported only by cases brought under the Labor-Management Reporting and Disclosure Act (LMRDA): *Murray v. Laborers Union Local No. 324*, 55 F.3d 1445 (9th Cir. 1995) (Pls.' Mem. at 8) (upholding attorney fee award because plaintiff's vindication of his LMRDA free speech rights provided a valuable service to the union membership); *Southerland v. International Longshoremen's & Warehousemen's Union, Local 8*, 845 F.2d 796 (9th Cir. 1987) (Pls.' Mem. at 8) (remanding to the district court for a hearing on the issue of whether plaintiff's LMRDA claim for violation of his due process rights conferred a benefit on the union's members); *Hall v. Cole*, 412 U.S. 1, 8 (1973) (Pls.' Mem. at 8-9) ("by vindicating his own right of free speech guaranteed by § 101(a)(2) of Title I of the LMRDA, respondent necessarily rendered a substantial service to his union as an institution and to all of its

[3] *See also*, Plaintiffs' Memorandum (Dkt. No. 613) at 8:8-9, asserting that "Common benefit doctrine is applied to DFR cases."

members").[4] The LMRDA cases, which involve the protection of free speech rights and the preservation of union democracy that benefit an entire union membership, are distinguishable from DFR seniority disputes, which involve individual economic rights.

Ironically, Plaintiffs chiefly rely on *Polonski v. Trump Taj Mahal Assocs.*, 137 F.3d 139 (3d Cir. 1998), *cert. denied by Arcuri v. Local 54*, 525 U.S. 823 (1998), a DFR case that flatly rejects the applicability of the common benefit exception under analogous circumstances. (Pls. Mem. at 10:8-9). *Polonski* involved a seniority dispute between former Trump Regency hotel employees who were transferred to Trump Taj Mahal, and who were contractually entitled to be granted the highest seniority status (the "Arcuri group"), and another group of Trump Taj Mahal employees known as the "Polonski group." When Trump management failed to recognize the higher seniority status of the Arcuri group, the union filed a grievance on their behalf, which resulted in an arbitration award that was in favor of the Arcuri group, and adversely affected the Polonski group.

After basing a finding of DFR liability on the arbitrary attempt to reopen the arbitration, the district court awarded attorneys' fees under the common benefit exception. Nevertheless, on appeal, the Third Circuit reversed the award of attorneys' fees and

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[4] Plaintiffs also cite *Local 4076 v. United Steelworkers of America*, 338 F. Supp. 1154 (W.D. Pa. 1972), which is a DFR case, but contains no discussion of the common benefit exception or even any determination as to the plaintiff's entitlement to attorneys' fees; its only mention of fees is in the court's order, at the end of the decision, for plaintiff to submit a bill of "counsel fees sought as an award for the representation of the plaintiff" and for defendants to file objections thereto. The result of that fee application is unknown, and, therefore is of no assistance in this case. It should also be noted that the *Local 4076* case involved a seniority integration arbitration, in which the arbitrator ruled that dovetailing of seniority lists was "the most appropriate and the most equitable under the circumstances." 338 F. Supp. at 1163.

specifically rejected the district court's reasoning that "all Union members derived a substantial benefit from the Union's receiving a 'generalized lesson' that an arbitrator may not reconsider the merits of a final arbitration award." 137 F.3d at 147. Thus, in the case at bar, Plaintiffs' argument that all USAPA members have derived a substantial benefit because "the Court established and/or clarified principles of law…" (Pls. Mem. at 11:21-22) must be rejected because, as the *Polonski* court held, a "generalized lesson" does not confer a common benefit.[5] "Otherwise, whenever a defendant violates a right common to all its membership, fee shifting would be appropriate without any inquiry into the nature of the 'substantial service' rendered to those who will ultimately pay for the litigation." *Polonski*, 137 F.3d at 147.

While the Third Circuit found that the Arcuri group directly benefited from the litigation, the court could not find that a substantial benefit was conferred on all of the union members:

> In the end, nothing in the present litigation indicates a "substantial service" rendered to the entire Union membership such as would justify an equitable award of attorney's fees. All the facts before us indicate that the internal seniority grievances among Union members directly at odds with each other had no broader implications to those completely divorced from the context of the dispute. The record cannot fairly support a legal conclusion that the Union's attempt to reopen arbitration was a practice that threatened "the enjoyment or protection of an essential right" to the entire Union's interest. *Mills, 396 U.S. at 396*.

