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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

US AIRWAYS, INC., a Delaware corporation, *et al.*, *Plaintiff*, vs. Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI, on behalf of themselves and all other similarly-situated individuals, and US AIRLINE PILOTS ASS'N, an unincorporated association, *Defendants*.	CASE NO. 2:10-cv-01570-PHX-ROS **ADDINGTON PILOTS' RESPONSE IN OPPOSITION TO:** ***Defendant USAPA's Amended Rule 11 Motion For Sanctions Against The Addington Defendants For Failure To Withdraw Their Cross Claim***

Don ADDINGTON; John BOSTIC; Mark BURMAN; Afshin IRANPOUR; Roger VELEZ; and Steve WARGOCKI (the "Addington Pilots"), on behalf of themselves and all other similarly-situated individuals, file this *Response In Opposition To: Defendant USAPA's Amended Rule 11 Motion For Sanctions Against The Addington Defendants For Failure To Withdraw Their Cross Claim*, doc. 70. The

Court should deny USAPA's motion on the merits. Moreover, the Court should sanction the law firm of Seham, Seham, Meltz & Petersen, LLP, (hereinafter "Seham") for filing such motion because it was plainly filed to unreasonably and vexatiously multiple these litigation proceedings. 28 U.S.C. § 1927; *see also* Rule 11(c)(2).[1] This response is supported by the *Memorandum of Points and Authorities* that follows.

Dated this 9th of December, 2010.

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[1] References to "Rule" are to the Federal Rules of Civil Procedure.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

A. The underlying dispute concerns seniority integration after an airline merger

The background to USAPA's Rule 11 motion was concisely set out by Judge Wake in an order filed in a related case, *Addington v. US Airline Pilots Association*, No. CV08-1633-PHX-NVW ("*Addington*"). *Order*, 2 (Oct. 19, 2010) (doc. 666),[2] copy previously filed here as doc. 56, *Notice of Filing*. Like *Addington*, this case "arose out of a seniority dispute precipitated by the merger of US Airways, Inc., and America West Airlines in 2005." *Id.* at 2:25 to 2:27. "Following the merger, the companies' respective seniority lists had to be integrated to create a single list for the merged airline." *Id.* at 2:27 to 3:2.[3]

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[2] Except as indicated, document numbers above 70 are from *Addington* and document numbers below 71 are from *US Airways*.

[3] The Addington Pilots provided this Court with additional background in an earlier filing as follows:

> The two pilot groups agreed to use binding arbitration conducted by George Nicolau to determine an equitable method of seniority integration. The seniority list resulting from that arbitration, referred to as the Nicolau Award, put 500 East Pilots at the top of the seniority list and placed all East Pilots who were on furlough below the West Pilots, all of whom were working.
>
> The East Pilots objected to the Nicolau Award and . . . refused to participate in collective bargaining that had to be completed before any integrated seniority list could be implemented. They also withdrew support from the union that represented both pilot groups, causing it to be decertified. They formed a new union, USAPA, and voted to have it represent the bargaining unit. Five months later, USAPA presented a date-of-hire seniority list to the airline that put more than a thousand East Pilots who had been on furlough at the time of the merger ahead of hundreds of West Pilots who had been working.

Resp. Oppos. USAPA's Mot. to Dismiss Addington Cross-Claim, 1:4 to 2:5 (Oct. 18, 2010) (doc. 55).

The Addington Pilots brought a suit in 2008 where "[t]hey alleged that their current union, the US Airline Pilots Association ('USAPA') breached its duty of fair representation . . . by abandoning an arbitrated seniority list in favor of a date-of-hire list solely to benefit one group of pilots at the expense of another." *Id.* at 3:8 to 3:13. A jury found in favor of the Addington Pilots and the Court awarded injunctive relief. *Id.* at 3:14 to 3:15.

USAPA appealed. On June 4, 2010, the Ninth Circuit held that the duty of fair representation claim was not ripe. *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174, 1184 (9th Cir. 2010). On August 13, 2010, Judge Wake ordered the Clerk to enter judgment dismissing *Addington* for lack of subject matter jurisdiction. Doc. 650.

