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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Don Addington, *et. al.*, *Plaintiffs,* v. US Airline Pilots Association, *et. al.*, *Defendants*.	Case No.: CV-13-00471-PHX-ROS **US AIRLINE PILOTS ASSOCIATION'S RESPONSE TO WEST PILOTS' MOTION FOR ATTORNEYS' FEES AND NON-TAXABLE COSTS** **(Oral Argument Requested)**

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POINT I

WEST PILOTS' MOTION DOES NOT COMPLY WITH L.R.CIV. 54.1 AND 54.2

West Pilots' motion should be denied for failure to comply with L.R.Civ. 54.1.and 54.2, including, but not limited to 54.2(c)(2)-(3), (d)(1), (2), and (e)(3). No Bill of Costs was served on USAPA as required by the rule. *See, e.g., Bogner v. Masari Investments, LLC*, , 2010 WL 2595273 (D.Ariz. June 24, 2010). West Pilots requested and received two extensions of time to file "a complete fee application." Docs. 333 at 2, 337, 339. As a result of West Pilots' failures to comply with the local rules, USAPA is prejudiced in its ability to respond, confirm and/or challenge the fees and costs requested.

POINT II

COMMON BENEFIT FEE AWARD IS AN EXCEPTION TO "AMERICAN RULE"

Under the traditional "American Rule", in the absence of statutory or contractual authorization, parties generally bear their own attorneys' fees. *Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943 (1973). The RLA does not provide for attorneys' fees in duty of fair representation cases. In *Ass'n of Flight Attendants, AFL-CIO v. Horizon Air Industries*, the Ninth Circuit rejected the union's contention that the district court's "fee award is justified as an exercise of the authority vested in the district court to remedy violations of the RLA 'by whatever appropriate means might be developed on a case-by-case basis.'" 976 F.2d 541, 551 (9th Cir. 1992)). Courts have recognized two exceptions to the American rule: the "bad faith" [1] and the "common benefit" exceptions. *Id.*, at 5, 93.

Under the common benefit exception, an award of attorneys' fees may be awarded in the court's discretion when the "plaintiff's **successful** litigation confers 'a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over

[1] Although West Pilots disparage USAPA's litigation conduct as "frivolous[] or causing "delay" or "increase[ing] costs" (Doc. 342-1 at ¶¶3-4), the West Pilot Class is not seeking attorneys' fees under the "bad faith" exception to the American Rule. If West Pilots change course and argue for fees under the "bad faith" exception to the American Rule, then USAPA seeks permission to respond to such a claim.

the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them.'" *Id.*, at 5 (quoting *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393-94 (1970)) (emphasis added). Fee-shifting is allowed in these cases "because '(t)o allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense.'" *Id.*, at 6 (quoting *Mills*, 396 U.S. at 392).

Thus, the touchstone for fee-shifting under the common benefit exception is a determination that a substantial benefit has been conferred on the members of an ascertainable class. The doctrine does not apply where the prevailing plaintiff and the group do not share in a common benefit as a result of plaintiff's suit. *See Aguinaga v. United Food and Commercial Workers Intern. Union*, 993 F.2d 1480, 1483 (10th Cir. 1993) (Reversing district court award of attorneys' fees under common benefit where the entire union membership did not receive a benefit common to the plaintiff class but instead received only the "reassurance that in the future, the Union would treat members more fairly, and investigate and pursue remedies against employers who breach collective bargaining agreements."); *Argentine v. United Steelworkers of Am., AFL-CIO*, 287 F.3d 476, 489 (6th Cir. 2002) (Reversing award of attorneys' fees under common benefit because where plaintiffs vindicated free speech rights which benefited local union as a whole, but also received compensatory and punitive damages, "the local union is not benefitting from the efforts of the successful Plaintiffs in the same way as the Plaintiffs and so would not be unjustly enriched at the Plaintiffs' expense if they did not equally contribute to the litigation expense.").

In this case, the West Pilots stated repeatedly that the *Addington* cases were maintained on behalf of the numerical minority West Pilots to redress the wrongful actions of the numerical majority East Pilots, and force USAPA to accept and advocate for the Nicolau Award. *See* 2:10-cv-01570-ROS, Doc. 193, at 4 (noting disputed

positions). The Ninth Circuit enjoined USAPA from presenting a list other than the list in the Nicolau Award as a basis for seniority list integration. In view of this history and its outcome, West Pilots cannot now argue that the "ascertainable class" for which any benefit resulted was anything other than the West Pilots. Under the common benefit analysis, the "others" amongst whom fees and costs should be allocated are the West Pilots, not the East Pilots whose position on Nicolau was overturned by the efforts of the attorneys representing the West Pilots.

POINT III

PLAINTIFFS ARE NOT ENTITLED TO ATTORNEYS' FEES FOR *ADDINGTON III*

West Pilots try to make a distinction between eligibility to a common benefit award and entitlement to such an award. The distinction is illusory, and one not made by the Supreme Court in either *Mills* or *Hall*. Regardless, West Pilots are neither eligible nor entitled to fees and costs for *Addington III*.

West Pilots claim that "[i]t is well established that a worker who brings a successful DFR claim against a labor union is eligible to receive a common benefit award of fees and costs incurred in that action." Doc. 342 at 4. No court has ever held that, as a matter of law, a plaintiff in a successful DFR claim against a labor union is eligible for or entitled to attorneys' fees. First, the RLA does not provide for attorneys' fees in a DFR case. Second, the logical extension of West Pilots' claim would be a common benefit award of attorneys' fees for every successful DFR action. The fact that common benefit awards in successful DFR cases are a rare exception evidences the lack of merit of West Pilots' claim. Indeed, if Congress intended such a result, it would have included a fee-shifting provision in the statute. It did not.