Polonski, 137 F.3d at 148.

The *Polonski* court is not the only court to reject the common benefit exception in

[5] In any event, the principles of law that have been established and/or clarified in this case are subject to USAPA's pending appeal.

the context of a seniority dispute. In *Rogers v. ALPA*, 988 F.2d 607 (5th Cir. 1993), the Fifth Circuit denied attorneys' fees to two pilots after ALPA was found liable for breaching its DFR by resisting the implementation of an arbitration award that benefited the plaintiffs. The Fifth Circuit concluded that the verdict for the plaintiffs did not benefit all union members, and found that "[i]n fact, Plaintiffs' success, based upon the rhetoric in the briefs, is probably considered a defeat by much of the union membership." *Id.* at 616. Here, too, the Plaintiffs have consistently characterized their case as one championing minority interests.

USAPA agrees with Plaintiffs' suggestion that, with respect to the common benefit analysis, "[t]his Court should follow the analytic framework used in *Polonski*." (Pls. Mem. at 11:10). Based on the *Polonski* analysis, Plaintiffs' common benefit argument must be rejected. This litigation has not conferred a valuable service or a substantial benefit on the entire Union membership. As Plaintiffs' counsel has conceded, the nature of this case is not one of common benefit, but is one where "some people win, some people lose." (Tr. 8/20/09 at 37:2-3). The lack of a common benefit has been confirmed in this Court's *Garner* ruling that "the West Pilots are adverse to the union, and their suit may have an adverse effect on the seniority rights of the other union members." (Dkt. No. 185 at 3:13-16). As in *Rogers*, Plaintiffs' success in this case is considered a defeat by the union members who will be adversely affected by the outcome.

Plaintiffs advance three arguments in support of the existence of a common benefit. First, they claim that "the Court established and/or clarified principles of law in this litigation that will protect the entire bargaining unit." (Pls. Mem. at 11:21-22). However,

this is the same "generalized lesson" argument that was rejected in *Polonski*, which Plaintiffs rely upon as "instructive." Moreover, the principles of law that have been established in this case will certainly not protect the entire bargaining unit, as Plaintiffs claim. The principles of law established here will result, for example, in the placement of probationary West pilots with under two months seniority above East pilots who have more than sixteen years of credited length of service. Plaintiffs do not explain how this principle could possibly protect those East pilots who will suffer this loss of seniority. To the contrary, the Plaintiffs' Complaint seeks to shift the economic burden of furloughs and demotions to the "majority" group and to secure promotional opportunities currently reserved to East pilots.

Second, Plaintiffs claim that "[t]his 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 [sic], or American Airlines." (Pls. Mem. at 13:9-12). Plaintiffs do not explain this claim either; nor could they, as it is demonstrably false. Indeed, to the contrary, the precedent established by this litigation will subject both East and West pilots to substantial harm in the event of a future merger, including: (1) by legitimizing the principle, established by the Nicolau Award, that US Airways pilots on furlough – including Plaintiffs such as Wargocki and Bostic – deserve to be stripped of their seniority in any future merger; and (2) by subjecting West pilots to massive displacement from their domiciles by more senior west-based pilot groups, such as the United Airlines pilots, which displacement would have been prevented under USAPA's

seniority proposal.[6] In fact, in light of the current merger environment, the best that might be said in terms of the impact of the decision on junior West pilots – supposedly the primary beneficiaries of the Court's decision – is that they have mortgaged their future for a short term gain. The contention that the entire bargaining unit will be protected by the Court's decision in the event of a merger has absolutely no factual foundation and, at minimum, would require an evidentiary hearing if this issue cannot be resolved on the motion papers.

Third, Plaintiffs claim that the litigation confers a common benefit because "[b]y 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." (Pls. Mem. at 13:18-21).[7] However, the Court has recognized that, due to the requirement of membership ratification, it is just as likely that Plaintiffs' "victory" will perpetuate a stalemate that will leave East and West pilots at "the bottom of the barrel." Indeed, in view of the Court's observation and the stipulations of the parties, the facts better support the contention that the chances of a ratifiable CBA with wage improvements for the entire pilot group would have improved more significantly if USAPA had prevailed.

