IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

US Airways, Inc., a Delaware Corporation,

Plaintiff,

vs.

Don Addington, an individual, *et al*

and

US Airline Pilots Association,

Defendants.

Case No. 2:10-CV-01570-PHX-ROS

REPLY BRIEF IN SUPPORT OF DEFENDNAT USAPA's AMENDED RULE 11 MOTION FOR SANCTIONS AGAINST THE ADDINGTON DEFENDNATS AND THEIR COUNSEL FOR FAILURE TO WITHDRAW THEIR CROSS-CLAIM

1. Summary.

The motion at bar follows the presentation of a cross-claim that is legally frivolous, was filed without a reasonable inquiry into the law, and is part of an on-going bad faith tactic of re-litigating barred claims. The Response clarifies there is no dispute over the material facts: the cross-claim is a virtual 'carbon copy' of the claim the Ninth Circuit barred, and the conditions that would make the claim ripe have not occurred. It cites no legal authority excusing re-presentation of a claim dismissed for lack of subject matter jurisdiction. It merely makes an un-supported assertion that Rule 11 excuses claims barred by res judicata, which case law easily refutes. At best, one might attribute the co-defendants' motive to the baseless contention that "[they] had to make their cross claim to preserve their rights." (Doc. #72 at 17:11). Yet a reasonable pre-filing inquiry would have shown just the opposite. Now, in indisputable possession of contrary precedent, co-defendants' Response attempts to distract the Court's attention from the motion's lack of substantive merit by casting false accusations and even misrepresenting the record. Regrettably, this is but a further example of the co-defendants' scorched-earth tactics that will not cease until deterred by this Court.

2. Co-defendants Admit Material Facts While Also Misstating the Record.

The "background" to the motion at bar is surely not, as co-defendants insist, the "underlying dispute concerning seniority integration." (Doc. # 72 at 7:2).[1] That is the background to the history of the litigation. The relevant background to the motion is confined to the Ninth Circuit's decision holding that no DFR claim can be brought until

[1] References to Docket filings are by ECF generated page numbers.

a CBA is reached as a "final product" of bargaining, and the fact that co-defendants re-filed their claim without waiting for that to happen. Co-defendants' Response confirms that the continuing absence of a "final product" of negotiations – the indispensable prerequisite to any ripe DFR claim – is not in dispute. In addition, co-defendants have admitted that their cross-claim is a mere "carbon copy" of their original *Addington* complaint. (Doc. # 71 at ¶ 4, Ex. B, p. 2).

By way of argument by distraction, the co-defendants ask this Court to focus on the litigation history of the previously dismissed *Addington* case for the purpose of contending that "Seham improperly threatens Rule 11 as a litigation tactic." (Doc. #72 at 9:24). As addressed below, these allegations are no answer to the motion nor are they true as the record shows. Indeed, to the contrary, the history of the litigation initiated by co-defendants has been one of scorched earth tactics that, while unsuccessful, have inflicted unnecessary cost. In fact, each prior Rule 11 motion served by USAPA was in response to an action by the co-defendants that proved to be meritless. The reason why USAPA refrained from filing the Rule 11 motion in these prior instances is explained briefly below.

First motion: here co-defendants have misled the Court by misstating the record. The December 18, 2008 motion was aimed at a federal pleading[2] that re-pled state claims, which were removed to federal court (co-defendants' motion for remand was denied). USAPA successfully moved to dismiss.[3] Nevertheless, the co-defendants have

[2] Doc. # 8 in Case No. 2:08-CV-01728-NVW
[3] Doc. # 16 in Case No. 2:08-cv-1728-PHX-NVW

stated inaccurately to this Court that the motion was "denied." (Doc. # 72 at 10:11). This is a blatant misrepresentation – the motion to dismiss was *granted* and the complaint dismissed for "failure to state a claim upon which relief can be granted." *Addington v. Bradford*, 185 L.R.R.M. 3116, at *16 (D. Ariz. 2008). Because the motion to dismiss was granted on an expedited basis, thereby limiting the costs arising from the meritless claim, the filing of the Rule 11 motion was deemed unnecessary. [4]

