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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

US AIRWAYS, INC.,

Plaintiff,

v.

DON ADDINGTON, JOHN BOSTIC, MARK BURMAN, AFSHIN IRANPOUR, ROGER VELEZ, and STEVE WARGOCKI, and US AIRLINE PILOTS ASSOCIATION,

Defendants.

Case No. 2:10-cv-1570-PHX-ROS

DEFENDANT USAPA'S *AMENDED* RULE 11 MOTION FOR SANCTIONS AGAINST THE *ADDINGTON* DEFENDANTS FOR FAILURE TO WITHDRAW THEIR CROSS CLAIM

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MOTION

Pursuant to Fed. R. Civ. P. 11(c)(2), USAPA hereby moves for an order granting sanctions, including but not limited to monetary sanctions, against the *Addington* Defendants and their counsel, for their failure to withdraw the *Addington* Cross Claim against USAPA filed in this matter, on September 7, 2010 (Doc. # 34), in violation of Fed. R. Civ. Rule 11(b)(1), 11(b)(2), 11(b)(3), 28 U.S.C. § 1927, and Local Rule 5.5(g); USAPA also moves under this Court's inherent power to issue sanctions for abusive litigation practices undertaken in bad faith, *Chambers v. NASCO, Inc*. 501 U.S. 32 (1991); *Gomez v. Vernon*, 255 F.3d 1118 (9th Cir. 2001).

The grounds for this motion are as follows:

1. Violation of the law of the case, the principles of collateral estoppel and *res judicata*. The Cross Claim asserts the very claim that the Ninth Circuit in *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174 (9th Cir. 2010) ("*Addington v. USAPA*") ordered the District Court to dismiss for lack of ripeness, and which the District Court did dismiss for lack of subject matter jurisdiction (*See* Case No. CV-08-1633-PHX-NVW (consolidated) at Doc. # 650, August 13, 2010). The Cross Claim is a virtual 'carbon copy' of the Second Amended Complaint in *Addington v. USAPA* (Doc. Nos. 611, 612, filed August 31, 2009). As a result of the Ninth Circuit's decision on June 4, 2010, ordering dismissal of the entire case, the District Court issued an order on June 7, 2010 (Doc. # 641), which rendered the Second Amended Complaint moot. Then, after plaintiffs filed a "petition for clarification" asking for modification of the mandate to

allow their damages claim to proceed, the Ninth Circuit summarily denied that motion as well. (Doc. # 19-3 at 2). A motion to stay the mandate was also denied and the mandate issued on August 10, 2010, requiring dismissal of the entire *Addington* case without qualification or exception. Nothing has happened since to moot, vacate, or diminish the Ninth Circuit's mandate. In addition, the Cross Claim also seeks to re-litigate claims dismissed by the district court in 08-CV-1728-PHX-NVW (Doc. # 118 in Case 2:08-cv-01633-NVW and Docs Nos. 650, 652, 653), that plaintiffs never appealed.

2. Bad faith attempt to pursue claims already dismissed.

3. The un-cured pleading is presented for an improper purpose: to harass and to needlessly increase the cost of litigation in violation of Rule 11(b)(1). It presents a claim identical to the recently dismissed *Addington* claim that is not warranted by existing law, or by a non-frivolous argument for extending, modifying or reversing existing law, in direct violation of Rule 11(b)(2). It asserts factual contentions without evidentiary support, or which will not, after a reasonable opportunity for further investigation or discovery, have evidentiary support, in violation of Rule 11(b)(3).

4. Pursuant to Rule 11(c)(2), this motion was originally served on counsel for the *Addington* defendants on September 8, 2010, via e-mail and first class mail.

5. Counsel for the *Addington* defendants acknowledged receipt by e-mail on September 8 and by letter dated September 9, 2010, by lead attorney, Marty Harper, which stated in part: "We do not intend to withdraw our cross claim."

6. The *Addington* defendants have failed to withdraw their Cross Claim

within 21 days after service of this amended motion.

7. This motion shall be filed with USAPA's included Memorandum of Points and Authorities, and any of its attachments, and supporting papers.

MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY

Through their Cross Claim, the *Addington* defendants subject USAPA to suit on the very claim that was just dismissed by the Ninth Circuit for lack of ripeness holding that any seniority-related claim would not be ripe until the final ratification of a collective bargaining agreement. Since the Ninth Circuit's determination, there has been no contract ratification that would make their claim ripe. With no non-frivolous argument to escape binding precedent, the Cross Claim is made in bad faith. The refusal to withdraw it after the opportunity to do so now warrants sanctions.

II. FACTS

This Court has been briefed on the background facts of this litigation, and they will not be repeated here. (*see* Doc. Nos. 18 at 4-8). *See also Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1176-79 (9th Cir. 2010). The salient facts material to this motion are these:

USAPA had not yet passed any proposal to the company to integrate seniority when the very same *Addington* defendants and their very same counsel in this matter sued USAPA in federal court in Arizona over USAPA's "intent" not to negotiate for the particular contractual seniority terms demanded by the *Addington* defendants, i.e. the

Nicolau list. (Doc. # 612 at ¶ 75, in Case No. 2:08-cv-01633-NVW). The legal theory of the federal suit, as pled, was that USAPA's failure to implement the Nicolau list violated the "bad faith" prong of the tripartite duty to fairly represent (the "arbitrary" prong was pled but later abandoned; the "discrimination" prong was never pled and was expressly abandoned by the *Addington* defendants at trial). At trial, the same bad faith theory now advanced in the Cross Claim – a 'deal is a deal' and breaking the 'deal' was an act of bad faith – was presented.

Simultaneously with the filing of the above-referenced duty of fair representation (DFR) lawsuit in federal court, the very same *Addington* defendants and their very same counsel in this matter sued all individual East pilots, as a class, in Arizona state court. (08-CV-1728-PHX-NVW). The theory of the state suit, as pled, was that individual East pilots had contracted with individual West pilots to make the Nicolau proposal binding in any future collective bargaining agreement (CBA) between the company and any union, and that individual East pilots breached this purported contract by electing a union that would not honor Nicolau. The district court dismissed that state suit for failure to state a claim. *Addington v. Bradford*, 2008 U.S. Dist. LEXIS 105831 (D. Ariz. Dec. 24, 2008). The *Addington* defendants never appealed that dismissal.

Before trial on the federal claim, the district court dismissed all claims against the company holding that, since these claims were for an alleged breach of the CBA, they were within the exclusive jurisdiction of an arbitral body known as the System

Board. *Addington v. US Airline Pilots Ass'n*, 588 F. Supp. 2d 1051, 1063 (D. Ariz. 2008). The *Addington* defendants thereafter submitted grievances corresponding to their dismissed federal claims, but subsequently determined to abandon the claims in a letter to the assigned arbitrator. (*see* Doc. # 33 at 5). The Addington defendants never appealed the district court's determination that the System Board had exclusive jurisdiction over these contract-based claims.

On appeal, the Ninth Circuit agreed with USAPA's long standing contention that the federal DFR claim was not ripe and ordered dismissal for lack of jurisdiction. *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174 1184 (9th Cir. 2010), *rehg. den.* (July 8, 2010) (hereinafter, "*Addington*"). Before the Ninth Circuit issued its mandate, the *Addington* defendants brought a motion seeking a "clarification" that they could pursue their DFR claim for damages remedy, notwithstanding lack of ripeness. (Declaration of Nicholas Paul Granath, Esq., hereinafter "Decl.", ¶ 3, Ex. A). Their motion was denied and the mandate issued. (*see* Doc. # 19-3). After the mandate issued and this suit was filed, the *Addington* defendants then moved to re-open judgment in order to re-litigate their dismissed DFR claim in the same court that had only days earlier entered judgment for USAPA for lack of subject matter jurisdiction. (*see* Doc. # 27).

At the time of this motion it is undisputed, and therefore subject to judicial notice under FRE 201, that:

- The company has not yet responded to USAPA's seniority proposal.