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[6] USAPA's Merger Committee Chairman, Randy Mowrey, testified at trial that "we have structured this set of conditions and restrictions to survive any subsequent transaction should there be another merger. We're going to provide the West Pilots a level of protection that would not be available to them absent our proposal." (Tr. 5/7/09 at 1634:3-8).

[7] Plaintiffs admit that a "stalemate" and "logjam" under ALPA did in fact exist.

B. Plaintiffs Are Not Entitled to Attorneys' Fees Based on Alleged Bad Faith.

The only other argument cited by Plaintiffs to support their claim for attorneys' fees is that of "bad faith." Plaintiffs contend that they are entitled to attorneys' fees based on either (1) a finding of bad faith in the conduct underlying the lawsuit ("pre-litigation" bad faith), or (2) a finding of bad faith in the conduct of the litigation ("intra-litigation" bad faith). Neither argument has merit.

1. Attorney fees cannot be based solely on pre-litigation bad faith.

Attorney fee awards based on pre-litigation bad faith are based on the Supreme Court's observation in *Hall v. Cole*, 412 U.S. 1, 93 S. Ct. 1943 (1973), that bad faith "may be found, *not only in the actions that led to the lawsuit*, but also in the conduct of the litigation." *Id.* at 15 (emphasis added). Nevertheless, the Ninth Circuit has commented that the *Hall v. Cole* pre-litigation bad faith doctrine may, in fact, only apply to claims for attorneys' fees asserted against the party that initiated the action:

> It is not clear that the phrase 'actions that led to the lawsuit' refers to conduct constituting the cause of action; it may refer instead to bad faith conduct in filing a frivolous or vexatious lawsuit.

Ass'n of Flight Attendants v. Horizon Air Industries, Inc., 976 F.2d 541, 550 (9th Cir. 1992). In any event, the *Ass'n of Flight Attendants* court stated that

> no federal appellate authority in or out of the Ninth Circuit has clearly approved an order shifting attorney's fees based solely upon a finding of bad faith as an element of the cause of action presented in the underlying suit. … Expansively applied, the bad faith exception risks conflict with the rationale of the American rule and hence should be construed narrowly.

Id. (citation omitted).

In order to circumvent the Ninth Circuit's strong indication that pre-litigation bad

faith does not support a claim for attorney's fees against a defendant, Plaintiffs try to argue that pre-litigation bad faith has "heightened significance" when it is based on a bad faith refusal to honor an arbitration award. (Pls. Memo at 15-17). There is no support for this argument. Plaintiffs cite only distinguishable cases involving the failure of employers to comply with an arbitration award. They cite no case in which attorneys' fees were awarded in a DFR action based on a union's refusal to implement a bargaining proposal developed through an internal arbitration process of a decertified predecessor. This distinction is particularly significant in light of the Court's and the Plaintiffs' recognition that USAPA had a legal right to re-visit the determination of the Nicolau Award. Indeed, as the Court recognized – unlike the cases discussed further below – the Plaintiffs never challenged USAPA's substantive right to negotiate a seniority integration arrangement other than that dictated in the Nicolau Award.[8]

In *Int'l Union of Petroleum & Indus. Workers v. Western Indus. Maintenance, Inc.*, 707 F.2d 425 (9th Cir. 1983) (Pls. Mem. at 15), the union and the company arbitrated a grievance pursuant to their CBA concerning the layoff of an employee. After the arbitrator ruled in favor of the union, the company refused to comply with the award. The district court confirmed the award and awarded fees to the union. Unlike the case at bar, this case involved a labor-management contract arbitration between the parties to a CBA, which was neither subject to further negotiation nor a membership ratification process. By contrast, as the Court explicitly recognized in its jury instructions, USAPA had a legal right to re-visit

[8] *See* Dkt. No. 84 at 9:20-21 (The West Pilots' "legal objection to USAPA's date-of-hire seniority policy is not directly substantive, but rather procedural.").

the terms of the Nicolau Award. Again, the Plaintiffs' objections were procedural, not substantive.

Int'l Union of Petroleum & Indus. Workers is also distinguishable because of the court's conclusion that "[b]ad faith may be demonstrated by showing a defendant's obstinacy in granting a plaintiff his clear legal rights." *Id*. at 428. Unlike the employer-union arbitration, which did grant the employee in question her "clear legal rights," the Nicolau arbitration did not grant "clear legal rights." The Nicolau award merely created a bargaining proposal that could only become a "clear legal right" upon negotiation and ratification of a single CBA.

