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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Don Addington; *et al*, *Plaintiffs*, vs. US Airline Pilots Ass'n; and US Airways, Inc., *Defendants*. _____ US Airways, Inc., *Intervenor*.	CASE NO. 2:13-CV-00471-ROS **REPLY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND NON-TAXABLE COSTS (DOC. 342)** Oral Argument Requested

Defendant USAPA failed to raise valid objections to Plaintiffs West Pilots' motion for fees and nontaxable costs incurred vindicating their right to fair representation under the Railway Labor Act. Plaintiffs address each point raised by USAPA in its response, Doc. 347, in the order presented therein.

I. Plaintiffs complied with the local rules.

USAPA failed to adequately explain how Plaintiffs failed to comply with the local rules. At best, it stated that Plaintiffs failed to serve a separate "Bill of Costs." The local rules provide for a bill of costs for taxable costs. Plaintiffs' motion concerns all costs, including non-taxable costs, which are awardable under common benefit doctrine, rather

than the limited taxable costs awardable to a prevailing party when no other fee and cost shifting procedure applies. Plaintiffs, therefore, had no reason to submit a separate Bill of Costs. USAPA otherwise merely cited to local rules, asserting without explanation how they were violated or how USAPA was prejudiced. Importantly, USAPA does not dispute that it received the Declaration of Marty Harper and all supporting documentation regarding the fees and costs Plaintiffs seek. USAPA's complaint about not receiving a separate Bill of Costs does not, therefore, raise an arguable issue in response to Plaintiffs' motion. The Court, therefore, should disregard USAPA's broad and unsupported assertion that Plaintiffs' fee motion failed to comply with the local rules.

II. "Common Benefit" doctrine applies.

In two parts of its brief, USAPA argues that common benefit doctrine does not apply to a duty of fair representation (DFR) claim. USAPA is wrong. As explained in Plaintiffs' memorandum, common benefit doctrine applies where a DFR plaintiff vindicates DFR rights applicable to all members of the union benefit — even those who opposed the plaintiff on the merits of his DFR claim. *See Harrison v. United Transp. Union*, 530 F.2d 558, 564 (4th Cir. 1975). Such is the case here, where Plaintiffs vindicated the DFR rights of all members of USAPA to be fairly represented in seniority proceedings.

It does not matter if a majority of USAPA's membership opposed Plaintiffs' DFR claim on the merits. Unions are governed by majority rule (albeit constrained by the DFR). It, therefore, is more than likely that a majority of the union membership supported conduct challenged in a DFR claim and opposed the DFR claim on the merits. Nonetheless, the majority benefits from a successful DFR claim if it establishes a precedent or otherwise corrects union conduct that in the future could benefit other union members. As happened here, workers are entitled to a common benefit award if they vindicated rights that apply to the entire worker group because such an outcome "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).

Although *Harrison* suggests that all successful DFR claimants are entitled to a common benefit award, a few Circuits (not the Ninth) have made exceptions to such a rule where there primary purpose of the claim was to obtain a monetary award, *e.g.*, *Aguinaga v. United Food and Commercial Workers Intern. Union*, 993 F.2d 1480 (10th Cir. 1993); *Argentine v. United Steelworkers of Am., AFL-CIO*, 287 F.3d 476 (6th Cir. 2002), or where the claim merely vindicated a well-established legal right, *e.g.*, *Polonski v. Trump Taj Mahal Assocs.*, 137 F.3d 139 (3d Cir. 1998). Neither of these exceptions applies here. Moreover, the Ninth Circuit did not apply the "monetary award" exception when it upheld a common benefit award in a matter where the plaintiff received a substantial monetary award as damages on a DFR claim. *Murray v. Laborers Union Loc. No. 324*, 55 F.3d 1445, 1454 (9th Cir. 1995).

The plaintiffs in *Aguinaga* obtained a substantial monetary award on a DFR claim. The Tenth Circuit found that it was error to make a common benefit award because the primary benefit was monetary. 993 F.2d at 1483. While it recognized that some benefit would accrue to the union membership, this did not support a common benefit award because the same benefit would not apply to the plaintiffs because they were not union members. *Id*. Hence, although both the plaintiffs and the union members benefited from the DFR litigation, they did not share any benefits in common. *Id*. at 1484. Finally, the court noted that common benefit doctrine should not have been applied because there "was no injunctive relief obtained in this case to effect any changes in the Union's practices or procedures." *Id*. at 1497.

The *Argentine* court also reversed a common benefit fee award on the basis that the plaintiffs' primary benefit was monetary and that they did not obtain injunctive relief that would apply for all union members. *See* 287 F.3d at 489 ("Although Plaintiffs vindicated their free speech rights and thereby benefitted the Local as a whole, they also received compensatory and punitive damages that exceeded twice the stipulated value of the attorney fees.").