- No seniority term has been negotiated between USAPA and US Airways.
- No 'tentative agreement' between USAPA and the company has been reached.
- No USAPA contract ratification vote by the membership has taken place nor is any ratification vote currently scheduled to take place.
- Current negotiations are in statutorily-mandated mediation under the jurisdiction of the National Mediation Board (NMB).
- There is no ratified collective bargaining agreement and neither party to the CBA – the company and USAPA – can unilaterally alter the status quo without a prior "release" by the NMB.

Further, both sides have several and significant contract issues left open. (Doc. # 40, ¶ 9). Presently, under the existing CBA, US Airways pilots, remain paid at levels that are below what the company has already offered in the current round of bargaining. Current pay rates, reflecting wages lowered through bankruptcy, place US Airways pilots at the bottom of the scale for major airline pilots.

The *Addington* defendants filed a Cross Claim in this matter on September 9, 2010. (Doc. # 34). The *Addington* defendants freely admit that it is a virtual replica of the very same DFR claim that they filed in their first suit. (Decl. ¶ 4, Ex B, p. 2: "The cross-claim is a carbon copy of the original Addington complaint against USAPA").[1] Indeed, with slight edits, it appears to have been cut and pasted. There is no allegation of a negotiated CBA, no allegation of a ratified CBA, and no allegation that the Ninth Circuit's requirement of a "final product of bargaining" has been obtained. *Addington*,

[1] Leonidas is a private corporation that raises funds for the *Addington* litigation and makes public internet postings and commentary on it at http://www.armyofleonidas.org.

606 F.3d at 1182 (requiring "final product" before DFR claim becomes ripe).

This motion in its original form was served on the *Addington* defendants' counsel on September 8, 2010 (Decl. ¶ 5, Ex C), and service was acknowledged that same day. The very next day, the *Addington* defendants advised counsel for USAPA that they did not intend to withdraw their cross claim. (Decl. ¶ 6, Ex D).

On November 1, 2010, an amended Rule 11 motion, together with a brief and proposed order was served on the *Addington* defendants' counsel. The *Addington* defendants have had at least 21 days to withdraw their Cross Claim. They have plainly refused to do so.

III. ARGUMENT

When an attorney files a pleading she or he certifies that, "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, – (1) [the pleading] is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; [and] (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law ..." Fed. R. Civ. P. 11(b)(1)-(2).

Courts reviewing a motion for sanctions under Rule 11 apply a reasonable inquiry test, which is "meant to assist courts in discovering whether an attorney, after conducting an objectively reasonable inquiry into the facts and law, would have found the complaint to be well-founded." *Holgate v. Baldwin*, 425 F.3d 671, 677 (9th Cir.

2005). A showing of bad faith may justify sanctions under Rule 11, but it is not required. *Yagman v. Republic Ins*., 987 F.2d 622, 628 (9th Cir. 1993); *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 33 (1st Cir. 2005).

When a complaint (or claim) is at issue, "a district court must conduct a two-prong inquiry to determine (1) whether the complaint is legally or factually baseless from an objective perspective, and (2) if the attorney has conducted a reasonable and competent inquiry before signing and filing it." *Holgate v. Baldwin*, 425 F.3d 671, 676 (9th Cir. 2005) (*quoting Christian v. Mattel, Inc*., 286 F.3d 1118, 1127 (9th Cir. 2002)). "As shorthand for this test, we use the word 'frivolous' 'to denote a filing that is both baseless and made without a reasonable and competent inquiry.'" *Holgate*, 235 F.3d at 676 (*quoting Moore v. Keegan Mgmt. Co*., 78 F.3d 431, 434 (9th Cir. 1996)). The reasonableness standard governing a Rule 11 inquiry is an objective one. *G.C. & K.B. Investments, Inc. v. Wilson*, 326 F.3d 1096, 1109 (9th Cir. 2003).

