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

USAPA'S RESPONSE BRIEF IN OPPOSITION TO ADDINGTON CO-DEFENDANTS' RULE 11 MOTION (DOC. NO. 74), AND REQUEST FOR SANCTIONS UNDER RULE 11(C)(2)

SUMMARY.

After the Addington co-defendants filed a cross-claim that they admit is a virtual carbon-copy of the same DFR claim held unripe by the Ninth Circuit, USAPA filed a Rule 11 motion because co-defendants refused to voluntarily withdraw their duplicative claim in response to service of that motion more than 21 days before its filing. In their response to USAPA's Rule 11 filing, co-defendants dodged the main issue and went on specifically to request sanctions against USAPA's law firm by invoking Rule 11(c)(2). (Doc. # 72 at [ECF] p. 17). Now, some three weeks later, co-defendants have filed their own cross-motion for Rule 11 sanctions. (Doc. # 74). Co-defendants seek the exact *same relief* they requested in their response to USAPA's Rule 11 motion. Moreover, the duplicative motion was obviously cut-and-pasted from co-defendants' earlier brief opposing USAPA's Rule 11 motion. Consequently, at the threshold, co-defendants' motion is utterly redundant. It can only serve to multiply the proceedings. Not only

should it be denied, but the costs of responding should be awarded to USAPA.[1]

But even assuming, *arguendo*, that co-defendants' cross-motion was not duplicative of their earlier response opposing USAPA's Rule 11 motion, it is still fatally flawed for its procedural defects. This is because, to the extent that it targets USAPA's filed Rule 11 motion in this litigation, co-defendants' motion is unsigned and co-defendants have failed to afford the mandatory 21 day 'safe-harbor.' Instead of serving their presented motion, co-defendants mailed a warning letter with unsigned drafts. And, to the extent that the motion targets "threatened" un-filed motions in dismissed cases outside of this litigation, no sanctions can be imposed because such events are plainly outside of the scope of Rule 11 under settled case-law.

The motion also fails on its merits because co-defendants do not advance any legally valid argument demonstrating how USAPA's Rule 11 motion is *frivolous* as opposed to merely deniable. Indeed, co-defendants manifestly fail to demonstrate that USAPA's Rule 11 motion should be denied. Once again, co-defendants fail to cite *any* reliable authority justifying the filing of their admitted "carbon-copy" cross-claim. Instead, co-defendants merely offer their *opinion* that, "it is hard to see how [this case] could be litigated without litigating the Addington Pilots' cross-claim against USAPA." (Doc. # 74 at 15). In short, rather than defending against USAPA's Rule 11 motion, co-defendants have filed a frivolous motion in a transparent attempt to retaliate by inflicting

[1] Given the redundant nature of co-defendants' motion, and its reassertion of arguments already contained in their Rule 11 response (doc. # 72), USAPA will not burden this Court by responding, yet again, to those duplications. Instead, pursuant to L.R. Civ. P. 7.1(d)(2), USAPA hereby incorporates by reference the arguments contained in its Rule 11 Reply. (*See* Doc. # 73).

cost. As such, the motion at bar is itself evidence that sanctions are needed to deter co-defendants' serial prosecution tactics. The Court should deny the motion and award USAPA's fees incurred in responding.

ARGUMENT.

1. The Motion Is Redundant Because It Admittedly Seeks The Same Relief Allowed Under Rule 11(c)(2), Therefore It Is Presented For An Improper Purpose.

Rule 11(c)(2) expressly provides that "the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion." Pursuant to this exact subsection, co-defendants, in their Rule 11 response (doc. # 72 at 17-19), *already* requested that sanctions be issued against USAPA's counsel for the filing of its Rule 11 motion. Nevertheless, co-defendants decided to further burden the Court and USAPA through the filing of a *redundant* cross-motion for sanctions that presents a mere regurgitation of the same arguments set forth in their Rule 11 response. A simple survey of Ninth Circuit case law or Rule 11 itself would have educated co-defendants' counsel to the fact that, in light of their Rule 11 response, the service and filing of the present cross-motion was and is unnecessary:

> **[S]ervice of a cross motion under Rule 11 should rarely be needed** since under the revision the court may award to the person who prevails on a motion under Rule 11 – whether the movant or the target of the motion – reasonable expenses, including attorney's fees, incurred in presenting or opposing the motion.