On July 26, 2010, US Airways filed this declaratory action ("*US Airways*"). In this action, the airline seeks one of three alternative declarations, which were summarized by Judge Wake in his October 19, 2010, order as follows:

> (1) USAPA's position regarding a merged seniority system breaches its duty under the Railway Labor Act and its duty of fair representation and therefore US Airways is prohibited from accepting USAPA's position;
>
> (2) USAPA's position does not breach its duty under the Railway Labor Act or its duty of fair representation and therefore US Airways is not prohibited from accepting USAPA's position; or
>
> (3) regardless of whether USAPA's position would breach its duty under the Railway Labor Act or its duty of fair representation, US Airways would not be liable to the Addington plaintiff class under the Railway Labor Act or otherwise if it were to enter into a collective bargaining agreement incorporating USAPA's position.

Order at 3:27 to 4:8 (doc. 666 / doc. 56) (declining to take *US Airways* as a LRCiv. 42.1(a) transfer). In other words, the airline seeks

declaratory determinations of whether it would incur liability for either: (1) acquiescing to USAPA's announced intention to disregard the arbitrated seniority integration; or (2) refusing to so acquiesce.

US Airways named the Addington pilots as defendants because "the absence of the West Pilots would preclude the issuance of meaningful relief to US Airways." *Plt. US Airways' Opposition to Def. USAPA's Mot. to Drop the Addington Defendants*, 4:8 to 4:9 (Oct. 21, 2010) (doc. 59) (referring to Addington pilots as "West Pilots"). *See id.* at 5:13 to 5:15 (asserting Addington Pilots are Rule 19 necessary parties); *id.* at 6:19 to 6:20 (asserting Addington Pilots are Rule 20 permissive parties).

On September 7, 2010, the Addington pilots filed an answer establishing their positions in *US Airways* and made a crossclaim against USAPA seeking related relief in accordance with Rule 13(g). *Addington Pilots Ans. & Cross-Claim* (doc. 34). This crossclaim seeks injunctive relief and damages. *Id.* at 30.

USAPA moved to "drop" the Addington Pilots from *US Airways*. Doc. 35. It also moved to dismiss the Addington Pilots' crossclaim. Doc. 50. US Airways and the Addington Pilots responded in opposition. Doc. 59 (US Airways opposition to "dropping" Addington Pilots); Docs. 48, 55 (Addington Pilots' oppositions). USAPA replied. Docs. 66, 69. These motions, therefore, are fully briefed and await attention from the Court.

B. Seham improperly threatens Rule 11 as a litigation tactic.

Seham is a New York law firm that is appearing in this case *pro hac vice*. As evidenced by its course of conduct here, Seham's routine practice is to aggressively attack anyone who challenges or disagrees with its positions. It did this with Judge Wake, accusing him of bias

whenever he disagreed with its position in *Addington*. *See Def. USAPA's Memo. in Opposition to the Addington Plts.' Mot. to Transfer Case* (doc 648), copy previously filed here as doc. 30, *Notice of Filing*.[4] Prior to filing its Rule 11 motion in *US Airways*, Seham threatened on three other separate occasions to make a Rule 11 motion in *Addington*.

Seham first threatened to file a Rule 11 motion on December 18, 2008, when it demanded that the Addington Pilots withdraw their *First Amended Complaint* in *Addington*. (Copy of letter attached as Exhibit "A"). The Addington Pilots did not withdraw their complaint. Seham never filed a Rule 11 motion. It did file a motion to dismiss on behalf of USAPA. The Court (Judge Wake) denied that motion to dismiss. In so doing, it stated as follows:

> The Plaintiff West Pilots allege that the East Pilots have manipulated union procedures for their sole benefit. They formed a union whose constituted purpose was to impose a date-of-hire scheme on the minority membership in disregard of an arbitrated compromise both sides agreed to and deemed fair in advance. The Plaintiff West Pilots allege that USAPA has followed through on that aim without any corresponding benefit to the pilots as a whole. In light of these principles and the cases cited above, the Plaintiff West Pilots have stated a claim for breach of the duty of fair representation.

Order, 11:11 to 11:19 (Nov. 20, 2008) (doc. 84). (Copy attached as Exhibit "B").

Seham next threatened to file a Rule 11 motion on January 5, 2009, when it demanded that the Addington Pilots withdraw a motion to compel in *Addington*. (Copy of letter attached as Exhibit "C"). The motion to compel at issue sought production of documents from

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[4]Of course, Judge Wake fully addressed and easily refuted USAPA's unfounded allegations in his October 19, 2010, order. (Doc 666 / doc. 56, pp 5-7).