Here, the cross claim at issue is legally baseless on the undisputed facts, hence it is not "warranted by existing law" and no reasonable or competent inquiry could reach any other conclusion, hence there is no "nonfrivolous argument for extending, modifying or reversing" the existing law, or none for "establishing new law." Rule 11(b)(2):

First, in *Addington* the Ninth Circuit not only found the DFR claim contained in the Cross Claim unripe, leaving no court with jurisdiction over it, but in precedent that is binding on the same *Addington* defendants and their counsel, it established when such

a claim *would* be ripe. A DFR claim based on substantive bargaining is normally only ripe when a "final product of bargaining" is reached. *Addington*, 606 F.3d at 1182 (*citing Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991)). The Ninth Circuit defined "final product" to mean the negotiation *and* final ratification of a CBA. *Addington*, 606 F.3d at 1180 (ripeness requirements are not met "until the airline responds to the proposal, the parties complete negotiations, and the membership ratifies the CBA ..."), 1181 n. 4 ("there is no disputing that this case would be the first time we allowed a DFR suit to proceed in a collective bargaining contract negotiating context before the CBA at issue was ratified").

It is undisputed here, and there is no allegation to the contrary that the CBA in question has neither been fully negotiated nor ratified. The Cross Claim is the same claim, with the same parties, on the same facts, and raises the same issues already litigated.[2] The *Addington* defendants have themselves described it as a "carbon copy" of the dismissed unripe claim. Yet no DFR claim aimed at the substance of a seniority integration term, regardless of its theory or the occasion of the claim, is ripe until there is a ratified contract. 606 F.3d 1174. Hence, as a matter of law, the Cross Claim is barred by the law of the case, the principles of collateral estoppel, and *res judicata*. Subjecting USAPA to prosecution for the same claim despite the law is thus sanctionable. *Cook v. Peter Kiewit Sons Co*., 775 F.2d 1030, 1036 (9th Cir. 1985)

[2] *See* Doc. # 48, p. 11 and 12: "The *Addington* Pilots and US Airways both assert claims that arise out of the same event – USAPA's *adoption and promotion of a date-of-hire seniority scheme*. These claims also raise an issue in common –whether USAPA's adoption and promotion of a date-of-hire seniority scheme *was* a DFR breach."

(sanctions imposed for filing "a carbon copy of [his] previous lawsuit, raising the identical cause of action..."); *Huettig & Schromm, Inc. v. Landscape Contr. Council*, 790 F.2d 1421, 1427 (9th Cir. 1986); *Norris v. Grosvenor Mktg., Ltd.*, 803 F.2d 1281, 1286 (2d Cir. 1986) (sanctions justified where claims were barred by operation of the doctrine of collateral estoppel).

Second, the *Addington* defendants' articulated argument for ignoring the Ninth Circuit's "final product" rule is specious and knowingly made without a shred of authority to justify it.[3] Rather, the *Addington* defendants merely assert that the occasion of the company's untested filing for a declaratory judgment allows them to proceed. No legal authority supports this theory, none has been offered.[4] The company's *suit* is not legal authority, its facts are mere *allegations*, and its *claims* are now subject to a motion to dismiss. (Doc. # 26). Indeed, even assuming, *arguendo*, that the company's suit were viable, that suit does not even require the underlying "seniority" dispute to be resolved because the Count III request for immunity regardless of the negotiated result is pled independently of *both* Counts I or II. (Doc. # 1, ¶ 59). Nor, prior to ratification, could the company present any DFR claim that the *Addington* defendants have made. Indeed the Ninth Circuit drew a sharp distinction when it offered the following observation:

> [t]o be sure, the parties' interest would be served by prompt resolution of *the seniority dispute*, but that is not the same as prompt resolution of the

[3] *See* USAPA's brief in support of its motion to dismiss the Cross Claim, which is incorporated into this motion and memorandum by reference. (Doc. # 50; 66).

[4] The *Addington* defendants cited no case law in support of their motion to reopen judgment on this point, and in response to service of the Rule 11 motion they merely pointed to their motion to reopen judgment. (Decl. ¶ 6, Ex. D).

> DFR claim. The present impasse, in fact, could well be *prolonged* by prematurely resolving the West Pilots' claim judicially at this point.

