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Exhibit B

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). Seham's repeated threats to file Rule 11 motions

show that it filed its Rule 11 Motion solely as a litigation tactic.[1] Moreover, Seham's Rule 11 motion is frivolous because any competent attorney would conclude it is destined to fail. 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 __ of _____, 2010.

POLSINELLI SHUGHART, PC

By

_____

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

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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 attached as Exhibit "A." 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. "Following the merger, the companies' respective seniority lists had to be integrated to create a single list for the merged airline." *Id.* at 2-3.

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. A jury found in favor of the Addington Pilots and the Court awarded injunctive relief. *Id.* [3]

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[2] Document numbers above 70 are from *Addington*. Document numbers below 71 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 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

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 otherwise if it were to enter into a collective bargaining agreement incorporating USAPA's position.

Order at 2-4 (Doc. 666) (declining to take *US Airways* in transfer pursuant to LRCiv. 42.1(a)).

> 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).

In other words, US Airways 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 awaiting attention from the Court.

B. Seham's Repeated, Improper Rule 11 Threats

Seham is a New York lawyer who is appearing in this case "pro hac vice." His local counsel is Stan Lubin, an Arizona lawyer. Seham's routine practice is, as evidenced by his course of conduct here, to aggressively attack anyone who challenges or disagrees with his position. He did it previously with Judge Wake, accusing Judge Wake of lacking impartiality because he did not always

agree with USAPA's position in the *Addington* case. (*Addington*, Doc #648, attached hereto as Exhibit "B").[4] Prior to the motion he filed in this case, he has threatened on three other separate occasions to make a Rule 11 motion in the course of these related lawsuits. The first such occasion was December 18, 2008, when he demanded that the Addington Pilots withdraw their First Amended Complaint in Case No. 08-cv-1728. (Copy of letter attached as Exhibit "C"). The Addington Pilots did not withdraw their complaint. Seham never filed a Rule 11 motion. The Court (Judge Wake) denied USAPA's 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 "D").

The second occasion that Seham threatened to file a Rule 11 motion was January 5, 2009, when he demanded that the Addington Pilots withdraw a motion to compel in Case No. 08-cv-1633. (Copy of letter attached as Exhibit "E"). The motion to compel 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

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

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 "F").

The third occasion that Seham threatened to file a Rule 11 motion was September 11, 2009, when he demanded that the Addington Pilots withdraw their Second Amended Complaint in Case No. 08-cv-1633. (Copy of letter attached as Exhibit "G"). The Second Amended Complaint added allegations to 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 and his local counsel invoke Rule 11 against the Addington Pilots' cross-claim as part of their 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 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 the pleading challenged by the motion was frivolous or filed for an improper purpose. 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. "[P]apers 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 does not assess subjective intent to determine "good faith" and "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) Objectively, it is hard to see how Seham and Lubin have anything other than an improper purpose for pursuing Rule 11 claims now four times in these "related cases."

C. Seham's Rule 11 motion warrants Rule 11 sanctions.

1. *Seham's Rule 11 motion is frivolous.*

Seham's Rule 11 Motion challenges a crossclaim. As such, it cannot succeed 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 could be frivolous. It could be frivolous on substantive merits or it could be frivolous on ripeness. Neither basis here justifies a Rule 11 motion and Seham and Lubin know this full well.

First, the Addington Pilots' crossclaim does not lack substantive merit. Indeed, the same 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.

Second, 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). That in turn considers the hardship to US Airways from delaying a decision on the merits. In contrast, ripeness in *Addington* considered the hardship to the Addington Pilots. Hence, the ripeness question now is different.

If *US* Airways is ripe, the Addington Pilots must preserve their crossclaim. To do so, 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). The crossclaim falls within this standard. Eventually, this Court will decide the "ripeness" issue for both US Airways' Complaint and the Addington's Cross-Claim. There is no room for Rule 11 claims here and they should not be tolerated.

Moreover, if the Addington Pilots fail to seek all relief available under their crossclaim, they may be 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."). Such relief 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). Again, any competent attorney should recognize this and understand the need for additional cross-claims.

In sum, Seham and Lubin have no basis to assert either that the substantive merits or the ripeness of the Addington Pilots' crossclaim is frivolous. There is no basis, therefore, to file a Rule 11 motion. Consequently, Seham's Rule 11 motion is frivolous.

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

Unlike a pleading, a motion is subject to the improper purpose element of Rule 11 analysis. In deciding whether Seham's Rule 11 motion was filed for an improper purpose, the Court makes an objective analysis that takes into account all the relevant circumstances. For example, a pattern of abusive litigation practice weighs in favor of finding that a Rule 11 motion was made for improper purposes. *E.g., Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1294 (11th Cir. 2002).

Here, as a routine part of his litigation strategy, Seham repeatedly threatens to file a Rule 11 motion nearly every time the Addington Pilots file a pleading or a substantive motion. *See* Exhibits C, E, and G. Seham and apparently local counsel use Rule 11 merely because Seham disagrees about the correct resolution of a matter in litigation. *See Morristown*, 832 F.2d at 32, n.1. That violates Rule 11(b)(2).

If Seham's objective purpose was to sanction a frivolous pleading, he should have directed his motion against the airline. After all, it is the US Airways Complaint that requires the additional cross-claim. Having failed to

do that, the evident purpose to Seham's motion is to bolster his motion to dismiss the crossclaim. That is itself a violation of Rule 11.

III. CONCLUSION

Seham and Lubin have filed a substantively frivolous Rule 11 motion and did so for an improper purpose. That is a violation of Rule 11 and warrants appropriate sanctions. The Addington Pilots respectfully ask the Court to grant this motion and enter an Order to such effect against both Seham and Lubin.

Dated this ___ day of _____, 2010.

POLSINELLI SHUGHART, PC

By

_____

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of _____ 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.

By _____