Second motion: the January 5, 2009 Rule 11 motion concerned the *Addington* plaintiffs' unwarranted attempt to pierce USAPA's attorney client privilege. Co-defendants lost on the merits, and the district court commented that they "appear[ed] to be blindly fishing." *Addington v. US Airline Pilots Ass'n*, 2009 U.S. Dist. LEXIS 14939, at *6 (D. Ariz. Feb. 11, 2009). USAPA's Rule 11 motion was not filed with the Court, however, for the objective reason that in ruling for USAPA the Court specifically expressed its opinion that, notwithstanding the fact that the co-defendants had been "blindly fishing," their misconduct was not so severe as to warrant sanctions. (Doc. # 185 at 5:12). A filing of a Rule 11 motion in those circumstances would clearly have been futile.[5]

Third motion: the September 11, 2009 motion for Rule 11 was over the failure to withdraw the Second Amended Complaint. The reason that it was not filed was also an

[4] Competent legal research conducted prior to the filing of the state law complaint (which paralleled a simultaneous filing of an unripe claim in federal court) would have confirmed that the asserted state law claims were preempted by federal law. *See Hartz v. Friedman,* 919 F.2d 469, 475 (7th Cir. 1990) (imposing Rule 11 sanctions on attorney when it appeared that "counsel neglected to make reasonable inquiry into the law before filing").

[5] USAPA respectfully disagreed with the Court's determination that sanctions were not appropriate; indeed subsequent abuses might have been deterred had the Court acted.

objective one: it became moot. Following oral argument in the Ninth Circuit, Judge Wake acted to stay all litigation anticipating (on the record) the possibility that the panel would find the case unripe. His order specifically addressed the pending motion to dismiss the Second Amended Complaint. (Doc. # 637). The district court's stay and the Ninth Circuit's subsequent ruling rendered the entire case a legal nullity, and therefore USAPA's Rule 11 for failure to withdraw the second amended complaint became moot.[6]

3. Co-defendants Misstate the Standards Applicable to the Motion.

The Response too narrowly states the applicable standards.

First, while the Response segues into a discussion of merit vs. frivolity, what the motion tests is whether, in the words of the Rule 11 drafting Committee, the co-defendants have advocated "positions contained in those pleadings ... after learning that they cease to have any merit" (Notes of Adv. Cmt. in 1993 Amendments), or, in the words of the Ninth Circuit, whether co-defendants filed "successive complaints based upon propositions of law previously rejected ..." *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 833 (9th Cir. 1986). USAPA contends that the cross-claim is both meritless *and* frivolous. Because the Court has not granted the motion to dismiss, and co-defendants have refused to withdraw, separate motions under Rules 11 and 12 are proper.

Second, co-defendants imply that merely arguing against the "merits" of their

[6] Service of that Rule 11 motion targeted plaintiffs' invented theory of damages in the Second Amended Complaint that was frivolous on its face and which counsel had admitted on the record was unsupported by any case law. *See infra* at § 8.

pleading is inadequate on a Rule 11 motion saying "if that were so, then the law could never change ..." (Doc. # 72 at 13:26). But this ignores the fact that co-defendants advance no argument for reversing, modifying or establishing new law. On the contrary, their assertion is that Rule 11 does not apply because they claim (mistakenly) that, "a rule 11 violation" cannot be "established by the doctrines of the law of the case, collateral estoppel or res judicata." (Doc. # 72 at 16:12).