Addington, 606 F.3d at 1180 n. 1 (emphasis added). Proceeding under present circumstances violates the law of this case and the doctrines of collateral estoppel and *res judicata* thereby bringing this Court into direct collision with controlling precedent. *Yong v. I.N.S.*, 208 F.3d 1116, 1119 n. 2 (9th Cir. 2000) ("once a federal circuit court issues a decision, the district courts within that circuit are bound to follow it"). *Addington* counsel's failure to address the legal deficiencies of the previously adjudicated claim, while pressing a virtual carbon copy of it in this action, violates Rule 11. *See Peabody v. Maud Van Cortland Hill Schroll Trust*, 892 F.2d 772 (9th Cir. 1990) ("a second presentation of the same, previously rejected, theory to the same court fairly defines 'frivolous.' Unless [the presenter] can show some relevant change subsequent to the first remand, the sanctions award was proper"); *McLaughlin v. Bradlee*, 803 F.2d 1197, 1205 (D.C. Cir. 1986) (successive lawsuits despite the collateral estoppel bar is an improper purpose); *Chestnutt v. Horizon Air Industries*, 133 F.R.D. 154, 156 (E.D. Wash. 1990) (sanctions imposed for the filing of "a veritable carbon copy of [a complaint] filed and dismissed previously"); *Martin v. Supreme Court of New York*, 644 F. Supp. 1537 (N.D.N.Y. 1986) (sanctions imposed upon counsel and party for re-filing as an amended complaint virtually the same pleading that was previously found insufficient).

Third, the administration of sanctions in this instance serves the policy rationale underlying Rule 11. *New York News, Inc. v. Kheel*, 972 F.2d 482, 488 (2d Cir. 1992)

(The "central purpose of Rule 11 is to deter baseless filings in the district court and streamline the administration and procedure of the federal courts."). Not to bar such claims as these would be to allow disputes to be decided not by law applied to facts, but by imposition of costs and harassment through litigation. The re-filing of dismissed, frivolous claims is exactly the situation presented here and it violates Rule 11. *Scott v. Younger*, 739 F.2d 1464, 1467 (9th Cir. 1984) (*citing A. V. Costantini v. CAB*, 706 F.2d 1025, 1026 (9th Cir. 1983)) ("when issues are raised and disposed of in prior proceedings, the reassertion of those issues may give rise to a finding of frivolousness sufficient to support sanctions"); *Virgin Atlantic Airways, Ltd. v National Mediation Bd.*, 956 F.2d 1245 (2d Cir. 1992), *cert. denied*, 506 U.S. 820 (1992) (attempt to reargue motion decided earlier contravened law of case and justified sanctions); *Kurkowski v. Volcker*, 819 F.2d 201, 203 (8th Cir. 1987) (claims found frivolous and sanctionable where "filed in the face of previous dismissals involving the exact same parties under the same legal theories"); *Kuroiwa, et al. v. Lingle, et al.*, 2008 U.S. Dist. LEXIS 66104 at, *8 (D. Haw. Aug. 27, 2008) (sanctions imposed after mandate foreclosed new claim); *Stone v. Baum*, 409 F. Supp. 2d 1164, 1171 (D. Ariz. 2005) (repeat claims barred by res judicata sanctioned); *U.S., ex. rel. Sampson, Sr. v. Crescent City E.M.S., et al.*, 1997 U.S. Dist. LEXIS 14147 at, *2 (sanctions awarded to "curb ... replicative filings"); *G & T Terminal Packaging Co. v. Consolidated R. Corp.*, 719 F. Supp. 153, 160 (S.D.N.Y. 1989) (sanctions imposed where "a reasonable inquiry into the facts and the law regarding *res judicata* and collateral estoppel could not have given plaintiffs'

attorney reason to believe that the present complaint merited consideration").

The Addington defendants' Rule 11 violation comes at the expense of USAPA, all the pilots it represents, and the attempts to conclude on-going bargaining at a major US commercial airline that will finally resolve the seniority dispute in a way that *can be ratified* and do it just where the Ninth Circuit has said it should be resolved – at the bargaining table.