The *Mills* Court explained the common benefit exception as a "primary judge-created exception . . . to award expenses where a plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of others **in the same manner as**

himself." 396 U.S. at 392 (emphasis added). The individual plaintiffs in *Addington III* commenced the litigation on behalf of "[a]ll pilots who are on the America West seniority list currently incorporated into the West CBA."[2] Doc. 134, ¶86. Plaintiffs successfully maintained their suit against USAPA with the Ninth Circuit ruling giving the West Pilot Class precisely what they wanted – a mandate requiring USAPA to advocate for the Nicolau Award. It is no surprise to anyone, least of all the West Pilot Class, that the result of *Addington III* was a defeat to USAPA and the East Pilots who consistently maintained their rejection of the Nicolau Award. *See Rogers v. Air Line Pilots Ass'n, Intern.*, 988 F.2d 607, 616 (5th Cir. 1993) ("In fact, Plaintiffs' success, based upon the rhetoric in the briefs, is probably considered a defeat by much of the union membership."). *Addington III* benefited precisely the class to whom it was filed on behalf of – the West Pilots, and unlike the successful litigation in *Mills*, *Addington III* did not benefit or "render[ ] a substantial service" to the USAPA membership, a majority of whom are East Pilots. 396 U.S. at 396. An award of fees would redistribute the costs of the litigation to a majority of USAPA members who clearly and consistently rejected the Nicolau Award and will not receive the alleged benefits of the Nicolau Award. *See* Doc.

[2] West Pilots consistently and repeatedly made clear in their pleadings and court submissions that their DFR claim was on behalf of **West Pilots ONLY**. *See* Doc. 134, ¶85 ("Plaintiffs bring this action, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on their own behalf and on behalf of the West Pilot Class of all persons similarly situated."); Doc. 11 at 7 ("'West Pilot Class' . . . is defined as: 'All pilots who are on the America West seniority list currently incorporated into the West Pilots' collective bargaining agreement' . . . All class members . . . (2) owed a DFR by USAPA to implement the Nicolau Award."); Doc. 13 at 18 ("No one but the West Pilots will defend the Nicolau Award here."); Doc. 205 at 2 ("Plaintiffs, a class of former America West Pilots . . . assert that Defendant US Airline Pilots Association . . . breached its duty to represent them fairly by making a contract, the Memorandum of Understanding . . . that – without an objectively legitimate union purpose – purports to establish seniority integration procedures that abrogate those in an existing collective bargaining agreement. . . known as the Transition Agreement . . . that required US Airways to implement in good faith an arbitrated merged seniority list known as the Nicolau Award list."). West Pilots cannot now claim that plaintiffs commenced the *Addington* cases on behalf of the entire union membership.

147, ¶64 ("USAPA has thoroughly considered the Nicolau Award and has concluded that it unfairly favors one group of pilots over another . . ."); Doc. 206-1, ¶35 ("The East Pilots opposed the Nicolau Award."); Ninth Circuit Case No. 14-15757, Dkt. 22-1 at 13 ("The East Pilots considered the [Nicolau] award to be unfair and inequitable . . ."). Moreover, West Pilots fail to explain how *Addington III* benefited those pilots hired after the US Airways/America West merger, or how those pilots are being unjustly enriched at West Pilots' expense.

West Pilots state that "the Ninth Circuit awards fees and other litigation expenses against a labor union where the worker made a successful claim that the union breached a legal duty owed to the worker under federal law." Doc. 342 at 4. They go on to cherry pick isolated dicta from cases in an attempt to convince this Court that Supreme Court precedent "compels" it to grant them a common benefit award. Doc. 342 at 4. However, the cases are against them. West Pilots mislead this Court by citing to *Local Union No. 38, Sheet Metal Workers' Intern. Ass'n, AFL-CIO v. Pelella*, 350 F.3d 73 (2d Cir. 2003) in support of their claim that they are entitled to a common benefit award in *Addington III* "because all USAPA members benefit from the result." Doc. 342, at 6. West Pilots use a partial quote from *Pelella* when they state that "all members are deemed to have sufficiently benefitted from the result if it 'will likely increase the [union's] sensitivity' to the rights vindicated in the litigation. *Id.* Such a broad statement is not supported by *Pelella*.

Like *Hall*, *Pelella* was an action in which a union member claimed that his LMRDA § 101(a)(2) due process rights were violated. In awarding fees, the district court found that plaintiff's victory resulted in definitive benefits to the membership as a whole, including members facing discipline who would receive notice of procedural rights at trial and increased likelihood the union would select impartial members for its trial committee. *Id.*, at 91. The Second Circuit found these considerations justified an award

of fees, stating "[t]he verdict against Local 38 confer[red] a common benefit to its members because it will likely 'increase the [union's] sensitivity to the full and fair hearing rights of its members." *Id.*, quoting *Bollitier v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers*, 735 F.Supp. 612, 622 (D.N.J. 1989). The quote from *Bollitier* referred to union members' due process rights under § 101(a)(2), and not to a union's DFR as it relates to seniority integration following a merger. The quote is taken out of context and does not support West Pilots' position.

The Supreme Court in *Mills* and *Hall* used a two-factor test to determine if a plaintiff could recover attorneys' fees under common benefit: "(1) if the litigation conferred a substantial benefit on the members of an ascertainable class, and (2) if the court's jurisdiction over the subject matter makes possible an award that will operate to spread the costs proportionately among the class." *Southerland v. Intern'l Longshoremen's and Warehousemen's Union Local 8*, 845 F.2d 796, 798 (9th Cir. 1987).

Applying the factors, there can be no doubt that the entire USAPA membership is not "the class of beneficiaries . . . who actually benefited from the litigation." The class is the West Pilot Class. West Pilots self-identified themselves as the class for which the *Addington* litigation was maintained. The *Addington* litigation was paid for by Leonidas whose sole purpose was to "solicit[ ] funds in the form of cash and using said funds to fund an independent legal campaign in the matter of seniority integration of the America West Airlines pilots and US Airways pilots, for the benefit of the pilots of the former America West Airlines." USAPA Trial Exhibit 147.

West Pilots ignore *Polonski v. Trump Taj Mahal Associates*, 137 F.3d 139 (3d Cir. 1998), *cert. denied* 525 U.S. 823 (1998), a DFR case that is precisely on point. Like the *Addington* litigation, *Polonski* involved an arbitration award that established the seniority status of some union employees. The union represented food and beverage employees of the Trump Castle, the Trump Plaza, and the Trump Regency. The management of the

Trump Taj Mahal failed to recognize the seniority status of certain union employees transferred from the Trump Regency who were given the highest seniority status pursuant to the CBA. The union filed a grievance on behalf of the former Trump Regency employees and the matter went to arbitration resulting in an award sustaining the grievance and establishing the seniority status for the former Trump Regency employees. The award, however, adversely affected a group of Trump Taj Mahal employees.

