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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' MOTION FOR RULE 11 SANCTIONS AGAINST THE LAW FIRM OF SEHAM, SEHAM, MELTZ & PETERSEN, LLP**

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 *Motion for Rule 11 Sanctions Against the Law Firm of Seham, Seham, Meltz & Petersen, LLP,* (hereinafter "Seham"). Despite the written demand required by Rule 11, Seham has failed to withdraw *"Defendant USAPA's Amended Rule 11 Motion for Sanctions Against the*

Addington Defendants for Failure to Withdraw their Cross Claim" (Doc. #70).[1] Seham's repeated threats to file Rule 11 motions show that it filed its Rule 11 motion in bad faith, solely as a litigation tactic. Moreover, Seham's Rule 11 motion is itself frivolous. No competent attorney would conclude that it was frivolous for the Addington Pilots to argue that the ripeness of *US Airways*, the declaratory action filed by the airline, makes their cross-claim ripe. The Court should, therefore, sanction Seham pursuant to Rule 11(b)(1). This motion is supported by the *Memorandum of Points and Authorities* that follows.

Dated this 27th 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

Other Authorities

Rules

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

A. Underlying Dispute

The background to this 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 attached to doc. 56, *Notice of Filing*. Both *Addington* and 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.

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.[3]

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[2] Except as indicated, document numbers above 74 are from *Addington* and document numbers below 73 are from *US Airways*.

[3] Further background is 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 vigorously prevented its implementation. For example, they refused to

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 Order of October 19, 2010, 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

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> 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. To this day USAPA's goal is to have a non-Nicolau CBA with US Airways.

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

> 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, in *US Airways* the airline seeks a declaratory determination 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 position on the issues raised by US Airways in its declaratory action and a crossclaim seeking related relief in accordance with Rule 13(g). *Addington Pilots Ans. & Cross-Claim* (doc. 34). The Addington Pilots' crossclaim seeks injunctive relief and damages against USAPA. *Id.* at 30. It arises out of the transaction or occurrence that is the subject matter of the action.

USAPA moved to "drop" the Addington Pilots from *US Airways*. Doc. 35. It also moved to dismiss the Addington Pilots' crossclaim. Doc. 50. Both 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's Repeated, Improper Rule 11 Threats

Seham is a New York law firm that is appearing in this case *pro hac vice*. Local counsel is Stan Lubin. Seham's routine practice, as evidenced by its course of conduct here, is to aggressively attack anyone who challenges or disagrees with its position. It did this previously with Judge Wake, accusing him of lacking impartiality whenever he disagreed with USAPA's position in *Addington*. *See Def. USAPA's Memo. in Opposition to the Addington Plts.' Mot. to Transfer Case*. Doc 648 (copy previously filed here attached to 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*.

The first occasion when Seham threatened to file a Rule 11 motion was December 18, 2008, when it demanded that the Addington Pilots withdraw their *First Amended Complaint* in the related matter *Addington v. Bradford*, 08-cv-01728. Doc. 72-1. The Addington Pilots did not withdraw that complaint and Seham never filed a Rule 11 motion. Seham had earlier filed a motion to dismiss. The Court (Judge Wake) granted that motion on the basis of complete preemption. In so doing, it recognized that the question was close as follows:

> The East Pilots argue that preemption deprives the court of jurisdiction and requires dismissal under Rule 12(b)(1). The court's November 21, 2008 order established that there is subject matter jurisdiction with respect to the original state

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

> court complaint under 28 U.S.C. § 1441 and *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 261 (1994). That jurisdictional basis—the complete preemption of state law claims by the RLA's duty of fair representation—remains sound. However, on reexamination, the question is a closer one than the previous order indicates.

Order, 7:1 to 7:7 (Dec. 24, 2008) (doc. 118, 08-cv-01728). Copy filed concurrently at Exhibit "A." Because there was a genuine question, there was no Rule 11 violation.[5]

The second occasion that Seham threatened to file a Rule 11 motion was January 5, 2009, when it demanded that the Addington Pilots withdraw a motion to compel in *Addington*. Doc. 72-3. The motion to compel at issue sought production of documents from 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) (emphasis added). Copy filed at doc. 72-4.

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[5] In doc. 72, the Addington Pilots mistakenly indicated that Seham's December 18, 2008, letter was directed against their complaint in *Addington*. That mistake is corrected here.