Fourth, the only notable difference between the Cross Claim and its earlier dismissed version is the elimination of any facially valid DFR claim whatsoever by the failure to plead any one of the tripartite prongs: arbitrariness, bad faith or discrimination. In its place the *Addington* defendants have revived their contract-between-individuals-claim, which was dismissed by this Court and never appealed. (Doc. # 34, ¶ 68(b): i.e, the "East Pilots' personal and group obligations"). The reasons at law for the Court's dismissal have not changed and there is no new allegation of fact or any valid argument at law to change the prior result.[5] The *Addington* defendants' insistence on pressing ahead with this rejected state law theory further warrants sanctions under Rule 11 and 28 U.S.C. § 1927. *See e.g.*, *Rady Children's Hospital v. Service Employees International Union Local 2028*, 2008 U.S. Dist. LEXIS 37047, at *6-7 (N.D. Cal. May 5, 2008) ("it was not objectively reasonable for plaintiff's counsel to re-file its claims for breach of contract and declaratory relief. The court previously

[5] As this Court previously recognized (Doc. # 595, p. 48, in Case No. 2:08-cv-01633-NVW) individual union members are not liable for a breach of the duty of fair representation for the reason that only unions owe such a duty. *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 416 (1981); *Peterson v. Kennedy*, 771 F.2d 1244, 1256 (9th Cir. 1985).

dismissed these exact same claims and even warned plaintiff that the amended complaint should not reiterate the original complaint"); *Innovative Med. Sys. v. Augustine Medical Inc.*, 2007 U.S. Dist. LEXIS 78693 (D. Minn. Oct. 23, 2007) (§ 1927 sanctions imposed on plaintiff who brought second action asserting the same claims that had previously been dismissed); *Roberts v. Chevron USA, Inc.*, 117 F.R.D. 581, 586 (M.D. La. 1984) (§ 1927 sanctions imposed for commencing a lawsuit obviously barred by operation of the doctrine of claim preclusion).

Fifth, under the Court's inherent powers, the obdurate filing of an action plainly barred by *res judicata*, other preclusion doctrines, or similar legal bars, is sanctionable. *Van Sickle v. Holloway*, 791 F.2d 1431, 1437 (10th Cir. 1986); *D. Silvestro v. United States*, 767 F.2d 30, 32 (2d Cir. 1985); *see also Gomez v. Vernon*, 255 F.3d 1118 (9th Cir. 2001) ("although recklessness, of itself, does not justify the imposition of sanctions, sanctions are available when recklessness is 'combined with an additional factor such as frivolousness, harassment or an improper purpose.' Sanctions, then, are justified 'when a party acts for an improper purpose – even if the act consists of making a truthful statement or a non-frivolous argument") (*quoting Fink v. Gomez*, 239 F.3d 989 (9th Cir. 2001)); *in accord B.K.B v. Mabui Police Department*, 276 F.3d 1091, 1106-07 (9th Cir. 2002) ("regardless of whether defense counsel's behavior constituted bad faith per se, we readily find the counsel's reckless and knowing conduct in this case was tantamount to bad faith and therefore sanctionable under the court's inherent power").

Sixth, sanctions are especially warranted here because the Cross Claim is an

admitted "carbon copy" not only of a claim dismissed and presently barred until such time as contract ratification has occurred, but it is the same claim pressed by co-defendants' 60(b) motion, even as the *Addington* defendants simultaneously promise a petition for certiorari to the United States Supreme Court on the same claim.[6] The 60(b) motion was correctly rejected (08-1633, Doc. # 663, p. 3) because it was precluded by the mandate, just as the nearly identical cross claim is precluded by *res judicata*. Consequently, within weeks after the Ninth Circuit's issuance of a mandate of dismissal, USAPA was forced to litigate against the same claim in *three* separate forums.[7] USAPA is in the midst of federally mediated contract negotiations that have already been burdened and frustrated by premature litigation and unnecessary entanglement with the courts. Now it faces draining litigation expense directly due to the need to defend itself against repetitive claims concerning a dispute that the Ninth Circuit has ruled cannot be ripe until there is a contract that is both negotiated and ratified. Litigation aiming to force a particular bargaining position on USAPA or its members, notwithstanding the law or the binding rulings of the courts, must either voluntarily cease or it must be stopped by the courts.