Seham pursuant to the fiduciary exception to privilege recognized in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970). Doc. 106. The Addington Pilots did not withdraw their motion. Once again, Seham did not file a Rule 11 motion. The Court (Judge Wake) ruled against the Addington Pilots on the motion but found no basis for sanctions. In so doing, it stated as follows:

> Counsel for USAPA alludes to the standard for good faith argument under Fed. R. Civ. P. 11 and then properly invokes Rule 37, which requires this court to award expenses and attorney's fees when a motion to compel is denied. The Court makes no such award because it finds that the Plaintiff's motion was substantially justified within the technical meaning of Rule 37.

Order, 5:13 to 5:17 (Feb. 11, 2009) (doc. 185). (Copy attached as Exhibit "D").

Seham made a third threat to file a Rule 11 motion on September 11, 2009, when it served an unfiled Rule 11 motion based the Addington Pilots failure to withdraw their *Second Amended Complaint* in *Addington*. (Copy of letter attached as Exhibit "E"). The *Second Amended Complaint* added allegations to the pleading that survived the earlier motion to dismiss. These added allegations were that USAPA was jointly liable for damages caused by failure to timely implement the Nicolau arbitration. Doc. 612. The Addington Pilots did not withdraw the *Second Amended Complaint*. Yet again, Seham did not file its Rule 11 motion. Now, for the fourth time, Seham and invokes Rule 11 against the Addington Pilots' cross-claim as part of its litigation strategy.

II. LEGAL ARGUMENT

A. Rule 11 motions can be subject to Rule 11 sanctions.

"Requests 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). Filing a frivolous Rule 11 motion "is itself subject to the requirements of the rule and can lead to sanctions." Rule 11, 1993 Advisory Comm. Notes.

"[A] Rule 11 motion must never be used as a mere tactic to bolster a response — whether meritorious or not — to a motion or pleading." *Caribbean Wholesales & Service Corp. v. U.S. JVC Corp.*, 101 F.Supp.2d 236, 246 (S.D.N.Y. 2000). "Conducting 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).

B. Standards for Rule 11 sanctions.

A court may appropriately impose Rule 11 sanctions in only two situations: (1) "where a litigant makes a 'frivolous filing,' that is, where he files a pleading or other paper which no competent attorney would believe was well grounded in fact and warranted by law;" and (2) "where a litigant files a pleading or paper for an 'improper purpose,' such as personal or economic harassment." *Greenberg v. Sala*, 822 F.2d 882, 885 (9th Cir. 1987) (internal citations omitted); *see* Rule 11(b)(1) & (2).

1. A crossclaim is frivolous and warrants sanctions if any competent attorney would necessarily conclude it was destined to fail.

"Rule 11 permits the imposition of sanctions only when the 'pleading, motion, or other paper' itself is frivolous, not when one of the arguments in support of a pleading or motion is frivolous." *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540 (9th Cir. 1986) (alteration marks omitted). A pleading is frivolousness only where, at the time the pleading was signed, a competent attorney would have concluded that it was "destined to fail." *See O'Malley v. New York City Transit Auth.*, 896 F.2d 704, 706 (2d Cir. 1990). This standard must be distinguished from that applied under Rule 12(b)(6). *Cf. Neitzke v. Williams*, 490 U.S. 319, 324 (1989) (holding, in the context of 28 U.S.C. § 1915(d), that "a complaint that fails to state a claim under Rule 12(b)(6)" is not "necessarily frivolous"). It is well established, for example, that "[a] complaint does not merit sanctions under Rule 11 simply because it merits dismissal pursuant to Rule 12(b)(6)." *Tahfs v. Proctor*, 316 F.3d 584, 595 (6th Cir.2003); *see also Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1508 (9th Cir. 1987) ("The granting of summary judgment against the pleader is not dispositive of the issue of sanctions against the attorney."). Hence, it is not enough, in a Rule 11 motion, to argue that a claim should be dismissed.

In other words, the fact that a claim is invalid under controlling precedent (something not conceded here) does not establish frivolousness. If that were so, then the law could never change or evolve without a Rule 11 violation. Hence, to find that Rule 11 has been violated, it must be "patently clear that . . . no reasonable

argument can be advanced to extend, modify or reverse the law as it stands." *Golden Eagle*, 801 F.2d at 1538; *see also Katzman v. Victoria's Secret Catalogue*, 167 F.R.D. 649, 661 (S.D.N.Y. 1996) (sanctions are warranted when there is a "flagrant lack of merit" to a party's claims and the likelihood of an improper motive for the filing of a lawsuit).

