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January 5, 2009

VIA ELECTRONIC MAIL AND FIRST CLASS MAIL

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Andrew S. Jacob, Esq.
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Re: **RULE 11(c)(2) NOTICE & WITHDRAWAL REQUEST**
*Addington, et. al. v. US Airline Pilots Ass'n, et. al.* (08-cv-1633)
Motion to Compel, Docket No. 106

Dear Mr. Jacob:

By this letter I am requesting that you voluntarily and at once withdraw your Motion to Compel, Docket No. 106 in the above-referenced action, inasmuch as it argues for application of the "*Garner* Exception" to the attorney-client privilege.[1] Pursuant to Rule 11(c)(2), notice of the opportunity to withdraw this motion is hereby given. In the absence of withdrawal, notice is hereby given that Defendant US Airline Pilots Association ("USAPA") shall, at any time more than 21 days after the day you receive this letter, seek sanctions under Rule 11(c)(1).

Your motion violates Rule 11(b)(2) because the argument in the motion, as it applies to the *Garner* Exception to the attorney-client privilege is not warranted by existing Ninth Circuit case law and no non-frivolous argument was made for modifying or reversing the existing Ninth Circuit law or for establishing new law. *See* Fed. R. Civ. P. 11(b)(2).

The Ninth Circuit has held that the failure to cite controlling precedent, under these circumstances, warrants imposition of Rule 11 sanctions:

[1] The term "*Garner* Exception" refers to the fiduciary benefit exception to the attorney-client privilege set forth by the Fifth Circuit in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), and cited by Plaintiffs in their motion to compel (Docket No. 106).

> The failure to cite relevant authority, whether it be case law or statutory provisions, does not alone justify the imposition of sanctions. …
>
> However, if the omitted case law and statutory provisions would render the attorney's argument frivolous, he or she should not be able to proceed with impunity in real or feigned ignorance of them, and sanctions should be upheld. **An argument contained in a motion is frivolous under Rule 11 if it is unreasonable when viewed from the perspective of a competent attorney admitted to practice before the district court.**

*United States v. Stringfellow*, 911 F.2d 225, 226 (9th Cir. 1990) (citations omitted) (emphasis supplied).

The Motion to Compel makes no mention of the Ninth Circuit's express limitation to the *Garner* Exception as set forth in *Weil v. Investment/Indicators Research & Management*, 647 F.2d 18 (9th Cir. 1981). It is apparent that this precedent was intentionally ignored as opposed to being overlooked, as you cited *Weil* to support the second portion of your argument relating to subject matter waiver of the attorney-client privilege. Additionally, one of the cases that you cited in support of your *Garner* Exception argument expressly acknowledges the Ninth Circuit's limitation of the *Garner* Exception to shareholder derivative suits. *Arcuri v. Trump Taj Mahal Associates*, 154 F.R.D. 97, 106 (D.N.J. 1994) (*citing Weil*, "[a]t least one circuit, while accepting *Garner,* has expressly limited its holding to shareholder derivative suits."). This "ostrich-like tactic of pretending that potentially dispositive authority against [your] contention does not exist [is] precisely the type of behavior that would justify imposing Rule 11 sanctions." *Borowski v. DePuy, Inc.*, 850 F.2d 297, 305 (7th Cir. 1988).

Sanctions sought will include, as allowed under Rule 11(c)(4), all reasonable attorneys fees and other expenses directly resulting from defending against the Motion to Compel and bringing any motion for Rule 11 sanctions.

Sincerely,

Lucas K. Middlebrook

cc: Marty Harper
Kelly Flood
Don Stevens