The third occasion that Seham threatened to file a Rule 11 motion was September 11, 2009, when it demanded that the Addington Pilots withdraw their *Second Amended Complaint* in *Addington*. Doc. 72-5. The *Second Amended Complaint* added allegations 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 a Rule 11 motion. Now, for the fourth time, Seham invokes Rule 11 against the Addington Pilots' crossclaim 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, n.3 (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 either of 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 Rule 11 motion is frivolous and warrants sanctions if there is no basis to find the challenged pleading frivolous.

The standard for frivolousness, in the context of a Rule 11 motion, is whether "at the time a Rule 11 motion was signed a competent attorney would have concluded that it was destined to fail." *Nakash*, 708 F. Supp. at 1368. A Rule 11 motion, therefore, is itself frivolous if a competent attorney would conclude that there was no possibility that the court would find filing the pleading that is challenged by the motion violated Rule 11. 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. A Rule 11 motion is improper and warrants sanctions if objectively made as a litigation tactic.

"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." *Greenberg*, 822 F.2d at 885. In contrast, "papers other than complaints [such as Rule 11 motions] may be filed for an improper purpose even though they are not frivolous." *Id.* at 885-86. District courts may, therefore, sanction attorneys who make a Rule 11 motion for an improper purpose. *See Carter v. United States*, 973 F.2d 1479, 1489 (9th Cir. 1992) ("Rule 11 requires imposition of sanctions if legal papers are filed for an improper purpose. . . ."). A court assesses objective intent to determine "improper motive" under Rule 11. *Zaldivar v. City of Los Angeles*, 780 F.2d 823 (9th Cir. 1986); *see also Yagman v. Republic Ins.*, 987 F.2d 622, 628 (9th Cir. 1993) (same). In making this objective assessment, the court may consider other tactics used by the attorney in the litigation. *See FDIC v. Maxxam, Inc.*, 523 F.3d 566, 584 (5th Cir. 2008).

C. Seham's Rule 11 Motion Warrants Rule 11 Sanctions.

1. Seham's Rule 11 motion is frivolous.

When directed against a pleading, a Rule 11 motion cannot succeed on the basis of improper purpose alone. *Greenberg*, 822 F.2d at 885-86 (the improper purpose element of Rule 11 does not apply to pleadings). Seham's Rule 11 motion challenges a crossclaim (a pleading). It cannot succeed, therefore, on improper purpose alone. It must demonstrate that the Addington Pilots' crossclaim is frivolous.

There are two bases by which the Addington Pilots' crossclaim could be frivolous. It could be frivolous on substantive merits or it

could be frivolous on ripeness. It is neither and Seham knows this full well.

First, the Addington Pilots' crossclaim has substantive merit. Indeed, a very similar claim had enough merit to prevail on the merits in *Addington*. 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). The Addington Pilots rightly expect to prevail on the substantive merits again. Surely, the substantive merits are not frivolous.

Second, the merits of ripeness are not frivolous. The determination of ripeness for *US Airways* is different than it was in *Addington* because the parties to *US Airways* are different. *See Simmonds v. INS*, 326 F.3d 351, 357-58 (2d Cir. 2003) (In determining ripeness, "the court must consider the likelihood that some of the parties will be made worse off on account of the delay."). Regardless that *Addington* was not ripe in December 2009, therefore, 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 a declaratory action such as *US Airways* is largely a question of the hardship of delaying a decision. *See Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941) (referring to the "adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment"). The Court's ripeness inquiry in *US Airways*, therefore, will consider the hardship to US Airways from delaying a decision on the merits. In contrast, the ripeness inquiry in *Addington* considered the hardship to the Addington Pilots.

The questions are different. Because the questions are different, it stands to reason that the answers may be different, a concept that Seham ignores.

As shown above, this Court has yet to determine whether *US Airways* is ripe. If *US Airways* is ripe, it is hard to see how it could be litigated without litigating the Addington Pilots' crossclaim against USAPA. Indeed, if *US Airways* is ripe the Addington Pilots are entitled to "state as a crossclaim any claim . . . [that] arises out of the transaction or occurrence that is the subject matter of the original action." Rule 13(g).

The available relief under the Addington Pilots' crossclaim includes an 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). The Addington Pilots must seek all such 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."). We know from past experience that Seham would fully press this point in the future if given the opportunity. *See Addington v. US Airline Pilots Ass'n*, 588 F. Supp. 2d 1051, 1062 (D. Ariz. 2008) ("In effect, USAPA argues that the Plaintiff West Pilots have sued too early and too late.").

