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September 9, 2010

Exhibit D

VIA ELECTRONIC MAIL
AND FIRST CLASS MAIL

Nicholas P. Granath
SEHAM, SEHAM, MELTZ & PETERSEN, LLP
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Minneapolis, MN 55405

RE: USAPA's FOURTH THREATENED RULE 11 MOTION

Dear Nick:

We are in receipt of your letter and the notice of *Defendant USAPA's Rule 11 Motion for Sanctions Against the Addington Defendants For Failure to Withdraw Cross Claim*. As you are surely aware, this is the fourth time that you have threatened to file a Rule 11 motion. The first such time was on December 18, 2008, when you demanded that we withdraw our *First Amended Complaint* in Case No. 08-cv-1728. The second such time was on January 5, 2009, when you demanded we withdraw a motion to compel in Case No. 08-cv-1633. The third such time was on September 11, 2009, when you demanded that we withdraw our *Second Amended Complaint* in Case No. 08-cv-1633. Now, you demand that we withdraw our cross-claim in Case No. 10-cv-1570.

We do not intend to withdraw our cross claim. We explained the basis by which our DFR claim is now ripe, notwithstanding that the Ninth Circuit opined that it was not ripe in December 2009. That explanation is made in Docs. ## 642, 645, 655, filed in Case No. 08-cv-1633. We shall respond further in response to your motions to dismiss and see no reason to preview those arguments here.

Until now, the District of Arizona apparently has not found the need to remind counsel that "[r]equests for sanctions seek court orders and are, therefore, subject to the same Rule 11 analysis as all other motions." *Nakash v. U.S. Dept. of Justice*, 708 F. Supp. 1354, 1368 (S.D.N.Y. 1988). Indeed, if at the time a Rule 11 motion was signed "a competent attorney would have concluded that it 'was destined to fail,'. . . pursuing it constitutes a violation of Rule 11, mandating the imposition of sanction." *Id.* Other federal courts have needed to remind counsel that "[c]onducting litigation with civility requires, at the least, restraint from threatening opposing counsel with baseless Rule 11 motions." *Stevenson v. Employers Mut. Ass'n*, 960 F. Supp. 141, 145, n3 (N.D. Ill. 1997). "Rule 11 should never be used as a litigation tactic for intimidating opposing counsel from asserting a meritorious position." *Edberg v. Neogen Corp.*, 17 F. Supp. 2d 104, 109 (D. Conn. 1998).

In a set of cases, the Third Circuit expressed unequivocal displeasure with abusive use of Rule 11:

> [W]hen issues are close, the invocation of Rule 11 borders on the abusive: "We caution litigants that Rule 11 is not to be used routinely when the parties disagree about the correct resolution of a matter in litigation. Rule 11 is intended for only exceptional circumstances." Nothing in the language of the Rule or the Advisory Committee Notes supports the view that "the Rule empowers the district court to impose sanctions on lawyers simply because a particular argument or ground for relief contained in a non-frivolous motion is found by the district court to be unjustified."

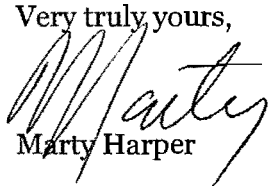
Gaiardo v. Ethyl Corp., 835 F.2d 479, 483 (3d Cir. 1987).

> The district court also denied a request for Fed. R. Civ. P. 11 sanctions by the company, which had asserted that the union's defense was frivolous. Because the issues in this case are close, we consider the company's invocation of Rule 11 to border on the abusive. We caution litigants that Rule 11 is not to be used routinely when the parties disagree about the correct resolution of a matter in litigation. Rule 11 is instead reserved for only exceptional circumstances.

Morristown Daily Record, Inc. v. Graphic Communications Union, Local 8N, 832 F.2d 31, 32, n.1 (3d Cir. 1987).

We urge you to carefully consider the consequences of repeatedly threatening to file Rule 11 motions. We urge as well that you confer with Stan Lubin so that you have local input on whether the actions you threaten would be well taken.

Very truly yours,



Marty Harper

MH:kh

c: ***VIA ELECTRONIC MAIL***
AND FIRST CLASS MAIL

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