Because of an unrelated RICO action, a special Monitor was appointed to oversee the union affairs. The adversely affected Trump Taj Mahal employees (the "Polonski group") alleged to the Monitor that the arbitration award had been unfairly procured, and filed suit against the union for breach of the DFR. The Monitor attempted to reopen the arbitration award but a group of employees who benefited from the arbitration award (the "Arcuri group") objected and filed their own DFR suit against the union and moved to enjoin the Monitor from attempting to reopen the arbitration award. After the union represented that it would not seek to reopen the arbitration award, the Arcuri group withdrew the motion for a preliminary injunction but the DFR suit remained.

The Polonski litigation was dismissed for failure to provide discovery. The district court in the Arcuri action held that the Monitor had breached its DFR by attempting to reopen the arbitration award. Attorneys' fees were granted under the common benefit doctrine, because "the plaintiffs, through their lawsuit, taught the Union a 'generalized lesson' that it should respect the finality of arbitration." *Id.*, at 145. "Because all Union members would benefit from the Union's respect for the law, the district court concluded that there was indeed a common benefit which mandated fee shifting to achieve equity." *Id.* The union appealed the grant of attorneys' fees.

On appeal, the union argued, *inter alia*, that "[e]ven if there was a benefit, . . . it was not a common one because the plaintiffs benefitted by vindicating their own seniority rights, and the other Union members did not stand to share that benefit in

common with the plaintiffs, as their seniority interests were in fact adverse to the plaintiffs." *Id.*, at 146. The plaintiffs on appeal argued "their litigation against the Union had established a violation of fair representation duties owed to them under the labor laws . . . [and] that a substantial benefit has been rendered to all Union members through the vindication of this legal right." *Id.* West Pilots make the same argument, positing:

> [A]ll members are deemed to have sufficiently benefitted from the result if it "will likely 'increase the [union's] sensitivity'" to the rights vindicated in the litigation. *Local Union No. 38 v. Pelella*, 350 F.3d 73, 91 (2d Cir. 2003). Consequently, even if a majority of the union's members opposed the plaintiffs' successful DFR claim, the entire membership is deemed to have sufficiently benefited from the claim if the result "will **lessen** the danger that other [union] members will be treated this way in the future." *Volkman v. United Transp. Union*, 770 F.Supp. 1455, 1477 (D.Kan. 1991) (emphasis added).
>
> Union members benefit whenever their union is made to adhere to its legal duties. *Pelella*, 350 F.3d at 91. All union members – even those presently in the majority – benefit from the DFR.

Doc. 342 at 6.

The appeals court rejected the plaintiffs' arguments and found that the "district court erred in its legal conclusion that all Union members derived a substantial benefit from the Union's receiving a 'generalized lesson' that an arbitrator may not reconsider the merits of a final arbitration award." *Id.*, at 147.

West Pilots here make the same unavailing argument as the plaintiffs concerning the "generalized lesson" of the finality of arbitration awards, arguing:

> Had this litigation gone the other way and established that USAPA could acquiesce to the demands of the majority and reject the Nicolau Award, nothing would stop the Allied Pilots Association ("APA") from rejecting the result of the seniority arbitration in this merger if that was demanded by the majority legacy American Airlines pilots. Thus, notwithstanding that the East Pilots are unhappy with the result in *Addington III*, they potentially benefit from the result because it increases APA's sensitivity to its duty to resist any demands that might be made by the legacy American pilots to disregard the result of the seniority arbitration in this merger.

Doc. 342 at 7.

The Third Circuit's reasoning in *Polonski* in reversing the district court's award of attorneys' fees under the common benefit doctrine applies with equal force to the West Pilots' application for attorneys' fees:

> Simple "generalized lessons" of well-established law are not substantial benefits that form the basis of fee shifting. Otherwise, whenever a defendant violates a right common to all its membership, fee shifting would be appropriate without any inquiry into the nature of the "substantial service" rendered to those who will ultimately pay for the litigation. This has never been the analysis and equity will not hinge on a result that is merely "technical in nature." *Mills*, 396 U.S. at 396, 90 S.Ct. at 627-28.
>
> There is little doubt that plaintiffs' litigation conferred a substantial benefit among some of those involved in the internal seniority dispute between Union factions. The Arcuri group of Union members directly benefitted from the outcome in that it prevented the Union from attempting to reopen a favorable arbitration award and procured a judgment that it was not being treated fairly as required under the duty of fair representation. But this alone cannot be the basis of fee shifting under the common benefit doctrine because the plaintiffs seek to collect fees from the Union treasury, which necessarily implies that all Union members must have benefitted from the litigation.
>
> Here, we cannot see what substantial benefits redounded to the benefit of all the Union members. This is not a case where the plaintiffs' litigation corrected a "deceit practiced on the stockholders as a group" as was evident in *Mills* itself. 396 U.S. at 392, 90 S.Ct. at 625 (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 84 S.Ct. 1555, 1560, 12 L.Ed.2d 423 (1964)). Nor did the successful litigants realistically dispel any "chill" associated with a Union abuse prejudicial to the enjoyment of essential rights by the entire Union membership. This dispute between Union factions can hardly be analogized to *Hall* and its progeny, where violations of first amendment or voting rights necessarily resulted in an immediate harm to the promise of Union democracy or the freedom of expression. Similarly, the

> lawsuit did not "establish[ ] significant new principles of law" beneficial to all Union members. *Marshall v. United Steelworkers*, 666 F.2d 845, 853 (3d Cir. 1981).
>
> In the end, nothing in the present litigation indicates a "substantial service" rendered to the entire Union membership such as would justify an equitable award of attorney's fees. All the facts before us indicate that the internal seniority grievances among Union members directly at odds with each other had no broader applications to those completely divorced from the context of the dispute. The record cannot fairly support a legal conclusion that the Union's attempt to reopen arbitration was a practice that threatened "the enjoyment or protection of an essential right" to the entire Union's interest. *Mills*, 396 U.S. at 396, 90 S.Ct. at 627. Nor can we see how fee shifting in the present case would establish a policy that would "encourage unions to more zealously represent employees' interests." *Cruz v. Local Union No. 3 of the Int'l Brotherhood of Elec. Workers*, 34 F.3d 1148, 1159 (2d Cir. 1994). It is important to emphasize that the logic underlying the common benefit doctrine is restitutionary in nature, not punitive or limited to labor policy. *Hall*, 412 U.S. at 6-7, 93 S.Ct. at 1946-47. Union members here would not be unjustly enriched at the plaintiffs' expense.

