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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 **REPLY IN SUPPORT OF ADDINGTON PILOTS' MOTION FOR RULE 11 SANCTIONS AGAINST THE LAW FIRM OF SEHAM, SEHAM, MELTZ & PETERSEN, LLP**

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I. OVERVIEW

The central issue is whether any competent attorney would conclude that it was frivolous for the Addington Pilots to argue that the ripeness of this matter makes their duty of fair representation (DFR) crossclaim against USAPA ripe. On one hand, if no competent attorney could conclude that the Addington Pilots' argument was frivolous, then Seham itself violated Rule 11 by filing its Rule 11 motion.[1] On the other hand, if a competent attorney could conclude that the Addington Pilots' argument was frivolous, then Seham did not violate Rule 11 by filing its Rule 11 motion—unless it did so for an improper purpose. Given the narrow meaning of "frivolous," Seham failed to demonstrate that any competent attorney would reasonably conclude that it was frivolous for the Addington Pilots to assert a DFR crossclaim in this declaratory judgment action. Seham's arguments support the position that it acts for improper purposes. Finally, Seham does not identify any fatal procedural defects in the Addington Pilots' motion.

II. LEGAL ARGUMENT

A. Seham failed to demonstrate that any competent attorney would reasonably conclude that it was frivolous for the Addington Pilots to assert a DFR crossclaim in this declaratory judgment action.

A motion is sanctionable under Rule 11 only if the legal positions argued in that motion are frivolous to the point that no "competent attorney" would think otherwise. *United States v. Stringfellow*, 911 F.2d 225, 226 (9th Cir. 1990). In other words, a motion is frivolous under Rule 11 if its arguments are unreasonable when viewed from the perspective of "a competent attorney admitted to practice before the

[1] All references to "Rules" are to the Federal Rules of Civil Procedure.

district court." *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830 (9th Cir.1986). The motion at issue here—Seham's Rule 11 motion—was frivolous because no competent attorney would reasonably regard it as frivolous for the Addington Pilots to make their DFR crossclaim in this declaratory action brought by the Airline.

In a related context (the *in forma pauperis* statute, 28 U.S.C. § 1915), " '[f]rivolous' means 'of little or no weight, value, or importance; paltry; trumpery; not worthy of serious attention; having no reasonable ground or purpose.' " *Deutsch v. United States*, 67 F.3d 1080, 1085-86 (3d Cir. 1995). A claim is frivolous only where it is "clear under existing precedents that there is no chance of success and no reasonable argument to extend, modify or reverse the law as it stands." *Mareno v. Rowe*, 910 F.2d 1043, 1047 (2d Cir. 1990); *see also Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985) ("[W]here it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify or reverse the law as it stands, Rule 11 has been violated.").

No competent attorney would regard the Addington Pilots making their DFR crossclaim as frivolous because there is a reasoned argument that the Airline's hardship of waiting until there is a final contract is different than the Addington Pilots' hardship alone. Hence, it is reasonable to argue that the ripeness of the DFR claim in this case is different than it was in *Addington v. US Airline Pilots Ass'n*, 606 F.3d 1174 (9th Cir. 2010), the "existing precedent." *Addington*, therefore, does not control. Because no competent attorney would regard this as a frivolous argument, it was frivolous for Seham to file a Rule 11 motion.

All Seham argued in its Response is the merits of ripeness—that the Addington Pilots' crossclaim is unripe. That goes to the merits of Seham's motion to dismiss, not to whether its Rule 11 motion was frivolousness. Seham failed to demonstrate that any competent attorney would reasonably conclude that its Rule 11 motion was nonfrivolous. Indeed, no competent attorney would so conclude. No competent attorney would expect to prevail on Seham's Rule 11 motion. Seham, therefore, violated Rule 11 by filing that motion.

B. Seham's arguments support the position that it acts for improper purposes.

Seham failed to refute that its conduct in *Addington* is evidence that it makes improper use of Rule 11. It argued only that it prevailed on the merits of the disputed issues when it threatened Rule 11 sanctions in *Addington*. *See* USAPA Resp. at 9:15 to 9:20. Not only do we disagree with that characterization but it is beside the point. What matters is not whether the court found that USAPA had the better argument but whether Seham abused Rule 11. That USAPA may have prevailed (on many but not all points) does not and cannot justify Seham's improper use of Rule 11.