Patelco Credit Union v. Sahni, 262 F.3d 897, 913 (9th Cir. 2001) (*quoting* Fed. R. Civ. P. 11, Advisory Committee's Note to 1993 Amendment) (emphasis added); *see also Vedatech, Inc. v. St. Paul Fire & Marine Ins. Co.*, 2005 U.S. Dist. LEXIS 45095, at *43

(N.D. Cal. June 22, 2005) ("because courts may award fees to a party that prevails on a Rule 11 motion, a cross motion under Rule 11 should rarely be needed"). In short, just as co-defendants filed an unnecessary cross-claim, now they have compounded their error by filing an unnecessary motion.

There is only one of two possible explanations for co-defendants' decision to file this unnecessary motion: 1) either co-defendants failed to adequately research Rule 11 and the case law interpreting it,[2] which would have alerted them that "a cross-motion under Rule 11 should rarely be needed;" *or* 2) co-defendants were aware of the law, chose to disregard it, and filed the motion for the improper purpose of harassing USAPA and subjecting their union to additional litigation costs. In either scenario their conduct in filing the redundant cross-motion is, in and of itself, subject to sanctions. *Lockheed Martin Energy Systems, Inc. v. Slavin*, 190 F.R.D. 449, 458 (E.D. Tenn. 1999) (*citing Cannon v. Loyola University of Chicago*, 116 F.R.D. 243, 244 (N.D. Ill. 1987)) ("the filing of meritless and redundant pleadings is recognized as appropriate for sanctions under Rule 11").

2. <u>The Motion Fails To Comply With Rule 11's Procedural Requirements.</u>

Even if co-defendants' Rule 11 motion had any merit, denial is required due to the co-defendants' failure to comply with the procedural requirements of Rule 11. Due to its penal nature the technical or procedural aspects of Rule 11 are strictly applied, especially

[2] USAPA has previously cited authority explaining that attorneys are compelled by Rule 11 to "conduct a reasonable inquiry into the law" prior to filing papers with the court (doc. # 73 at 9-10), and that Rule 11 sanctions are warranted where it appears that counsel neglected to make a reasonable inquiry into the law before filing. (Doc. # 73 at 6, fn. 4).

in the Ninth Circuit. *See e.g.*, this Court in *Matsumaru v. Sato*, 521 F. Supp. 2d 1013, 1015 (D. Ariz. 2007) (*citing Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 789 (9th Cir. 2001)); *see also Miller v. Relationserve, Inc.*, 2006 U.S. Dist. LEXIS 87139, at * 6 (S.D. Fla. Dec. 1, 2006). Denial is required here because the motion at bar fails to comply with the technical requirements of Rule 11 in two fundamental ways:

First, co-defendants have not complied with the requirement of Rule 11(c)(2) to provide a 21-day "safe-harbor." The motion at bar presented to the Court (doc. # 74) was never served on USAPA's counsel prior to its filing on ECF on December 27, 2010. Instead, co-defendants merely mailed a *warning letter* dated December 2, 2010, along with an *un-signed motion*, *unsigned brief* (without any supporting declarations), and some exhibits (most of which were not filed with the presented motion). (Declaration of Nicholas P. Granath, hereinafter "Decl.," at ¶¶ 3, 4). Indeed, co-defendants have tacitly conceded this omission in their assertion that, "despite the *written demand* required by Rule 11, Seham has failed to withdraw" (Doc. # 74, at i:26) (emphasis added). Co-defendants' fatal non-compliance with Rule 11 procedure is further confirmed by their conspicuous failure to allege when, where, or how USAPA's counsel was served with the same motion and brief presented to this Court.

Rule 11 does not contemplate a mere "written demand," or merely the service of a warning, or merely an un-signed, draft motion. Rather, it mandates that the same motion presented to the court be "served under Rule 5" twenty-one days or more before filing with the court. Fed. R. Civ. P. 11(c)(2); *Robison v. Alutiiq-Mele, LLC*, 643 F. Supp. 2d 1342, 1351 (S.D. Fla. 2009) ("because it ... failed to serve and file the same motion,

defendant failed to satisfy the procedural requirements of Rule 11 and its request for Rule 11 sanctions should be denied ...") (*citing In re Kirk-Murphy Holding, Inc.*, 313 B.R. 918, 921 (N.D. Fla. 2004)) (same.)