Polonski, 137 F.3d at 147-48.

In *Polonski,* the district court's finding that the union breached its DFR by attempting to reopen the arbitration award was not a substantial benefit to the entire union membership. Likewise, the Ninth Circuit's finding that USAPA breached its DFR was not a substantial benefit to the entire USAPA membership. The seniority dispute between the East and West pilots did not establish a significant new principle of labor law beneficial to all union members. The "generalized lesson" that a union cannot breach its DFR is not a substantial benefit that would form the basis for fee shifting. It is further not a lesson to USAPA, which is no longer a certified bargaining representative. Any "lesson" to the APA is an insufficient reason to award fees given that West Pilots are not moving to redistribute the costs of the litigation onto APA members. *See* Doc. 342 at 7. Similar to the plaintiffs in *Polonski*, *Addington III* conferred a substantial benefit among

one group of union members – the West Pilots. West Pilots received the outcome they wanted – that USAPA must advocate for the Nicolau Award. USAPA members here would not be unjustly enriched at West Pilots' expense.

The vindication of all union members' DFR rights argument was also rejected by the Tenth Circuit in *Aguinaga*. The district court awarded attorneys' fees on the ground that the jury's verdict that the union breached its DFR "vindicated the right of all Union members to be fairly represented by the Union." 993 F.2d at 1483. The Tenth Circuit reversed, finding that the record failed "to establish that the benefits received by Plaintiffs and the rest of the Union membership meet the commonality requirement of the common benefit exception." *Id.*, at 1484. "[S]hifting fees to the Union does not result in the costs of the litigation being borne by the group that 'would have had to pay them had it brought suit.'" *Id.*, quoting *Mills*, 396 U.S. at 397. The plaintiff class received money damages including back pay, lost benefits, and prejudgment interest. The entire union membership did not receive those benefits, but instead only the "reassurance that in the future, the Union would treat members more fairly, and investigate and pursue remedies against employers who breach collective bargaining agreements." *Id.*, at 1483. Under those circumstances, "no Union member, outside Plaintiff class, could have brought suit to redress Plaintiffs' injuries." *Id.*, at 1484.

The *Aguinaga* court further reversed the award of attorneys' fees because "t[]he assessment of attorney fees against the entire Union membership here does not spread the costs of litigation in proportion to the benefits received." *Id.*, at 1484-85. "Under the district court's shifting of fees to the Union, Plaintiffs would not be required to pay any greater portion of the attorney fees even though Plaintiffs received a substantially greater benefit." *Id.*, at 1485. The Court found that "[s]uch a result would allow Plaintiffs to be unjustly enriched at the expense of the Union membership." *Id.*

In a DFR case arising from a union's failure to comply with a binding arbitration award resolving a seniority dispute resulting from an airline merger, the Fifth Circuit affirmed a finding that the union breached its DFR but vacated the award of attorneys' fees because "the award to Plaintiffs does not 'inure to the benefit of all union members.'" *Rogers v. Air Line Pilots Ass'n, Intern.*, 988 F.2d 607, 616 (5th Cir. 1993) (quoting *Guidry v. IUOE, Local 406*, 882 F.2d 929, 944 (5th Cir. 1989)).

POINT IV

NO ENTITLEMENT TO FEES AND COSTS FOR *ADDINGTON I* AND *II*

In addition to the applicability of the foregoing analysis regarding which pilots did and did not benefit from the *Addington III* result, separate considerations mandate rejection of common benefit fees and costs for *Addington I and II*.

Subject matter jurisdiction is a condition precedent to an award of attorneys' fees. Both *Addington I* and *II* were dismissed on ripeness grounds, thus shedding the court of subject matter jurisdiction over the West Pilots' claims against USAPA. Because the district courts in *Addington I* and *II* never had jurisdiction over the West Pilots' claims against USAPA, there can be no grant of attorneys' fees and costs for *Addington I* and *II*. *Smith v. Brady*, 972 F.2d 1095, 1097 (9th Cir. 1992) ("[I]f the district court lacked jurisdiction over the underlying suit, 'it had no authority to award attorney's fees.'") (quoting *Latch v. U.S.*, 842 F.2d 1031, 1033 (9th Cir. 1988); *Skaff v. Meridien North Am. Beverly Hills, LLC*, 506 F.3d 832, 837 (9th Cir. 2007) ("A court that lacks jurisdiction at the outset of a case lacks the authority to award attorneys' fees."); *In re Knight*, 207 F.3d 1115 (9th Cir. 2000) (Where the district court dismissed the ERISA action for lack of subject matter jurisdiction, it also had no authority to grant attorneys' fees.); *Branson v. Nott,* 62 F.3d 287 (9th Cir. 1995) (Vacating the district court's grant of attorneys' fees because it lacked subject matter jurisdiction over the purported civil rights action, and thus lacked the power to award attorneys' fees under the civil rights attorney fee statute.),

cert. denied 516 U.S. 1009 (1995); *Clark v. Busey*, 959 F.2d 808, 810 (9th Cir. 1992) ("Subject matter jurisdiction to decide the merits of the underlying action is a 'condition precedent' to an award of fees or costs under the EAJA.").

That West Pilots seek attorneys' fees for *Addington I* and *II* under the common benefit exception does not grant this Court authority to award them fees and costs for litigation in which no court had jurisdiction. The common benefit rule is merely an exception to the American Rule that parties bear their own attorneys' fees. Underlying the exception is the condition that a court had jurisdiction over the litigation in the first place. No court had jurisdiction over *Addington I* and *II*, and fees and costs should not be awarded.