Phoenix Newspapers, Inc. v. Phoenix Mailers Union Loc. 752, Int'l Bhd. of Teamsters, 989 F.2d 1077 (9th Cir. 1993) (Pls. Mem. at 15) is distinguishable because it also involved an arbitration between the parties to a CBA. The Ninth Circuit in that case held that the district court's grant of attorneys' fees was clearly erroneous because the company had a good faith objection to the arbitrator's remedy and correctly believed that the arbitrator had exceeded his authority. Thus, *Phoenix Newspapers* does not support Plaintiffs' assertion that "[t]he Ninth Circuit recognizes that bad faith is particularly significant where the defendant refuses to abide by an arbitration award." (Pls. Mem. at 15). Indeed, in the case at bar, the Court forbade any presentation of evidence concerning the good faith objections on which the *Phoenix Newspapers* decision turned through its instruction that:

> No evidence will be admitted to challenge the process, procedure, or decision of the Nicolau Award.

(Dkt. No. 362 at 2:1-2).

Like *Phoenix Newspapers, United Food & Commercial Workers Union, Locs. 197 v. Alpha Beta Co*., 736 F.2d 1371 (9th Cir. 1984) (Pls. Mem. at 16) is another case concerning which Plaintiffs fail to inform the Court that the ultimate holding on attorneys' fees is adverse to Plaintiffs' position. In *United Food & Commercial Workers Union*, ten locals of an international labor union filed a petition to compel arbitration of a dispute with an employer concerning the meaning and effect of a CBA provision regarding trust fund contributions. When Alpha Beta Company refused to submit the dispute to arbitration, the locals petitioned the district court to compel arbitration, which was granted. Alpha Beta appealed on the grounds that, first, the CBA did not provide for arbitration of the dispute, and, second, that the provision of the contract requiring continued trust fund contributions was contrary to law and public policy.

The locals sought an award of attorneys' fees for the appeal "on the ground that Alpha Beta's appeal is without justification and interferes with the effectuation of federal labor policy." *Id*. at 1382. According to the court, "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." *Id*. at 1383. However, the court held that Alpha Beta's principal argument – that the disputed contract provision was unlawful – was not frivolous. *Id*. The court therefore held that the appeal did not justify an award of fees. *Id*.

Plaintiffs assert that "[o]ther circuits have done the same" (Pls. Mem. at 16:4), presumably referring to awarding attorneys' fees for pre-litigation bad faith. However, the cases that Plaintiffs cite from outside the Ninth Circuit are as inapposite as the Ninth Circuit

cases on which they rely, in that each relies on a violation of a substantive labor-management contractual obligation rather than a procedural DFR issue. *Int'l Association of Machinists v. Texas Steel Co*., 538 F.2d 1116 (5th Cir. 1976) (Pls. Mem. at 16); *United Food & Commercial Workers, Loc. 400 v. Marval Poultry Co., Inc*., 876 F.2d 346 (4th Cir. 1989) (Pls. Mem. at 16)(also inapposite due to court's reliance on finding that the company based its objections "on grounds not raised before the arbitrator," *id*. at 352).[9]

Plaintiffs acknowledge that a critical difference between this case and the cases that they cite is "the status of the parties," i.e., that the Nicolau arbitration was an intra-union arbitration, while the arbitrations in the cases cited by Plaintiffs were union-employer arbitrations. (Pls. Mem. at 16:17-19). They argue that the union-employer decisions "should apply just the same because it was based on the policy disfavoring bad faith, not on the status of the parties" (Pls. Mem. at 16:20-22), but they cite no case that supports such an argument. USAPA submits that the union-employer cases should not apply "just the same" because the bad faith findings in the union-employer cases are based on the violation of substantive contractual obligations rather than the vaguer "procedural" violation which the Court and the Plaintiffs recognized to be the sole basis of their action. Indeed, the application of these labor-management arbitration cases to a seniority integration arbitration would clearly constitute a brazen end-run around the Third Circuit's holding in *Polonski*,

[9] Plaintiffs also cite *Polonski* in their bad faith argument ("In *Polonski*, the union's bad faith was far more circumscribed than it was here"). (Pls. Mem. at 16:11-16). But bad faith was not an issue in *Polonski*. The only issue in *Polonski* was whether the plaintiffs were entitled to attorneys' fees based on the common benefit exception. Plaintiffs' reference to the "union's bad faith" in *Polonski* is misleading as it suggests that it was a finding made by the court.

which rejected a union's liability for attorneys' fees in such a context.