A motion is frivolous if any competent attorney would conclude it was destined to fail. Any competent attorney should recognize that Seham's Rule 11 motion is destined to fail because the ripeness of the

Addington Pilots' crossclaim is in genuine dispute. Seham's Rule 11 motion, therefore, was frivolous, in violation of Rule 11.

2. Seham's Rule 11 motion was filed for improper purpose.

Unlike a pleading, a motion—such as a Rule 11 motion—is subject to the improper purpose element of Rule 11. The Court, therefore, should inquire into Seham's purpose for filing its motion—an objective inquiry. *Sussman v. Bank of Israel*, 56 F.3d 450, 458 (2d Cir. 1995). In deciding whether Seham's Rule 11 motion was filed for an improper purpose, the Court makes an objective inquiry that takes into account factors such as "whether particular papers or proceedings . . . *lacked any apparent legitimate purpose*." *Id.* (emphasis added); *see also* Schwarzer, *Sanctions Under the New Federal Rule 11-A Closer Look*, 104 F.R.D. 181, 195-96 (1985) ("The court can make such findings guided by its experience in litigation, its knowledge of the standards of the bar of the court, and its familiarity with the case before it . . . .") (addressing former version of Rule 11 on points applicable to the current rule).

A pattern of abusive litigation practice (routine use of Rule 11), *see Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1294 (11th Cir. 2002), and the lack of any apparent legitimate purpose demonstrate that Seham filed its motion for an improper purpose. "[L]itigants misuse the Rule when sanctions are sought against a party or counsel whose only sin was being on the unsuccessful side of a ruling or judgment." *Reiffin v. Microsoft Corp.*, 158 F.Supp.2d 1016, 1029 (N.D. Cal. 2001) (quoting *Gaiardo*, 835 F.2d at 483). Here, Seham repeatedly threatens to file a Rule 11 motion nearly every time the Addington Pilots file a pleading or a substantive motion. *See* Exhibits A, C, and E. This demonstrates that Seham makes routine use of Rule 11 whenever

it disagrees about the correct resolution of a matter in litigation. This is abusive. *See Morristown*, 832 F.2d at 32, n.1 ("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.").

Moreover, because Seham filed its Rule 11 motion after its motions to dismiss were fully briefed, it had no legitimate purpose for doing so. Although a Rule 11 motion must be served in time to allow withdrawal of a pleading, it need not be filed in time to allow withdrawal. As long as it is timely served, a Rule 11 motion can be filed after the court rules. *See Retail Flooring Dealers of Am., Inc. v. Beaulieu of Am., LLC*, 339 F.3d 1146, 1150 (9th Cir. 2003).[6] *See also Winterrowd v. Am. Gen. Annuity Ins. Co.*, 556 F.3d 815, 826 (9th Cir. 2009) ("A Rule 11 motion for sanctions must be served on opposing counsel twenty-one days before filing the motion with the court, providing the opposing counsel a safe harbor to give the offending party the opportunity to withdraw the offending pleading and thereby escape sanctions.") (alteration and quotation marks omitted).

Seham could not gain a legitimate advantage from filing its Rule 11 motion after its Rule 12 motions were fully briefed and pending. There are only two apparent advantages to Seham filing its motion: (1) it was a procedural device to allow Seham to make additional arguments on USAPA's Rule 12 motions; and (2) it was a means to

[6] In *Matsumaru v. Sato*, 521 F. Supp. 2d 1013, 1016 (D. Ariz. 2007), this Court held that a Rule 11 motion was untimely because it was both served and filed after the complaint was dismissed).

intimidate the Addington Pilots into withdrawing their crossclaim before the Court rules on the merits of USAPA's Rule 12 motions. Neither of those advantages is legitimate. The Court should find that Seham filed its Rule 11 motion for an objectively improper purpose. Seham's Rule 11 motion, therefore, was both frivolous and filed for an improper purpose.

III. CONCLUSION

Seham filed a substantively frivolous Rule 11 motion for an improper purpose, in violation of Rule 11. The Addington Pilots respectfully ask the Court to grant this Rule 11 motion and enter an order sanctioning Seham as the Court sees fit.

Dated this 27th day of December, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th 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 _____