IV. REMEDY

USAPA seeks the following remedies: i) an award of its reasonable attorneys' fees and costs arising from this motion; ii) an award of its reasonable attorneys' fees and

[6] And this in the context of constant threats of serial prosecution of "DFR II" and so on.

[7] Another cost inflicted was the motion to transfer which was rejected (08-1633, Doc. # 66, p. 8) after co-defendants proffered case law that they had not researched adequately that did not overcome the express wording of the local rule requiring a "pending" case.

costs incurred by reason of having to defend against the Cross Claim in this action; iii) that the Cross Claim be dismissed, with prejudice; iv) any other relief that the Court deems warranted.

USAPA does not bring this motion to the Court lightly. It seeks only a remedy that would deter the harm, which is the pressing of claims barred by the Ninth Circuit in *Addington*, barred by the law of the case, and/or waived by these defendants. It has incurred fees and expense directly related to defending against the barred Cross Claim. It has brought this motion early, without delay and before more expenses could be incurred, precisely to mitigate its injury.

This Court has jurisdiction to impose sanctions upon any party, or its counsel, who has presented papers to it even where the Court determines that it lacks subject matter jurisdiction. *Willy v. Coastal Corp*., 503 U.S. 131 (1992); *Orange Prod. Credit Ass'n v. Frontline Ventures, Ltd*., 792 F.2d 797, 801 (9th Cir. 1986).[8] This is true even of the sanction of dismissal with prejudice. *In re Exxon Valdez*, 102 F.3d 429, 431 (9th Cir. 1996); *Caribbean Broadcasting Sys. v. Cable & Wireless PLC*, 148 F.3d 1080, 1091 (D.C. Cir. 1998).

Similarly, the fact that an offending party has filed an appeal (or petition for certiorari) is no bar to sanctions. *See Mahone v. Ray*, 326 F.3d 1176, 1180 (11th Cir. 2003); *Val-Land Farms, Inc. v. Third Nat'l Bank*, 937 F.2d 1110, 1117 (6th Cir. 1991);

[8] Noting that monetary sanctions may not be awarded against a represented party for a violation that consists of the assertion of unwarranted legal contention. Rule 11(c)(5)(A). No such bar exists for sanctioning counsel, however.

Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 98 (3d Cir. 1988); *Langham-Hill Petroleum v. Southern Fuels Co.*, 813 F.2d 1327, 1330-31 (4th Cir. 1987).

An award of reasonable attorneys' fees and costs arising from this motion is also appropriate and warranted. *See, e.g. Margolis v. Ryan*, 140 F.3d 850 (9th Cir. 1998); *Stewart v. American Int'l Oil & Gas*, 845 F.2d 196 (9th Cir. 1988); *In re Yagman*, 796 F.2d 1165, 1185 (9th Cir. 1986).

An award of reasonable attorneys' fees and costs incurred by reason of having to defend against the Cross Claim in this action is appropriate and warranted. *See, e.g.*, *Claiborne v. Wisdom*, 414 F.3d 715 (7th Cir. 2005) ("sanctions may include appropriate attorneys fees incurred as a direct result of the violation").

The Cross Claim is barred by law and it should be dismissed. Dismissal is a remedy for a Rule 11 violation. *See, e.g.*, *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 482 (3d Cir. 1987); *Murray v. Dominick Corp. of Canada, Ltd.*, 117 F.R.D. 512, 515-16 (S.D.N.Y. 1987).

USAPA respectfully requests that the Court grant this motion and award the requested relief and any other relief the Court deems warranted.

—

Respectfully Submitted,

Dated: November 24, 2010

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

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CERTIFICATE OF SERVICE

Case No. 2:08-CV-01633-PHX-NVW

I hereby certify that on this day of November 24, 2010, I electronically transmitted the foregoing document and all its attachments to the U.S District Court Clerk's Office using the ECF System for filing and transmittal.

By: ***/s/ Lucas K. Middlebrook, Esq.***
Lucas K. Middlebrook, Esq.