Here, what was presented to the Court (assuming, for the sake of argument, that Doc. # 74 is treated by the Court as a bona fide motion), was *not* served on counsel in compliance with Rule 11's 21-day requirement. As co-defendants concede, only a "written demand" was served.[3] This disregard of Rule 11 procedure is fatal to co-defendants' motion. *See, e.g., Winterrowd. v. American General Annuity Insurance Co.*, 556 F.3d 815, 826 (9th Cir. 2009) (failure to provide required notice precludes award of Rule 11 sanctions); *see also Roth v. Green*, 466 F.3d 1179, 1192 (10th Cir. 2006) (warning letters did not satisfy safe-harbor requirements); *Brickwood Contractors, Inc. v. Datanet Engineering, Inc.*, 369 F.3d 389 (4th Cir. 2004) (safe-harbor is a mandatory condition precedent to sanctions). Mere service of a warning letter accompanied by an unsigned draft motion fails the plain-language requirement of Rule 11(c)(2) as the courts in this and other circuits have applied it.

Second, co-defendants did not comply with the fundamental requirement of Rule

[3] Noting that in other respects, too, the unsigned draft is *not the same* as the submission to the Court in Doc. Nos. 74 and 75. For example, the argument has changed (compare sections II C 1 and 2 between the unsigned draft brief and the presented brief); the presented brief offers an additional argument (i.e. 'no legitimate advantage' argument starting at p. 12:21); what was presented is supported by a single attachment ("Exhibit A") but what was mailed to counsel included exhibits a, b, c, d, e, f and g. (Decl. ¶ 5); and additional and different authorities are cited in the presented motion. These differences go beyond a tolerable supplementation. *See Ideal Instruments, Inc. v. Rivard Instruments, Inc.*, 243 F.R.D. 322 (N.D. Iowa 2007) (discussing tolerable supplementation of served Rule 11 motion prior to filing).

11(a) that "every ... written motion ... must be signed by at least one attorney of record," because they did not sign the Rule 11 motion they presented. (*See* Doc. # 74, ii:13). The first commandment of Rule 11(a) is that "every ... written motion ... must be signed by at least one attorney of record in the attorney's name" (if the party is represented). But here the omission has not been promptly corrected, in fact it has not been corrected at all. The error is therefore fatal under the plain language of Rule 11(a): "the court must strike an unsigned paper unless the omission is promptly corrected ..." *See also Maxwell v. Snow*, 409 F.3d 354, 356 (D.C. Cir. 2005) (motion must be stricken if lack of signature not promptly corrected, even if party is *pro se*).

3. The Alleged "Pattern" Of "Abusive" Rule 11 Motions Outside Of This Litigation Is Specious And Outside Of The Scope Of Rule 11.

Lacking any legal defense for the presentation of their carbon-copy cross-claim, co-defendants chose rather to allege abuse of Rule 11 and similarly now, on this motion, they resort to the same tactic. Co-defendants dodge the frivolous nature of their cross-claim by expressly grounding their motion for sanctions on the alleged past service of Rule 11 motions outside of this litigation. (*See* Doc. # 74, p. 11:11-26; 16:18-17:7). However, if the Court were to accept co-defendants' argument and impose sanctions based on alleged conduct that occurred in past litigation, it would clearly exceed the scope of Rule 11 for the following reasons:

First, Rule 11(b) expressly applies only to motions that have been presented to the court – yet here there is no dispute that none of the three served Rule 11 motions were ever filed with *any* court – let alone this Court. Without papers presented to a court there

is nothing to withdraw, hence it is impossible to afford the mandatory 21 day safe-harbor.

Second, even if it were still possible to withdraw sanctionable papers, here there is no dispute that *co-defendants* never timely served a Rule 11 motion (or took any other action) based on the served but un-filed Rule 11 motions by USAPA in the dismissed *Addington* litigation. Therefore, co-defendants cannot fulfill the mandate that they provide USAPA and/or its counsel the mandatory 21 day safe-harbor.