2. No Intra-Litigation Bad Faith Exists.

Plaintiffs argue that "[f]ederal courts have the power to award attorneys' fees against a party who litigates in bad faith." (Pls. Mem. at 17:10-11). This bad faith exception to the American Rule is "a narrow one," typically invoked in cases of "vexatious, wanton, or oppressive conduct." *Barry v. Bowen*, 825 F.2d 1324, 1334 (9th Cir. 1987) (citation omitted). An award of attorney fees under the bad faith exception is "punitive, and the penalty can be imposed only in exceptional cases and for dominating reasons of justice." *Beaudry Motor Co. v. Abko Properties, Inc.*, 780 F.2d 751, 756 (9th Cir.), *cert. denied*, 479 U.S. 825 (1986). Plaintiffs submit no evidence of "vexatious, wanton, or oppressive" conduct on the part of USAPA or its counsel. They claim bad faith based on (1) alleged delay and (2) the Court's finding that USAPA's evidence of impasse was pretextual. Neither of these arguments have any factual merit, and neither constitute evidence of vexatious, wanton, or oppressive conduct.

First, USAPA caused no delay of this litigation. In fact, this case was rushed to trial by the Court, and not delayed in any sense. The procedural history ignored by Plaintiffs is as follows: On November 21, 2008, the Court scheduled trial for no later than February 17, 2009. (Dkt. No. 85). Subsequently, however, based on Plaintiffs' amended complaint seeking class certification, and Plaintiffs' rejection of the jury trial that they had requested in their complaint and amended complaint, and Plaintiffs' fishing expedition seeking

USAPA's attorney-client privileged documents,[10] the Court commented that:

> But I'm getting the stronger and stronger feeling this case is expanding beyond anything that's possible to reach trial in late February. And that's not a criticism of anyone. That's just the reality. These things look like things that are appropriate but inconsistent with getting to a decision in two months.

(Tr. 12/15/08 at 51:16-21). Based on the Plaintiffs' expansion of the case, the Court stated that "I have already given up on this idea of a February 17 trial." (Tr. 12/15/08 at 55:3-4). Plaintiffs' counsel, Don Stevens, recognized that the postponement of the February trial date was due to Plaintiffs' own actions:

> Your Honor, I was going to ask whether -- you have indicated that to some extent the posture of the case presented by the plaintiffs has implicated the speed at which we can get the case done between the discovery and the class certification.

(Tr. 12/15/08 at 58:15-19).

At the February 20, 2009 conference, the Court stated that its "goal is to have a trial on this probably in July, maybe in June." (Tr. 2/20/09 at 27:5-6).[11] In response, Plaintiffs' counsel agreed that they might be prepared for trial by June or July: "We would be prepared, **I think**, by June or July." (Tr. 2/20/09 at 32:3) (emphasis added). On March 3, 2009, however, the Court abruptly changed course and ordered trial to commence on April 28, 2009. (Dkt. No. 224). Nothing that USAPA did delayed the case from getting to trial on schedule on April 28. Contrary to there being any delay, this case was tried faster than Plaintiffs anticipated when they agreed that they might be prepared for trial by June or July.

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[10] The Court found that Plaintiffs appeared to be "blindly fishing." (Dkt. No. 185 at 3:23).

[11] The Court also stated "I really, really want to have this case in a position to be tried by this summer." (Tr. 2/20/09 at 43:4-5).

As tacitly recognized by the Court, the delay occurring prior to April was principally attributable to the Plaintiffs' eleventh hour conversion of their case to a class action lawsuit.