Donovan v. CSEA Local Union 1000, 784 F.2d 98, 103-104 (2d Cir. 1986), cited by West Pilots (Doc. 342 at 5), does not support their claim for fees and costs for *Addington I* and *II*. The issue in *Donovan* was whether an "award of attorneys' fees to Title IV intervenors is permissible under the "common benefit" exception to the American Rule." 784 F.2d at 102. Under Title IV, the Secretary of Labor has exclusive authority "to bring post-election challenge suits and permits the aggrieved election candidate to intervene solely to support the Secretary's complaint." *Id.* In holding that a common benefit award of attorneys' fees is permissible to a Title IV intervenor, the Second Circuit found that "[e]ven if the intervenor provides little benefit at the trial stage compared to that provided by the Secretary, the intervenor usually confers a substantial benefit on the union membership by identifying, investigating and presenting for the Secretary's ultimate prosecution, evidence of union violations of Title IV." *Id.*, at 103. Unlike West Pilots' application for attorneys' fees, the issue was not a claim for attorneys' fees for past *unsuccessful* litigation. In fact, prior to the Title IV suit, the intervenor in *Donovan* had commenced a suit against defendant CSEA that was dismissed. *Id.*, at 100. Like West Pilots here, the intervenor sought attorneys' fees in the

Title IV action for work on the unsuccessful action. The district court denied attorneys' fees for the case that was dismissed, and the intervenor did not appeal the denial, a fact that West Pilots conveniently omit. *Id.*, at 101.

Courts have granted attorneys' fees under the common benefit exception for work done on cases that were dismissed when the dismissed litigation resulted in defendants taking corrective action or when defendants caused the litigation to become moot. In *Angoff v. Goldfine*, 270 F.2d 185 (1st Cir. 1959), cited by West Pilots (Doc. 342 at 5), the appeals court ruled that the district court erred in refusing to consider in its fee award a prior mandamus proceeding that resulted in a monetary benefit of approximately $230,000. *Id.*, at 190. The mandamus action had been dismissed. Nevertheless, prior to the commencement of the litigation at issue, monies were paid that had the result of benefiting the plaintiff minority shareholders.

Likewise, the Ninth Circuit in *Reiser v. Del Monte Properties Co.* held that plaintiffs were not, as a matter of law, precluded from seeking attorneys' fees for an action that was dismissed as moot. 605 F.2d 1135 (9th Cir. 1979). The plaintiffs accused defendants of issuing a false and misleading proxy statement in violation of the Securities Act of 1933. After the suit was filed, defendants withdrew the challenged proxy statement and issued a new proxy statement. "The new statement acknowledged that the issues raised in this suit were one of several reasons for the modifications in the statement." *Id.*, at 1137. In such a situation where defendants' actions caused the litigation to become moot, and defendants corrected the conduct that was the basis of the litigation, the Ninth Circuit held that plaintiffs were not precluded as a matter of law from seeking attorneys' fees.[3] *Id.*, at 1140.

[3] The Court expressed no opinion concerning the merits of the attorneys' fees claim, which it left to the discretion of the trial judge. *Id.*, at 1140.

Such is not the case with *Addington I* and *II*. West Pilots lost both actions and neither resulted in any action by USAPA in furtherance of West Pilot interests prior to the commencement of *Addington III*. The dismissals of *Addington I* and *II* were not a result of actions taken by USAPA that West Pilots would have deemed "corrective." On the contrary, USAPA consistently maintained its rejection of the Nicolau Award, and neither litigation had any beneficial result to the West Pilots or the USAPA membership other than their dismissal. Nor did *Addington I* and *II* help achieve the decision in *Addington III*, in whole or part.

Citing to *Wininger v. SI Management L.P.*, 301 F.3d 1115 (9th Cir. 2002), West Pilots claim they are eligible for attorneys' fees for *Addington I* and *II* because "[w]hen courts make a common benefit fee and cost award, they can include fees and costs arising from other litigation that 'helped' achieve the result in the litigation at issue." Doc. 342 at 4. *Wininger* does not stand for such a proposition.[4] *Wininger* was a class action alleging violations of federal securities laws and regulations governing proxy solicitations concerning a 1997 Plan to dissolve a limited partnership formed to own the capital stock of company Synthetic Industries, Inc. Prior to the 1997 Plan, there was a 1996 Plan in which the defendants sought to liquidate the partnership's common stock in the company. Plaintiffs opposed the 1996 plan and took steps to call for a meeting to vote on the 1996 Plan. The 1996 Plan was thereafter withdrawn. Unlike the *Addington* litigation, **there was no litigation over the 1996 Plan.** Defendants thereafter announced the 1997 Plan which sought to dissolve the partnership. Plaintiffs brought suit, and obtained an injunction. The 1997 Plan was withdrawn, and a settlement was reached resulting in a

[4] *Jenkins v. State of Missouri*, 862 F.2d 677 (8th Cir. 1988), also cited by West Pilots (Doc. 342 at 5), is irrelevant to West Pilots' application. *Jenkins* is not a common benefit fee award case. It concerned an award of attorneys' fees under the Civil Rights Attorneys Fees Award Act, 42 U.S.C. § 1988.

common fund being created for the plaintiff class of limited partners. The litigation and settlement resulted in a significant increase in value for the company.

Plaintiffs' counsel sought attorneys' fees for their work in stopping the 1996 Plan and the 1997 Plan. An issue on appeal was whether the district court had jurisdiction to award fees to plaintiffs' counsel for their work in opposing the 1996 Plan even though it was non-litigation work. The Ninth Circuit stated that "[t]he level of relatedness to the ongoing litigation is of less importance than the extent to which the non-litigation work was calculated to – and in fact did – bring about the common fund presently under the district court's control." *Id.*, at 1121 n.3. The court found the benefits to the plaintiffs stemming from plaintiffs' counsel's work in preventing the 1996 Plan could be traced with enough accuracy such that "because the district court had jurisdiction over the resulting fund, it was within its equitable power to award fees for work that helped create the fund, even though the fees compensated for work done outside the strict confines of the litigation immediately before the court." *Id.*, at 1121.