Third, the Response asserts that mere "arguments" cannot be sanctioned under Rule 11. At best, this counter-thrust strikes only at a straw man. The motion targets the presentation to the Court of the cross-claim, not a mere argument in defense of the meritless cross-claim. Co-defendants' defense of its actions also ignores that USAPA's motion was brought under 28 U.S.C § 1927, as well as Rule 11. Section 1927 *does* make the repetitive advancement of meritless positions in the form of arguments subject to sanction. *See, e.g, In re Keegan Mgmt. Co., Sec. Lit.*, 78 F.3d 431, 436 (9th Cir. 1996) (subjective bad faith ... is present when an attorney knowingly or recklessly raises a frivolous argument ..."). Significantly, co-defendants have attempted to reassert their unripe claim not only through their cross-claim, but also by advancing a meritless argument under Rule 60(b), which has already been denied by Judge Wake. (Doc. #663 in CV-08-01728-PHX-NVW).[7]

4. <u>The "Merits" of a Future DFR Claim Are Not Relevant to the Re-filing of a Claim Presently Frivolous.</u>

The Response attempts to deflect the motion at bar with the argument that the co-

[7] The pattern was the same at the Ninth Circuit where co-defendants actually requested permission to litigate a new claim for damages based on the identical DFR claim the panel had just found to be unripe. This request was summarily denied by the Ninth Circuit.

defendants' underlying DFR claim may have "substantial substantive merit" (*sic*) (doc. # 72 at 15:8) and therefore Rule 11 is inapplicable. This argument attempts to draw support from the Ninth Circuit's refusal to rule on the merits of a DFR claim that it held no federal court has jurisdiction over. The argument is misplaced. USAPA's Rule 11 motion is not based on the lack of merit of the DFR claim. It is based on the continued lack of ripeness that deprives any court of jurisdiction, and that it was not objectively reasonable for co-defendants to re-file the *exact same claim previously dismissed*. *See Rady Children's Hosp. v. SEIU*, 185 L.R.R.M. 3269, at *7 (S.D. Cal. 2008) (imposing Rule 11 sanctions noting it "was not objectively reasonable for Plaintiff's counsel to refile its claims … [after] [t]he Court previously dismissed [the] *exact same claims"*).

5. <u>The "Ripeness" of the US Airways Action Is Not Relevant Because the Motion Targets the Cross-Claim Which Is Not Ripe.</u>

The Response also attempts to deflect the motion at bar with the contention that the "ripeness of *US Airways* is a different issue than the ripeness of *Addington*." (Doc. #72 at 15:16). The issue raised by this motion, however, is not the ripeness of the company's claims, it is the frivolity of the cross-claim. Un-stated but lurking in this argument is the notion that the cross-claim can 'borrow' ripeness from an otherwise ripe company claim (assuming *arguendo* it is ripe). However, it is well settled under Rule 11 that otherwise non-frivolous claims within a complaint cannot excuse accompanying *frivolous* claims. *Ledford v. Peeples*, 568 F.3d 1258, 1307 (11th Cir. 2009) (error for court to fail to isolate claims); *Perez v. Posse Comitatus*, 373 F.3d 321 (2d Cir. 2004). And this certainly applies to a separate pleading asserting a frivolous cross-claim. *See e.g.*, *Frank v D'Ambrosi*, 4 F.3d 1378 (6th Cir. 1993) (cross-claim sanctioned).

6. Co-Defendants Mislead the Court by Advancing the Erroneous Argument that *Res Judicata* "Cannot Determine Whether Filing a Claim Merits Rule 11 Sanctions."

"Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of re-litigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 880 (9th Cir. 2007) (*quoting Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979)). Co-defendants and their counsel, by making no argument against preclusion, have tacitly *admitted* that their cross-claim suffers from fatal estoppel issues as a result of the Ninth Circuit's *Addington* decision. They even admit – as they must – that "the doctrines of law of the case, collateral estoppel and *res judicata* can establish that a claim must fail as a matter of law." (Doc. # 72 at 16).

Nevertheless, co-defendants' counsel attempts to avoid imposition of sanctions for the filing of an unripe cross-claim barred by principles of res judicata by erroneously arguing that "these doctrines cannot determine whether filing a claim merits Rule 11 sanctions." (Doc. # 72 at 17). Counsel even goes so far as to mislead this Court by falsely proclaiming that it "is simply not the law" that "a Rule 11 violation can be established by the doctrines of law of the case, collateral estoppel or *res judicata*." (Doc. # 72 at 16). They could not be more wrong:

> If the record supports a complaint being barred by the *res judicata* or collateral estoppel effects of prior judgments, and a reasonable and competent inquiry would have led to the same conclusion, Rule 11 sanctions are justified.