The cases cited by Plaintiffs in support of their delay argument are distinguishable. *United States v. Blodgett*, 709 F.2d 608 (9th Cir. 1983) (Pls. Mem. at 17:22-23) held that a district court has the power to sanction counsel for filing a frivolous appeal in bad faith, which includes one filed solely for purposes of delay. Plaintiffs do not claim that USAPA filed its appeal in bad faith, or for purposes of delay.[12] Plaintiffs' citing of *In re Zelis*, 66 F.3d 205 (9th Cir. 1995) (Pls. Mem. at 17:23) is frivolous because the issue in that bankruptcy appeal was whether certain sanctions orders were nondischargeable debts under the Bankruptcy Code. Finally, *Williams v. Lane*, 96 F.R.D. 383 (N.D. Ill. 1982) (Pls. Mem. at 18:5) is distinguishable because, in that case, the Attorney General's office was ordered to show cause as to why they should not be subjected to payment of attorneys' fees because they appeared to take "totally inconsistent" positions with respect to class certification in two similar cases. USAPA did not delay class certification, as alleged by Plaintiffs. USAPA rightfully conducted class certification discovery pursuant to the Court's finding that "[t]he current state of the record is not sufficient for the Court to address these important [class certification] questions, and the original response deadline … did not give USAPA enough time to develop the record…." (Dkt. No. 155 at 3:5-7). Moreover, arguably at the expense of USAPA's due process rights, the Court prevented any delay by denying USAPA both further discovery and a hearing on the merits regarding the motion

[12] In fact, USAPA expedited its appeal, which is inconsistent with Plaintiffs' allegations of intentional delay.

for class action certification.

Plaintiffs' other examples of USAPA's alleged delay have no merit. They allege that USAPA caused delay by making certain arguments in support of its motion to dismiss (ripeness, statute of limitations, lack of jurisdiction) (Pls. Mem. at 18:18-24). However, by these arguments Plaintiffs seek to penalize USAPA for merely defending the lawsuit. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718, 87 S. Ct. 1404 (1967) ("since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit…"). In any event, Plaintiffs do not explain how USAPA's arguments allegedly delayed the litigation; nor do they allege that such arguments were vexatious, wanton, or oppressive.

Finally, Plaintiffs assert that USAPA's counsel acted in bad faith by advancing an argument that the Court found to be pretextual (evidence of impasse). (Pls. Mem. at 19:5-13). According to Plaintiffs, submitting evidence of impasse violated the ethical rule that a lawyer must not knowingly submit false evidence. (Pls. Mem. at 19:14-19). However, USAPA's counsel did not knowingly submit pretextual arguments or false evidence, and Plaintiffs submit no evidence to support such allegations. Plaintiffs themselves admit that an impasse existed.[13] And former West MEC Chairman John McIlvenna admitted that an impasse existed.[14] No evidence of bad faith exists in this case. Plaintiffs seek to penalize USAPA for merely defending the lawsuit.

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[13] *See supra* footnote 7.

[14] *See* Trial Exhibit 1063 ("The basic conundrum can be summed up with the following statement: The East seeks a seniority solution, while the West seeks an economic one. Clearly, we are at an impasse with seniority versus economic solutions.").

CONCLUSION

Plaintiffs are not entitled to an award of attorneys' fees in this case. The common benefit exception does not apply because this litigation has not performed a substantial benefit for USAPA and its members. Bad faith is not a basis for attorneys' fees in this case because USAPA did not conduct the litigation in a vexatious, wanton, or oppressive manner, and pre-litigation bad faith, even if it existed, cannot be the sole basis for an attorney fee award. USAPA submits that Plaintiffs' application for attorneys' fees should be denied.

Respectfully Submitted,

Dated: October 23, 2009

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

Nicholas P. Granath, Esq. (*pro hac vice*)
ngranath@ssmplaw.com
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
2915 Wayzata Blvd.
Minneapolis, MN 55405

Lee Seham, Esq. (*pro hac vice*)
Lucas K. Middlebrook, Esq. (*pro hac vice*)
Stanley J. Silverstone, Esq. (*pro hac vice*)
Theresa Murphy, Esq. (*pro hac vice*)
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
445 Hamilton Avenue, Suite 1204
White Plains, NY 10601

Nicholas Enoch, Esq. State Bar No. 016473
nick@lubinandenoch.com
LUBIN & ENOCH, PC
349 North 4th Avenue
Phoenix, AZ 85003-1505

Attorneys for Defendant
US Airline Pilots Association

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*,

- DEFENDANT USAPA'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND EXPENSES;
- 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:

Marty Harper	Andrew S. Jacob
MHarper@Polsinelli.com	AJacob@Polsinelli.com
Kelly J. Flood	Katie Brown
KFlood@Polsinelli.com	KVBrown@Polsinelli.com

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 October 23, 2009, by:

/s/ Stanley J. Silverstone