Third, there is no dispute that the three served but unfiled Rule 11 motions in *Addington* were all served in a prior litigation in which final judgment has been entered in USAPA's favor. As this Court observed in *Matsumaru v. Sato*, 521 F. Supp. 2d 1013, 1016 (D. Ariz. 2007), Rule 11 motions served and filed after a complaint is dismissed must be rejected, "because such timing does not give the offending party the opportunity to withdraw the offending pleading and thereby escape sanctions." *See also Christian v. Mattel*, 286 F.3d 1118, 1130-31 (9th Cir. 2002) (rejecting Rule 11 sanctions for conduct occurring outside the current litigation because "behavior in prior proceedings does not fall within the ambit of Rule 11"); *see also Truesdell v. Southern California Permanente Medical Group*, 209 F.R.D. 169, 170 (C.D. Cal. 2002) (explaining that "in light of [Ninth] Circuit's decision in *Christian v. Mattel, Inc.*, 286 F.3d 1118 … the Ninth Circuit remanded this action because the Court's 2001 order [imposing sanctions] addressed other actions in which Plaintiff's counsel had filed frivolous complaints.").

Fourth, USAPA should not be faulted for merely serving these motions when it did so precisely because the law in this Circuit (and elsewhere) favors the prompt serving of motions when sanctionable conduct appears. The Committee comments (1983) to

Rule 11 flatly state that "a party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so." Moreover, the Ninth Circuit has stated: "if the purposes of the rules are to be served, the sanctionable behavior should be brought to the immediate attention of the offending attorney ..." *In re Yagman*, 796 F.2d 1165, 1184 (9th Cir. 1986), *cert. denied*, 484 U.S. 963 (1987). *See also Community Electric Service of Los Angeles, Inc., v. National Electrical Contractors Association, Inc*., 869 F.2d 1235, 1242 (9th Cir. 1986) (*citing Yagman* at 1184 ("early notification of sanctionable behavior desirable")); *Kaplan v. Zenner*, 956 F.2d 149, 151 (7th Cir. 1992) ("we do not wish to encourage unnecessary delay in bringing Rule 11 motions, ... such motions should be filed at an earlier time – as soon as practicable after discovery of a Rule 11 violation"). And while co-defendants focus on the fact that the three Rule 11 motions were served but not filed, i.e. "threatened" – they offer nothing for the Court to conclude that the unfiled motions were *frivolous*.

Fifth, with respect to each of the three served motions, not only did USAPA prevail on the underlying legal issue over which the sanction-motions were served (including one issue wherein the court scolded the co-defendants for having engaged in a "fishing expedition"), but there were objective reasons not to file the motions as already set forth in detail to this Court. (*See* Doc. # 73 at pages 2-5).[4]

[4] As now conceded by co-defendants, the first served but unfiled Rule 11 was based on the State complaint which Judge Wake dismissed on USAPA's motion; the second Rule 11 was based on an ill-fated motion to compel privileged information that Judge Wake denied; the third Rule 11 was based on the Second Amended federal complaint which was thrown out by the Ninth Circuit along with co-defendants' entire case.

4. The Motion Is Unsupportable On Its Merits And Co-Defendants Continue To Dodge The Case-Law Holding That The Cross-Claim Is Not Necessary To Avoid Prejudice To Them.

In place of a coherent or legally supported argument showing that USAPA's Rule 11 motion violates the standards of Rule 11(b), the motion at bar simply asserts that co-defendants' cross-claim is not frivolous because "Seham knows this full well." (Doc. # 74, p. 14:1). Co-defendants provide *no response* to legal authority provided by USAPA demonstrating that co-defendants would *not* be prejudiced by refraining from filing a cross-claim that is a carbon-copy of a DFR claim recently dismissed by the Ninth Circuit on ripeness grounds.[5] They neither deny the authority nor address it. Instead, they stand on their opinion that "it is hard to see how it [US Airways' action] could be litigated without the Addington Pilots cross-claim against USAPA." (Doc. # 74, p. 15:5). Yet they offer no authority for the proposition that the ripeness of US Airways' claims makes *their* carbon-copy cross-claim ripe. The simple jurisdictional facts have not changed, nor is there any dispute about them: there is no ratified contract and therefore no final product of bargaining. The invocation of the generality in the Restatements (Second) (at Doc. # 74. P. 15:17) is no substitute for those cases which hold that co-defendants are not at risk for failing to assert an unripe cross-claim in response to US Airways' declaratory judgment action.[6] Nor is counsel's self-serving worry ("we know from past experience

[5] *See* 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*.