Seham believes it is justified to threaten Rule 11 sanctions whenever it believes it has the better argument. That is wrong. Having the better argument does not entitle a litigant to threaten Rule 11 sanctions. Because "Rule 11(b) is not a strict liability provision[,] . . . showing of at least culpable carelessness is required before a violation of the Rule can be found." *Citibank Global Markets, Inc. v. Rodriguez Santana*, 573 F.3d 17, 32 (1st Cir. 2009) (citations and quotation and alteration marks omitted). "The mere fact that a claim ultimately proves unavailing, without more, cannot support the imposition or

Rule 11 sanctions." *Protective Life Ins. Co. v. Dignity Viatical Settlement Partners, L.P.*, 171 F.3d 52, 58 (1st Cir. 1999).

In litigation, one or both of the parties will often believe they have the better argument. Rule 11 is not intended to be used every such time a litigation dispute leads to motion practice. Rather, the consistent tenor of authority discourages this practice. *See, e.g., Caribbean Wholesales & Service Corp. v. U.S. JVC Corp.,* 101 F. Supp. 2d 236, 246 (S.D.N.Y. 2000); *Stevenson v. Employers Mut. Ass'n*, 960 F. Supp. 141, 145, n.3 (N.D. Ill. 1997); "*Edberg v. Neogen Corp.*, 17 F. Supp. 2d 104, 109 (D. Conn. 1998).

Seham refuses to acknowledge this point. The fact that Seham improperly threatened to file Rule 11 motions in *Addington* and the fact that it continues to argue that it was entitled to do so shows that it does so for improper purposes.

C. Seham does not identify any fatal procedural defects in the Addington Pilots' motion.

Seham does not have any meaningful authority for its procedural arguments. First, counsel did put an electronic signature at the end of document 74 (the Addington Pilots' Rule 11 motion). It is true, however, that no signature was entered after the introductory motion statement on page (ii) of this document. It would be absurd, on that basis, to regard document 74 as "unsigned." Moreover, it is not fatal that a motion is filed unsigned, unless the litigant fails to promptly correct that omission when so notified: "Under Fed.R.Civ.P. 11(a), all pleadings by a *pro se* plaintiff must be signed by the party and, if not, must be stricken unless corrected promptly after being notified of the omission." *Maxwell v. Snow*, 409 F.3d 354, 356 (C.A.D.C. 2005).

Seham omitted the emphasized language from *Maxwell* in its Response.[2]

Seham also complains that the Addington Pilots did not serve a valid motion served with their 21-day letter because the motion they attached to the letter was not signed and had some differences in language from the language at the start of document 74 that was filed with the Court. Again, Seham has no authority that requires a signature or identical language.

Rule 11 requires only that a motion "describe the specific conduct that allegedly violates Rule 11(b) and that the motion be served pursuant to Rule 5. Rule 11(c)(2). Rule 5 provides that a paper requiring service can be mailed to counsel. Rule 5(b)(2). It does not require that the paper be signed (the 21 day letter itself was signed).

The Addington Pilots mailed their Rule 11 motion to Seham on December 2, 2010. That motion stated, in relevant part, as follows:

> 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. 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).

Motion (Dec. 2, 2010). See Ex. "B."

The Addington Pilots filed their Rule 11 motion with the Court, document 74, on December 27, 2010. This document states, in relevant part, as follows:

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[2] Seham's response to this motion provides notification that document 74 was unsigned and the Addington Pilots attach a signed page (ii) of document 74 as Ex. "A" to correct that oversight.

> 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 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).

Doc. 74 at i-ii. Surely, service of the motion (and supportive memorandum) on December 2, 2010, satisfied Rule 5 and the content of the motion so served satisfied Rule 11. Seham's arguments, therefore are trival and of no import.

III. CONCLUSION

Seham filed a frivolous Rule 11 motion for an improper purpose, in violation of Rule 11. Its Response to the Addington Pilots' Rule 11 motion failed to demonstrate otherwise. The Addington Pilots, therefore, respectfully ask the Court to grant their Rule 11 motion and to enter an order sanctioning Seham as the Court sees fit.

Dated this 18th day of January, 2011.

POLSINELLI SHUGHART, PC

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January 2011, 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 _____