Kajander v. City of Phoenix, 2010 U.S. Dist. LEXIS 61496, at *13 (D. Ariz. June 22,

2010) (*citing Buster v. Greisen*, 104 F.3d 1186, 1190 (9th Cir. 1997)); *Thomas v. Evans*, 880 F.2d 1235, 1240 (11th Cir. 1989) ("a plaintiff may be sanctioned under Rule 11 for filing claims barred by res judicata."); *Robinson v. National Cash Register Co.*, 808 F.2d 1119 (5th Cir. 1987) (sanctions against plaintiffs and attorney who signed their pleadings were proper where suit was barred by res judicata since it involved same parties and claims as earlier suit which plaintiffs had filed against defendants and had lost); *Paganucci v City of New York*, 993 F.2d 310 (2d Cir. 1993), *cert. denied*, 510 U.S. 826 (same); *King v Hoover Group, Inc.*, 958 F.2d 219 (8th Cir. 1992) (same); *Cannon v Loyola University of Chicago* 609 F. Supp. 1010 (N.D. Ill. 1985), *affd*. 784 F2d 777 (7th Cir. 1986), *cert. denied* (1987) 479 U.S. 1033 (1987) (sanctions are properly imposed against plaintiff's counsel pursuant to Rule 11 where it should have been apparent to him that bringing instant action on same facts as prior action would be barred by res judicata, collateral estoppel, or both.).

Moreover, "upon signing a pleading, motion or other paper, an attorney certifies that he or she has conducted a *reasonable inquiry into the law* such that the paper embodies existing law…" *Gutierrez v. City of Hialeah*, 729 F. Supp. 1329, 1332 (S.D. Fla. 1990) (emphasis added). "This affirmative duty is violated by failing to research legal precedent adequately." *Id*.[8] Here, even the most cursory review of relevant authority issued *in the district within which they practice* would have prevented co-

[8] Rule 11 "imposes an obligation on counsel … to … Stop, Think, Investigate and Research before filing papers either to initiate a suit or to conduct the litigation." *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 482 (3d Cir. 1987); *Terminix Int'l Co., L.P. v. Kay*, 150 F.R.D. 532, 537 (E.D. Pa. 1993) (Rule 11 "requires an attorney to conduct … a normally competent level of legal research to support the presentation.").

defendants' counsel from burdening this Court with the obviously incorrect argument that *res judicata* and related doctrines "cannot determine whether filing a claim merits Rule 11 sanctions." (Doc. # 72 at 17). However, by advancing this erroneous argument without citation to any supporting authority, co-defendants' counsel have demonstrated precisely why the requested sanctions are appropriate. Rule 11's "central purpose" is that of "deterring abusive litigation tactics." *Townsend v. Homan Consulting Corp.*, 914 F.2d 1136, 1142 (9th Cir. 1990). In the absence of deterrence, the shoot-from-the-hip approach to legal practice employed by co-defendants' counsel, which produced the abusive filing of a self-described "carbon copy" of the complaint recently dismissed by the Ninth Circuit, will continue unabated.

7. <u>The Argument that Co-defendants "Had To" Present their Cross-Claim Is Specious Under Law that They Unreasonably Failed to Research.</u>

The pursuit of the current cross-claim is based in arguments "already rejected by a court of higher level [and] is clearly vexatious conduct that disregards the orderly process of justice and must be sanctioned." *Ramirez v. Arlequin*, 491 F. Supp. 2d 202, 204 (D.P.R. 2006). The only legal justification offered by co-defendants in defense of their frivolous filing is that "the *Addington* Pilots had to make their cross claim to preserve their rights against USAPA." (Doc. # 72 at 17). However, co-defendants make this argument without explanation or citation to any authority whatsoever.[9] That is because co-defendants failed to conduct any research: rather, they simply cut-and-

[9] *See Lyon v. Yellow Transportation, Inc.*, 186 L.R.R.M 2878 (S.D. Ohio 2009) (imposing Rule 11 sanctions based on counsel's failure "to include any supporting authority whatsoever") (*citing Gilreath v. Clemens & Co.*, 212 F. App'x 451, 464-65 (6th Cir. 2007) (affirming the imposition of Rule 11 sanctions where a plaintiff failed to cite any legal authority in support of his position)).

pasted their same unripe claim into their Answer as soon as they could file it. Worse, had co-defendants' counsel performed any "reasonable and competent inquiry" *Townsend*, 929 F.2d at 1362, the baseless nature of their speculation would have been obviated.