Even if *Aguinaga* and *Argentine* applied in the Ninth Circuit (which would be contrary to *Murray*), they would not apply here because the facts here are materially distinguishable from the facts of those cases. First, Plaintiffs did not seek or obtain a monetary award and they did obtain injunctive relief in both *Addington I* and *Addington III*. Second, Plaintiffs are members of USAPA. Thus, these decisions do not support making an exception to common benefit doctrine here.

The plaintiffs in *Polonski* obtained relief on the principle that it violated the DFR to repeat seniority arbitration merely because the award was unpopular with the union majority. Because it was well-established law that arbitrations should not be repeated for such reasons, the Third Circuit held the litigation did not provide a benefit to other union members because it merely provided "'generalized lessons' of well-established law." 137 F.3d at 147. Even if *Polonski* applied in the Ninth Circuit (which would be unlikely because it has not been adopted by other Circuits), it would not apply here because the facts here are materially distinguishable from the facts of that case. The DFR claim here was not resolved by the mere application of well-established law. No other worker majority has successfully evaded implementation of a seniority arbitration award by forming a new union and having that union disclaim that it is bound by the arbitration. No other worker group has attempted to evade a contractual agreement (with the employer) to advocate for implementation of the result of seniority arbitration by renegotiating that contract. This series of DFR litigations has established new law showing that such actions, when not supported by a legitimate union purpose, breach the DFR.

The outcome of this litigation does more than establish legal principles that hypothetically benefit all union members. It benefits the members of USAPA in the current merger with American Airlines. At present, the USAPA pilots (East and West) are engaged in seniority arbitration with the much larger legacy American Airlines pilot group. As a result of this DFR litigation, the legacy American Airlines pilots are on notice that they cannot use the devices used by the East Pilots to evade implementation of

this currently ongoing seniority arbitration if they are dissatisfied with the result. This Court, therefore, should find that entire membership of USAPA benefitted form this DFR litigation. Consequently, it is entirely appropriate to make a common benefit award here.

III. The court should make a common benefit award in *Addington III*.

The outcome of *Addington III* is (1) judgment that USAPA breached its DFR by making a contract that omitted the obligation to advocate for implementation of the Nicolau Award and (2) an order that USAPA cannot participate in the US Airways-American Airlines seniority arbitration unless it advocates for using the Nicolau Award.

Plaintiffs are entitled to a common benefit fee award in *Addington III* notwithstanding that many East Pilots want USAPA to advocate against implementation of the Nicolau Award. What matters is that all USAPA pilots—East and West—benefitted from this litigation because it established that a majority of union membership cannot use the devices used by the East Pilots to evade an agreement to implement the award from a seniority arbitration. The question here, in other words, is not (as USAPA argues) whether all of its members will benefit from implementation of the Nicolau Award. Rather, the question is whether all of its members benefit from establishing that a union majority cannot evade an agreement to advocate to implement a seniority arbitration award by forming a new union and arguing that the agreement did not pertain to that new entity. Nor can they evade such an agreement by making a new contract with the employer that omits such an obligation.

As explained above, the result here benefits all union members because they could find themselves in the minority in a future merger. Moreover, it benefits these USAPA members here because they are the minority group in the current merger with the legacy American Airlines pilots. If this case had gone the other way, the legacy American Airlines pilot majority could try to do to the USAPA members what the East Pilots did to the West Pilots if they are unhappy with the seniority list that is expected to issue thus summer. The result here establishes that they cannot. The Court, therefore, should reject USAPA's argument that Plaintiffs are not entitled to a common benefit fee award for

Plaintiffs' litigation expenses (attorneys' fees and nontaxable costs) incurred in *Addington III*.

IV. The court should make a common benefit award, in *Addington III*, of litigation expenses incurred in *Addington I* & *Addington II*.

Plaintiffs concede that it will be somewhat unusual for the Court to award Plaintiffs the attorneys' fees and nontaxable costs that they incurred in prior, now-terminated but nevertheless inextricably intertwined litigation. But, it is not unprecedented. Indeed, there is persuasive authority for the proposition that the Court has such authority. *E.g.*, *Wininger v. SI Management LP*, 301 F.3d 1115, 1121 (9th Cir. 2002) ("We are aware of no case restricting a district court's equitable powers to award attorneys' fees to the litigation directly before the court" and "it was within [the district court's] 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"). The question then is not whether the Court has such authority but whether it should exercise that authority here. It should do so because the work in *Addington I* and *Addington II* substantially helped achieve the result in *Addington III*.

USAPA's arguments largely rests on cases that are off point because they address jurisdiction to make orders in closed cases. Those arguments are off point because Plaintiffs are not asking this Court to reopen *Addington I* and *Addington II*. Rather, Plaintiffs are asking the Court (1) to recognize that the expenses incurred in those actions provided a substantial benefit in *Addington III* and (2) to find that it would be equitable to have all USAPA members share the burden of those expenses because they all benefit from the result in *Addington III*.