Wininger is far removed from West Pilots' application. The *Addington* litigation did not result in a common fund, and *Addington I* and *II* were both dismissed on ripeness grounds, and thus did not help achieve the result in *Addington III*. *Addington I* was vacated on appeal. Precedent uniformly holds that an appellate court's decision vacating a lower court's judgment or order "effectively annuls or sets aside the lower court's decision for all purposes" and "the appealed from judgment or order" should be treated "as if [it] never occurred." C. Goelz & M. Watts, Rutter's California Practice Guide: Federal Ninth Circuit Civil Appellate Practice § 10:231, citing *State of Calif. Dept. of Social Servs. v. Thompson*, 321 F.3d 835, 847 (9th Cir. 2003). Thus, the Ninth Circuit did not rely on *Addington I* in deciding *Addington III*.

The Ninth Circuit in *Addington I* did not set forth a new ripeness analysis. Rather, the decision relied upon long established ripeness principles. Moreover, there is no basis

for West Pilots' assertion that the ripeness analysis in *Addington I* informed the decision in *Addington III*. West Pilots' claim that "if Plaintiffs had not obtained the ripeness ruling in *Addington I*, a court looking at the issue years later might have held that the DFR claim accrued in April, 2008 and that the statute of limitations expired in October, 2008" (Doc. 342 at 9) is imaginary, pure speculation and without merit. Their efforts did not obtain the ripeness ruling; USAPA's did, and there is nothing to suggest that bringing an unripe claim shielded Plaintiffs from an improper determination of time bar.

The same goes for *Addington II*. West Pilots would have this Court believe that *Addington II* was US Airways' declaratory judgment action against USAPA. It was not. *Addington II* was West Pilots' cross-claim DFR action against USAPA which this Court dismissed. Thus, there was no record in *Addington II* for the Ninth Circuit to rely on in deciding *Addington III*. Aside from mentioning the facts of US Airways' declaratory judgment action for background information, the Ninth Circuit did not rely on the outcome of that action in rendering its decision in *Addington III*. That **West Pilots** may have used work done in *Addington I* does not mean the entire USAPA membership obtained benefits that can be accurately traced to *Addington I* and *II*. Moreover, West Pilots provide no authority for their claim that a co-defendant is liable under common benefit for fees incurred in an action commenced by the employer. If West Pilots are seeking fees and costs for *Addington II*, then they should be seeking them from the plaintiff in that action – the employer.

POINT V

WEST PILOTS SEEK FEES AND COSTS ON IMPERMISSIBLE MATTERS

West Pilots claim "Addington III vindicated a hotly contested DFR claim based on USAPA's failure to implement the Nicolau Award, and Addington I and II substantially helped obtain that result." Doc. 342 at 3. Even assuming, *arguendo,* that they are entitled to fees (which USAPA argues they are not), their motion nevertheless improperly seeks

fees and costs for matters unrelated to their DFR claims against USAPA and/or did not "help" obtain the result in *Addington III*. As to those unrelated and unhelpful matters, there is absolutely no basis in fact or law to award fees and costs.

Case No. 08-1728 (Case Against Individual Defendants):

West Pilots improperly seek attorneys' fees and costs for *Addington v. Bradford, et al.*, Case No. 08-1728-NVW. Doc. 342-1, ¶2. The case was originally filed on September 4, 2008 in the Superior Court of the State of Arizona for the County of Maricopa against six East Pilots alleging breach of common law contract obligations. *Id.*, Doc. 1 and Doc. 8.[5] The case was removed to federal court. West Pilots thereafter moved to remand the case back to state court arguing that "Defendants' removal is a meritless, transparent attempt to recharacterize Plaintiffs' valid state law claims into federal question claims that would be preempted by the . . . RLA . . . and . . . LMRA." *Id.*, at Doc. 9. Denying that the action presented a federal question, pled a breach of the CBA, or otherwise relied on federal law, West Pilots contended that it was "an action to enforce common law contract obligations related to an uncommon law arbitration and is brought against ordinary individuals who were parties to that contract and that arbitration." *Id.*, Doc. 9, at 2. West Pilots' motion was denied. *Id.*, Doc. 20. The case was eventually consolidated with *Addington I*, and was thereafter dismissed with prejudice for failure to state a claim. *Addington I* Docket, Doc. 118. West Pilots did not appeal the dismissal. As the litigation is unrelated to *Addington III*, and did not render a "substantial benefit" to the entire USAPA membership, West Pilots are not entitled to any fees and/or costs from this action. *See Webb v. Sloan*, 330 F.3d 1158, 1169 (9th Cir. 2003) ("If the hours are unrelated and unsuccessful, they should not be included in the award of fees."). Because the time sheets submitted for *Addington I* include entries for this unrelated litigation, and

[5] West Pilots filed *Addington I* on the same day.

the entries do not delineate with any specificity what litigation and matters were being addressed on any given day, USAPA is unable to parse out those entries relating specifically to this unrelated litigation.

North Carolina RICO Action Commenced by USAPA:

West Pilots' time sheets for *Addington I* include entries for a RICO action filed in North Carolina prior to the filing of *Addington I*. *See e.g.*, Doc. 342-4. West Pilots provide no explanation as to why they are seeking fees and costs for work on this action. As the litigation is unrelated to *Addington III*, and did not render a "substantial benefit" to the entire USAPA membership, West Pilots are not entitled to any fees and/or costs from this action.

Work related to Claims Against US Airways in *Addington I, II* and *III*:

In *Addington I*, West Pilots asserted two claims against US Airways. Count One alleges that US Airways' plan to furlough West Pilots is in breach of the CBA. *Addington I* Docket, Doc. 86, ¶¶83-97. Count Two alleges US Airways is in breach of the CBA by failing to negotiate with USAPA in good faith to implement the Nicolau Award. *Id.*, at ¶¶98-104. On September 18, 2008, West Pilots moved for a preliminary injunction enjoining US Airways "from furloughing any premerger America West pilot before it re-furloughs all US Airways pilots who were on furlough status at the time of the merger." *Id.*, Doc. 12, at 1. On September 29, 2008, US Airways moved to dismiss the claims against them for lack of jurisdiction. *Id.*, Doc. 30. On November 20, 2008, the court issued an order denying West Pilots' motion for a preliminary injunction against US Airways, and granting US Airways motion to dismiss. *Id.*, Doc. 84. West Pilots did not appeal either ruling.