USAPA directed co-defendants and their counsel to case law that directly refuted their unsupported contention that they "had to make their cross claim to preserve their rights."[10] In addition, co-defendants were provided with precedent that expressly explained that they could "overcome the previous dismissal only by showing satisfaction of the conditions for ripeness set forth therein."[11] Nevertheless, despite the utter lack of authority supporting co-defendants' position and the overwhelming authority contravening it, they refused to withdraw their frivolous cross-claim. In this context, co-defendants' failure to address this contradictory authority in their Rule 11 response speaks volumes. Even if the failure to address this authority could be attributed to negligent oversight, they cannot "avoid the sting of Rule 11 sanctions by operating under the guise of a pure heart and empty head." *Smith v. Ricks*, 31 F.3d 1478, 1488 (9th Cir. 1994).

It is well settled that "successive complaints based upon propositions of law previously rejected may constitute harassment under Rule 11." *Buster*, 104 F.3d at 1190 (*quoting Zaldivar*, 780 F.2d at 833). Co-defendants have utterly failed to present even a

[10] Doc. # 66 at 8 (citing multiple cases establishing that an unripe claim is not one that "could have been litigated" and therefore it cannot be barred by *res judicata*.).
[11] Doc. # 66 at 4, fn. 4 (*citing Park Lake Resources Ltd., v. U.S. Dept. of Agriculture*, 378 F.3d 1132, 1134 (10th Cir. 2004).

colorable argument justifying the re-filing of their unripe DFR claim.[12] Therefore, co-defendants' "efforts to relitigate" the unripe *Addington* case "support a finding of harassment" under Rule 11, and co-defendants and their counsel should be sanctioned accordingly. *Id*; *see also Rady Children's Hospital*, 185 L.R.R.M. 3269, at *7.

8. Co-Defendants Have Exhibited a Pattern of Advancing Positions Devoid of Any Basis in the Law.

Co-defendants have exhibited a pattern of advancing legal arguments devoid of any basis in the law. When asked to present supporting authority they have admitted they have none. For example:

- When asked in motion hearing in *Addington* if he had any cases to support his damages theory (the same included as part of the current cross-claim), counsel responded by admitting that it was "**not the first time I have been asked if I have any cases on point, and I don't.**" (Decl., Ex. G) (emphasis added).
- In October of this year, when pressed by Judge Wake as to whether he had any case law whatsoever to support his 60(b) ripeness argument (the same made in the Response here), counsel had no choice but to admit that he "**didn't have any such cases.**" (Decl., Ex. H) (emphasis added).

These examples illustrate that "[t]here is a point beyond which zeal becomes vexation ... and transforms to obdurateness." *Ramirez*, 491 F. Supp. 2d at 204. That line has been crossed here. In the absence of the co-defendants' voluntary restraint, USAPA has been forced to request that this Court impose sanctions on co-defendants and their counsel in order to deter further violations.

[12] Moreover, as a practical matter, the company's count I already effectively pressed co-defendants' claim.

Respectfully Submitted,

On: December 20, 2010 By: ***Nicholas P. Granath, Esq.***

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

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

Stanley Lubin, State Bar No. 003076
Nicholas Enoch, State Bar No. 016473
LUBIN & ENOCH, PC
349 North 4th Avenue
Phoenix, AZ 85003-1505
Email:stan@lubinandenoch.com

Attorneys for Defendant
US Airline Pilots Association

CERTIFICATE OF SERVICE

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

I hereby certify that on this day of December 20, 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.