[6] As Judge Wake remarked of co-defendants' proclivity for citing Black's Law Dictionary and the Restatements, "you can't get much higher level of generality than the Restatements." Transcript, July 7, 2009, Tr. 38:25. Similarly, Judge Posner has referred to the Restatement as an "antiquated screed." *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 510 (7th Cir. 1997).

that Seham would fully press this point ..." [Doc. # 74, p. 15:20]) a valid legal justification for re-pleading a dismissed claim that remains to this day unripe.

Without legal authority or legal argument to show the alleged frivolousness of USAPA's Rule 11 motion, co-defendants fall back on inviting this Court to conjure an "improper purpose" behind USAPA's Rule 11. To do that, they attempt to distract the Court with accusations of a "pattern of abusive litigation practices," by which they mean the "routine use of Rule 11." (Doc. # 74, p. 16:18). But objective facts shed light on this diversion:

First, all three past Rule 11 motions in *Addington* were never filed;

Second, all three were based on issues which USAPA prevailed on;

Third, a review of the nearly 700 docket filings entered in the two *Addington* lawsuits (federal and state) does *not* admit of a 'routine' of filing Rule 11 motions. (There were *zero* sanction motions filed, and of the dozens of motions heard, only three sanctions motions were ever served in the two cases over the course of intense litigation spanning more than two years).[7]

Instead of facts or evidence, co-defendants offer merely their misplaced conclusion that "Seham repeatedly threatens to file a Rule 11 motion nearly every time the Addington Pilots file a pleading or substantive motion." (Doc. # 74 p. 16:25). But the record shows that the objective facts are quite different. Moreover, the "purpose" behind USAPA's Rule 11 motion is in harmony with the policy underlying that rule: the filing of

[7] And as stated in § 2 herein above, these events are outside the scope of the Rule 11 motion at bar. The detailed explanation demonstrating the justification for not filing the Rule 11 motions served outside of this litigation is set forth in doc. # 73 at pages 2-5.

a carbon-copy of a DFR claim, previously held to be unripe, where the core facts admittedly remain unaltered, is wasteful of the resources of the litigants and this Court.

The last fall-back in substitution for a supportable legal argument is the "no legitimate purpose for filing" claim. (Doc. # 74, p. 17:8). Co-defendants make a timing point, but not a valid one. They say that because USAPA's motion to dismiss the cross-claim preceded its Rule 11 motion, there was no need to file the Rule 11. Instead, they say, USAPA should have waited for the Court to rule and (presumably) enter judgment in USAPA's favor. Co-defendants suggest that by filing the Rule 11 motion before USAPA's motion to dismiss was decided, that USAPA sought to make duplicative arguments for dismissal or that it filed prematurely for the purpose of intimidating the co-defendants.

However, there is no merit to the claim that duplicative arguments in favor of dismissal were made on behalf of USAPA's Rule 11 motion. That is why this particular claim by co-defendants is not supported by a single reference or example. Simply put, the argument in USAPA's Rule 11 brief supports sanctions. Furthermore, that the motion to dismiss the cross-claim and the motion for sanctions have a common target, a frivolous cross-claim, will necessarily occasion some overlap.

Most importantly, with respect to whether USAPA has filed its motion prematurely, co-defendants fundamentally misapply this Court's observation in *Matsumaru* in which the Court held:

> [A] motion for sanctions violates the safe-harbor provision if it is filed after the complaint has been dismissed. *Retail Flooring Dealers of Am., Inc. v. Beaulieu of Am., LLC*, 339 F.3d 1146, 1150 (9th Cir. 2003) (quoting *Barber*,

> 146 F.3d at 710). This is because such timing does not give the offending party the opportunity to withdraw the offending pleading and thereby escape sanctions. *Id.* Because Sato did not serve his Rule 11 motion until after the complaint was dismissed, the Court cannot award sanctions pursuant to his motion.

Id. at 1016.

USAPA filed its Rule 11 motion prior to a ruling on its motion to dismiss precisely because any further delay may have rendered its motion stale. *See e.g., Stevens v. Lawyers Mut. Liability Ins. Co. of North Carolina,* 789 F.2d 1056 (4th Cir. 1986) (sanctions motion filed eight months after allegedly offending act and four months after hearing was untimely); *Duane Smelser Roofing Co. v. Armm Consultants, Inc.*, 609 F. Supp. 823 (D. Mich. 1985) (sanctions motion brought twenty-six months after appeal was decided was untimely). The presumption favors early filing and, in this circuit, the timeliness of a Rule 11 motion rests within the judge's discretion. *See Community Electric Service Of Los Angeles, Inc., v. National Electrical Contractors Association, Inc*., 869 F.2d 1235, 1242 (9th Cir. 1986) (*citing* Advisory Committee Note of 1983 to Amended Rule 11: "The time when sanctions are to be imposed rests in the discretion of the trial judge").