On July 26, 2010, US Airways filed a declaratory judgment action against USAPA and the *Addington I* plaintiffs (referred to by West Pilots as *Addington II*). *Addington II* Docket, Doc. 1.On September 7, 2010, West Pilots filed a cross-claim against USAPA

for breach of its DFR. *Id.*, Doc. 34. On September 30, 2010, USAPA moved to dismiss the West Pilots' cross-claim. *Id.*, Doc. 50. On June 1, 2011, this Court granted USAPA's motion, and dismissed the DFR cross-claim because it was not ripe, thus ending West Pilot's DFR claim against USAPA. *Id.*, Doc. 85, at 9.

On March 3, 2013, West Pilots commenced the action they refer to as *Addington III* against USAPA and US Airways. *Addington III* Docket, Doc.1. As to US Airways, West Pilots alleged the company breached the Transition Agreement. *Id.*, Doc. 134. US Airways moved on April 4, 2013 to dismiss the claim against it. *Id.*, Doc. 28. This Court granted US Airways' motion to dismiss. *Id.*, Doc. 122.

West Pilots claim they are entitled to a common benefit award of fees and costs for *Addington I, II,* and *III* because the litigation achieved the generalized lesson that a union must abide by its DFR. Even if there was any validity to this claim, West Pilots are ineligible for fees and costs related to their claims against **US Airways** in *Addington I* and *III*, including opposing US Airways' motions to dismiss, because those claims are unrelated to the "substantial benefit" West Pilots claim was afforded to the entire USAPA membership. For the same reason, West Pilots are ineligible for fees and costs in *Addington II* for work on matters unrelated to their DFR claim against USAPA, which was dismissed on June 1, 2011, including work relating to US Airways' appeal to the Ninth Circuit which they later withdrew.

West Pilots' Claim for Refund of Agency Fees and Membership Dues in *Addington I*:

In their motion for class certification, West Pilots "sought class-wide relief in the form of a refund of union agency fees and membership dues, as well as a vacatur of such fees and dues obligations." *Addington I* Docket, Doc. 287 at 1. USAPA moved for judgment on the pleadings on that issue (*id.*, Doc. 272), and the court denied that specific class-wide relief and held that "[p]laintiffs' claims for monetary and injunctive relief relating to past and future payments of union dues and fees are dismissed with prejudice."

Id., Doc. 287 at 3. West Pilots did not appeal that ruling. The class-wide relief sought is unrelated to West Pilot's claim that *Addington I* "helped" obtain the result in *Addington III*, which they define as the generalized lesson of a union's DFR. Moreover, this claim was not pursued in *Addington III*, and was not addressed by the Ninth Circuit. West Pilots are not entitled to fees and costs for work on this dismissed claim.

Motion for Relief from Judgment Dismissing for Lack of Ripeness in *Addington I*:

On August 6, 2010, two months after the Ninth Circuit held that West Pilots' DFR claim was not ripe, West Pilots moved for relief under Fed.R.Civ.P. 60(b) "expressly ask[ing] the Court to vacate the judgment mandated by the Court of Appeals on the very issue disposed of by the Court of Appeals." *Addington I* Docket, Doc. 663 at 4; *see also* Doc. 645. The court denied the motion finding that "[v]acating the order of dismissal based on ripeness would violate the unconditional mandate for dismissal for lack of ripeness." *Id.*, Doc. 663 at 4. West Pilots' motion was frivolous, not addressed by the Ninth Circuit in its decision in *Addington III*, and unrelated to the basis for which West Pilots seek fees and costs. Fees and costs for work on the motion should be denied.

West Pilots' Petition for Certiorari in *Addington I*:

West Pilots provide no explanation for why they should be awarded fees and costs for work done on their unsuccessful petition for certiorari. The petition did not "help" achieve the result in *Addington III*, nor provide any benefit to the entire USAPA membership. Fees and costs should be denied.

McCaskill-Bond Claim in *Addington III*:

The Ninth Circuit "vacate[d] as moot the portion of the district court's decision denying the Plaintiffs separate representation in the McCaskill-Bond proceedings, with instructions to dismiss." *Addington v. US Airline Pilots Ass'n*, 791 F.3d 967, 992 (9th Cir. 2015). West Pilots are not entitled to fees and costs incurred on the McCaskill-Bond claim. The claim was dismissed as moot, and not as a result of any corrective action by

USAPA. *See Angoff*, 270 F.2d 185; *Reiser*, 605 F.2d 1135. The McCaskill-Bond issue went to arbitration. USAPA opposed the West Pilots' position at arbitration, and the "Preliminary Arbitration Board granted the West Pilots relief, thus rendering the West Pilots' claim moot 'due to circumstances unattributable to any of the parties.'" *Addington*, 791 F.3d at 992 n. 13. It was "unhelpful" with respect to any ruling that conferred any benefit to West Pilots, let alone the entire US Airways pilot group.

Motion to Transfer *Addington III* to Judge Wake:

West Pilots moved under Local Civil Rule 42.1 to transfer *Addington III* to Judge Wake. *Addington I* Docket, Doc. 642. USAPA opposed the motion, which was denied because it did not comply with the plain language of LRCiv. 42.1(a) which "requires for an unconsented transfer that the related case be 'pending' before the transferee judge alone is authorized to transfer the other case to himself." *Id.*, Doc. 666 at 11. The motion is unrelated to the outcome of *Addington III*, and the purported "substantial benefit" conferred on the membership. West Pilots are not entitled to fees and costs incurred for work on the motion.