Given that "Rule 11 is an extraordinary remedy, one to be exercised with extreme caution," *Operating Engineers Pension Trust v. A-C Co.*, 859 F.2d 1336, 1345 (9th Cir.1988), "when issues are close, the invocation of Rule 11 borders on the abusive." *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3d Cir. 1987). "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, Loc. 8N,* 832 F.2d 31, 32, n.1 (3d Cir. 1987).

2. Nonfrivolous pleadings are <u>not</u> subject to the improper purpose element of Rule 11.

"Rule 11 requires imposition of sanctions if legal papers are filed for an improper purpose. . . ." *Carter v. United States*, 973 F.2d 1479, 1489 (9th Cir. 1992). "[P]apers other than complaints may be filed for an improper purpose even though they are not frivolous." *Greenberg*, 822 F.2d at 885-86. "Where a complaint is in question, the 'improper purpose' analysis is not necessary because a non-frivolous complaint cannot be said to be filed for an improper purpose." *Id.* at 885; *see also Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156, 1162 n.4 (9th Cir. 1987) ("When a complaint is frivolous, however, we are not precluded from also reaching the question whether the purpose underlying the complaint is improper.").

C. The Addington Pilots' crossclaim satisfies Rule 11.

USAPA's Rule 11 motion challenges a crossclaim. As such, the motion must fail unless the crossclaim is frivolous. *See Greenberg*, 822 F.2d at 885-86 (improper motive standard of Rule 11 does not apply to pleadings). There are two bases by which the crossclaim here could be frivolous: (1) it could be frivolous on substantive merits; or (2) it could be frivolous on ripeness. Neither applies.

1. The Addington Pilots' crossclaim has substantial substantive merit.

The Addington Pilots' crossclaim surely has substantial substantive merit. Indeed, the related duty of fair representation claim in *Addington* had enough merit to prevail at a jury trial. Those merits were not reversed on appeal. "[T]he Ninth Circuit did not determine that any of the Court's views or findings were erroneous except for the question of ripeness." *Order* at 5:25 to 5:26 (Doc. 666).

2. Ripeness of US Airways is a different issue than ripeness of Addington.

Regardless that *Addington* was not ripe in December 2009, there is a genuine dispute whether *US Airways* is ripe now. *See Addington Pilots' Resp. in Oppos. to USAPA's Mot. to Drop the Addington Defs., Pursuant to Rule 21* (doc. 48). The ripeness of *US Airways* is judged by whether "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941). Ripeness here, therefore, is a matter of hardship to US Airways from delaying a decision on the merits. In contrast, ripeness in *Addington* was a matter of hardship to

the Addington Pilots from delaying decision. Hence, the ripeness question here is different.

3. The Court need not address wrongful purpose.

"[A] non-frivolous complaint cannot be said to be filed for an improper purpose." *Greenberg*, 822 F.2d at 885-86. As shown above, the crossclaim is not frivolous. The Court, therefore, need not address wrongful purpose before it denies relief on USAPA's Rule 11 motion.

D. A crossclaim would not merit Rule 11 sanctions simply because it merits dismissal pursuant to law of the case, collateral estoppel or *res judicata*.

USAPA offers no authority for the proposition that a Rule 11 violation can be established by the doctrines of law of the case, collateral estoppel or *res judicata*. That is simply not the law. Indeed, the cases USAPA cites for this proposition are far off point. *USAPA Memo.* at 14:8 to 14:20. One case cited by USAPA is an example of a court that sanctioned a party for filing an action in violation of a direct order enjoining such filings. *Di Silvestro v. United States*, 767 F.2d 30, 32 (2d Cir. 1985). Two other cases cited by USAPA imposed sanctions, pursuant to 28 U.S.C. § 1927, for improperly multiplying litigation. *B.K.B. v. Maui Police Dept.*, 276 F.3d 1091, 1108-09 (9th Cir. 2002); *Gomez v. Vernon*, 255 F.3d 1118, 1134 (9th Cir. 2001). The fourth case cited imposed sanctions pursuant to Fed. R. App. P. 38. *Van Sickle v. Holloway*, 791 F.2d 1431, 1437 (10th Cir. 1986).