Moreover, there are circumstances – such as here – where promptly bringing to the Court's attention a served sanctions motion is not only allowed and proper, but promotes efficiency and judicial economy. The Court has several motions currently pending, and putting USAPA's Rule 11 motion promptly before the Court serves to clarify the Court's options. In addition, every Rule 11 movant owes a duty to mitigate. "By resolving

frivolous issues quickly and efficiently" that duty is met. *Pollution Control Industries of America, Inc., v. Van Gundy*, 21 F.3d 152, 156 (7th Cir. 1994). Of course, co-defendants would prefer a deferred filing, as do all non-movants in a Rule 11 context. But co-defendants are not entitled to file in this action the same claim that the Ninth Circuit dismissed in another action and then be given immunity from Rule 11 for doing so. Thus, their claim of "intimidation" from the filing of USAPA's Rule 11 motion rings hollow: not only have they not been intimidated from repetitiously re-pleading their DFR claim to this and every Court they have appeared before, they can have no legitimate defense against the deterrence of a frivolous presentation of a carbon-copy of their still unripe claim.[8]

5. <u>Because The Motion Is Redundant, Was Presented For The Improper Purpose Of Inflicting Cost, And Has Inflicted Cost, The Court Should Deny It And Award To USAPA Its Reasonable Expenses Including Attorney's Fees Pursuant To Rule 11(c)(2).</u>

Under Rule 11(c)(2), this Court may award USAPA its reasonable expenses including attorneys fees incurred as a result of co-defendants' motion. Unlike co-defendants, USAPA will not file a separate motion to request this relief. The Court should deny the motion at bar and award expenses to USAPA because co-defendants'

[8] By not directly addressing the specific contentions made in the "background" or the "standards" section of co-defendants' brief, USAPA does indicate agreement with those sections. USAPA has addressed this elsewhere (*see* Doc. Nos. 70, 73). The "background" co-defendants allege here has little to do with the context for the motion at bar and misstates the record by, *inter alia*, misrepresenting the Ninth Circuit's findings of fact supporting its jurisdictional analysis, which findings remain the law of this case. We hope that co-defendants' effort (*see*, Doc. 74, p. 9:4-14) to engender judicial hostility against USAPA's counsel based on their state of residence and other *ad hominem* attacks will also be deemed unworthy of consideration.

motion is redundant and fails to show a basis upon which USAPA should be sanctioned for filing its Rule 11 motion – even if this Court were to deny USAPA's Rule 11 motion. Co-defendants have simply retaliated for USAPA's Rule 11 motion by filing a transparently frivolous motion, one that does not even comport with the basic procedure required by Rule 11. This has inflicted cost on USAPA and burdened this Court with another motion and set of briefs. "One of the fundamental purposes of Rule 11 is to 'reduce frivolous ... motions and to deter costly meritless maneuvers, ... [thereby] avoiding delay and unnecessary expense in litigation." *Christian v. Mattel*, 286 F.3d 1118, 1127 (9th Cir. 2002) (*citing Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1536 (9th Cir. 1986)). The tactic employed by co-defendants here, filing a frivolous Rule 11 cross-motion in retaliation for a Rule 11 motion against the movant has been found to be "sanctionable." *Nike v. Top Brand Company*, 216 F.R.D. 259, 275 (S.D.N.Y. 2003). In short, USAPA's Rule 11 motion is not sanctionable, rather co-defendants' repeat presentation of an unripe pleading, where the core facts upon which the Ninth Circuit based its decision remained unaltered, is. *Fabriko Acquisition Corporation v. Prokos*, 536 F.3d 605, 610 (7th Cir. 2008) (Rule 11 violation found in continuing to advance a claim that has no legal basis and refusing to withdraw it when the deficiency is pointed out).

USAPA respectfully requests the Court deny the motion and award the reasonable costs incurred as a result of it.

Respectfully Submitted,

On: January 11, 2011

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 January 11, 2011, 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.