POINT VI

WEST PILOTS ARE NOT ENTITLED TO FEES AND COSTS PAID BY LEONIDAS

West Pilots rely on *Morrison v. C.I.R.*, 565 F.3d 658 (9th Cir. 2009) for their claim that "an individual may 'incur' fees even if those fees are paid initially by a third party." Doc. 342 at 12. *Morrison* is inapplicable, and, indeed, the West Pilots acknowledged such in an earlier stage of litigation.[6] It is not a common benefit or DFR case. It did not arise

[6] It is ironic that West Pilots rely on *Morrison* now. USAPA cited to *Morrison* in its opposition papers to West Pilots' motion to quash the subpoena on Leonidas. USAPA argued it was entitled to discovery on whether attorneys' fees have already been paid by Leonidas, and whether West Pilots had an obligation to repay any fees paid. Doc. 163 at 6. West Pilots replied:

> USAPA fails to explain how *Morrison v. C.I.R.*, 565 F.3d 658 (9th Cir. 2009) bears on awarding fees pursuant to common benefit doctrine. Indeed, *Morrison* has no such bearing because it addressed 26 U.S.C. § 7430, a provision that allows fees only if they were "incurred" by the

under the RLA. It was a successful challenge to a tax deficiency claim by the IRS. Morrison prevailed and sought attorneys' fees under the IRC, 26 U.S.C. § 7430. The Tax Court denied fees on the ground that "a litigant can *never* 'incur' fees if the fees are first paid by a third party." *Id.*, at 667 (emphasis in original). The Ninth Circuit's reversal rested on its analysis of the definition of "incur" as used in § 7430, and the legal standard applied by the court is wholly irrelevant to West Pilots' claim here.

Even if *Morrison* applied, West Pilots provide no evidence that they "incurred" any fees. The Tax Court in *Morrison* denied fees because the fees were paid by third party Caspian. The Ninth Circuit remanded the case because there was "little direct evidence of the fee arrangement between Caspian and Morrison." *Id.*, at 667. Indeed, on remand, the Tax Court held that Morrison failed to prove he has either an absolute or continent obligation to repay attorneys' fees. *Morrison v. C.I.R.*, T.C. Memo, 2011-76 (April 4, 2011), *aff'd* 506 Fed.Appx. 568 (9th Cir. 2013).

West Pilots fail to comply with L.R.Civ. 54.2 and have provided even less "evidence" other than counsel's unsupported claim that "Plaintiffs are obligated to repay Leonidas for the attorneys' fees and costs that Leonidas advanced on their behalf." Doc. 342-1 at 4 n. 3. Indeed, the engagement letters with the individual plaintiffs in *Addington I* state that Leonidas "has been collecting funds to pay and has paid all legal fees to date relating to your representation . . . Our firm will have no recourse against you personally if Leonidas fails to make payments of your legal fees . . . By signing this engagement

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> litigant. *See id.* at 660 (explaining that "Section 7430 provides: 'In any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection or refund of any tax, interest, or penalty under this title, the prevailing party may be awarded a judgment or a settlement for . . . reasonable litigation cost incurred in connection with such court proceeding.' *Id.* § 7430(a)(2).") (emphasis added). There is no such requirement to limit a common benefit award to fees "incurred."

Doc. 168 at 5-6.

letter you are assuming no financial responsibility relating to the engagement, but you are consenting to this third party fee payment arrangement." *Addington I* Docket, Doc. 196-9. West Pilots also do not provide any agreement between class members and Leonidas, if such an agreement existed. The purpose of Leonidas was to fundraise for West Pilots' legal efforts. *Id.* To that end, they solicited funds from the pilots on whose behalf the *Addington* litigation was filed – West Pilots. *See* Doc. 149 at 4 ("West Pilots formed Leonidas, LLC, for the sole purpose of collecting voluntary West Pilot contributions to be used to defend the Nicolau Award in and out of litigation.").

USAPA sought the "evidence" the Ninth Circuit held was necessary in *Morrison* when it issued a subpoena (*see e.g.*, Doc. 149-2, Demands 12 and 13) and 30(b)(6) deposition notice on Leonidas (*see* Doc. 178-1). West Pilots moved to quash both, arguing they were "unduly burdensome" and "immaterial to the allegations and claims at issue", including their claim for attorneys' fees. Doc. 149 at 7; Doc. 169 at 5-6. They argued that "it is premature to conduct any discovery related to a fee award before there is a determination of prevailing party." Doc. 149 at 6; *see also* Doc. 178 at 11 ("When it is time to address Claim Three, the Court may want to assure itself that the award will fairly accrue to the benefit of Leonidas. That might require some inquiry into agreements between Plaintiffs and Leonidas and it might, based on that inquiry, require tailoring the fee award to have that effect. But this is not time to address those issues.").

This Court granted the motions to quash. Doc. 194 at 4. Having objected to any discovery on Leonidas, West Pilots cannot now claim they are entitled to fees and costs incurred in the *Addington* litigation when their own records show that it was, in fact, Leonidas, that was the "client" and not the individual plaintiffs or the West Pilot class.[7] *See Wall Indus., Inc. v. United States*, 15 Cl. Ct. 796, 802 (1988), *aff'd,* 883 F.2d 1027

[7] The billing records show that all work was done on an account entitled "Leonidas, LLC".

(Fed.Cir. 1989) (Plaintiff ineligible for attorneys' fees where its certified public accountants, as a condition of payment, required plaintiff to initiate action, selected the attorneys to prosecute the claim, and controlled the tactics and strategies used in the litigation.).

West Pilots have not prevailed in their burden to prove they are entitled to a common benefit award for fees paid by non-party Leonidas.[8]

POINT VII

WEST PILOTS ARE NOT ENTITLED TO NON-TAXABLE COSTS

West Pilots provide no authority for their claim that they are entitled to non-taxable costs. Litigation costs available under Fed. R. Civ. P. 54(d) are limited to those enumerated in 28 U.S.C. §§ 1821(b) and 1920 absent statutory authority and clear Congressional intent providing for those costs. *See Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) ("Any argument that a federal court is empowered to exceed the limitations explicitly set out in §§ 1920 and 1821 without plain evidence of congressional intent to supersede those sections ignores our longstanding practice of construing statutes *in pari material*."). The RLA does not provide for non-taxable costs. Nor has Congress provided for them in cases arising under the RLA. *Ahwatukee Custom Estates v. Bach*, 193 Ariz. 401, 404, 973 P.2d 106, 108-09 (1999), cited by West Pilots (Doc. 342 at 13), is inapplicable. The plaintiff in *Ahwatukee* sought non-taxable costs pursuant to a contract. Here, no such contract allows for recovery of non-taxable costs.

Respectfully submitted this 12th day of January, 2016.

Martin & Bonnett, P.L.L.C.

By: s/Susan Martin
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[8] USAPA requests leave to respond to any new arguments made by West Pilots in their reply, if any, on this issue.

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2016, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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