At best, the doctrines of law of the case, collateral estoppel and *res judicata* can establish that a claim must fail as a mater of law. As noted above, it is well established that a complaint does not merit sanctions merely because it fails as a matter of law. *See Tahfs* 316 F.3d at 595; *Rachel*, 831 F.2d at 1508. Hence, it logically follows that

these doctrines cannot determine whether filing a claim merits Rule 11 sanctions. USAPA's argument, therefore, that the crossclaim is barred by "law of the case, the principles of collateral estoppel, and *res judicata*" is misplaced in a Rule 11 motion. *USAPA Memo.* at 9:17 to 9:18.

E. The crossclaim is allowed by the rules of pleading.

The Addington Pilots are entitled to "state as a crossclaim any claim . . . against a coparty [such as USAPA] if the claim arises out of the transaction or occurrence that is the subject matter of the original action." Rule 13(g). Consequently, assuming *US Airways* is ripe, the Addington Pilots had to make their crossclaim to preserve their rights against USAPA. Moreover, when making their crossclaim against USAPA, the Addington Pilots had to seek all available relief or risk being barred from doing so later. *See Restatement (Second) of Judgments* § 17, comment (b) (1982) ("When a valid and final personal judgment is rendered in favor of the defendant, the judgment is generally a bar to a subsequent action on the claim."). That relief includes injunction and damages. *See Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192, 207 (1944) (approving "resort to the usual judicial remedies of injunction and award of damages when appropriate" in duty of fair representation claims).

F. The Court should award attorneys' fees against Seham pursuant to 28 U.S.C. § 1927 and Rule 11(c)(2).

Both Rule 11(c)(2) and § 1927 support a fee award against Seham. "Section 1927 authorizes the imposition of sanctions against any lawyer who wrongfully proliferates litigation proceedings once a case has commenced." *Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1117 (9th Cir. 2000). "Any attorney . . . 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. In contrast to Rule 11, § 1927 does not apply to initial pleadings and it requires consideration of the overall context to determine if the proceedings were improperly "multiplied." *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986), *overruled on other grounds by*, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990).

A further distinction, in contrast to the objective analysis made pursuant to Rule 11, is that:

> section 1927 sanctions must be supported by a finding of subjective bad faith, which is present when an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent. Thus, for sanctions to apply, if a filing is submitted recklessly, it must be frivolous, while if it is not frivolous, it must be intended to harass.

Maui Police Dept., 276 F.3d at 1107 (citation, alterations and quotation marks omitted).

"Bad faith is present when an attorney knowingly or recklessly raises a frivolous argument or argues a meritorious claim for the purpose of harassing an opponent." *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989). "Tactics undertaken with the intent to increase expenses, or delay, may also support a finding of bad faith." *Id.* (internal citations omitted). Because the analysis is subjective, "[e]ach case must be taken individually and evaluated in light of its own peculiar circumstances." *Matter of Yagman*, 796 F.2d 1165, 1182 (9th Cir. 1986).

In this instance, the Court should consider that Seham makes a practice of misusing Rule 11 to try to deter opposing counsel from taking meritorious positions. *See* Ex. A, C, E. The Court should also consider that Seham filed two motions to dismiss that raise the same issues raised in its Rule 11 motion. Doc. 35 (motion to "drop" Addington Pilots); doc. 50 (motion to dismiss crossclaim). Finally, the Court should consider the high standard that must be met to prevail on a Rule 11 motion. *Riverhead Sav. Bank v. National Mortg. Equity Corp.*, 893 F.2d 1109, 1115 (9th Cir. 1990) (sanctions allowed "only in the `exceptional circumstance,' where a claim or motion is patently unmeritorious or frivolous").

In the context of the aforementioned considerations, the Court should find that Seham's subjective purpose was only to unreasonably and vexatiously multiply these proceedings. Seham should, therefore, be sanctioned pursuant to § 1927. Moreover, when "warranted," a fees award is allowed to the side that prevails on a Rule 11 motion. Rule 11(c)(2). "Rule 11 specifically allows a district court to include the costs associated with sanctions proceedings: 'the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.'" *Margolis v. Ryan*, 140 F.3d 850, 855 (9th Cir.1998) (quoting what is now Rule 11(c)(2)). An award in favor of the Addington Pilots is warranted here.

III. CONCLUSION

Seham filed a frivolous Rule 11 motion for an improper purpose. The Addington Pilots respectfully ask the Court to deny relief on USAPA's motion and to award them the reasonable attorneys' fees incurred responding to the motion.

Dated this 9th day of December, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December 2010, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the ECF System for filing and transmittal.

/s/ Andrew S. Jacob
By _____