Plaintiffs explained in their fee memorandum, Doc. 342, that *Addington I* preserved the viability of the DFR claim by establishing that the claim was not ripe in 2008 and, therefore, could be brought later. They also explained that *Addington II* established that USAPA had to have a legitimate union purpose if it was going to make a contract that abrogated the commitment to advocate for implementation of the Nicolau Award. Thus,

notwithstanding that Plaintiffs did not get a final favorable DFR ruling in those cases, the results of those cases were a substantial factor in achieving success in *Addington III*.

USAPA argued that *Addington I* was unnecessary because it rested on application of existing law—that there was no question that the DFR claim was not ripe. Nonsense. Two judges found the claim was ripe and two found it was not. It just happened that those two were on the Court of Appeals. *Addington I*, therefore, could have gone the other way.

As explained in Plaintiff's brief, had they not litigated the DFR claim to final judgment in *Addington I*, a later court could have found that the claim was ripe in 2008 and was, therefore, untimely when brought thereafter. Indeed, USAPA argued in *Addington I* that the claim was brought too late!

Addington II established the limits on USAPA's freedom to contract. This Court held that USAPA had to have a "legitimate union purpose" to make a contract that abrogated the existing commitment to advocate for the Nicolau Award. That issue was hotly litigated. USAPA argued that it was free to change contract terms without regard to such a standard. This important issue that was established in *Addington II* provided the basis for the Ninth Circuit's ruling in *Addington III*.

In short, this Court should find that *Addington I* and *Addington II* substantially contributed and were necessary to achieving the result in *Addington III*. The Court, therefore, should view the Plaintiffs' expenses in these actions as expenses incurred for work done outside the strict confines of the litigation immediately before the court and include those expenses in its common benefit award.

V. Plaintiffs did not seek fees and nontaxable expenses on matters that did not support the result in *Addington III*.

Plaintiffs did not seek fees and nontaxable expenses in matters that did not support the results in *Addington III*[1].

Granted, Plaintiffs raised additional issues *Addington I* that did not ultimately *directly* contribute to the result in *Addington III*. But it was necessary for Plaintiffs to do so because their fiduciary duties to the class required that that make such claims if they were reasonable tenable or if that supported the central DFR claim against USAPA. For example, Plaintiffs made claims against individual defendants and US Airways in *Addington I*. Even though these claims failed, they supported the *Addington I* DFR claim because they prevented USAPA from evading liability by asserting that either US Airways or the individual defendants were responsible for USAPA's refusal to advocate for implementation of the Nicolau Award (the gravamen of *Addington I*). Plaintiffs also made a claim for disgorgement of dues and agency fees in *Addington I*. As class representatives Plaintiffs were obligated to make this claim or could have faced claims themselves for breaching fiduciary duties owed to the class. The Court, therefore, should include the fees (there were no nontaxable costs) incurred by Plaintiffs on these claims in the common benefit award.

The fees and nontaxable costs incurred petitioning the Supreme Court in *Addington I*, should also be include n the common benefit award here. Again, Plaintiffs' fiduciary duties required making such a petition where the *Addington I* Ninth Circuit panel was split and there was such a cogent and forceful dissent. The fees and nontaxable costs incurred in making that petition, therefore, should be included in the award here.

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[1] USAPA argues, without pointing to specific time entries, that Plaintiffs improperly seek fees and costs for defending West Pilots in USAPA's frivolous pre-*Addington I* RICO action that it filed against certain West Pilots in North Carolina. Counsel re-reviewd the time entries and do not see any that relate specifically to USAPA's frivolous RICO action. Rather, the pre-*Addington I* time was devoted to investigating and preparing the *Addington I* suit.

The motion to transfer to Judge Wake was part of *Addington II*, not *Addington III*. Because this was intertwined with the overall strategy in *Addington II*, those fees (there were no costs) should be included in the award.

USAPA agreed to arbitrate the McCaskill-Bond claim issue in lieu of it being decided on appeal. The West Pilots ultimately succeed on that claim when the arbitration panel ruled that the West Pilots should be separately represented in the McCaskill-Bond arbitration. Those fees, in all fairness then, should be included in the fee application.

VI. It is immaterial that Leonidas paid Plaintiffs' fees.

USAPA provides no authority for the proposition that a plaintiff must personally pay its fees as a prerequisite to making a fee claim. To the contrary, "an individual may 'incur' fees even if those fees are paid initially by a third party." *Morrison v. Comm'r of Internal Revenue*, 565 F.3d 658, 659 (9th Cir. 2009). *Morrison* required only that the plaintiff have at least a contingent obligation to pay their fees. There is clear evidence here that Plaintiffs have a contingent obligation to repay Leonidas to the extent they receive a fee award. In addition to evidence provided by Mr. Harper, Doc. 342-1 at ¶ 5 n.3, Plaintiffs attach a copy of their agreement with Leonidas on this issue. [CITATION].

VII. Plaintiffs are entitled to all costs, including non-taxable costs.

Common benefit doctrine functions to spread the expenses of litigation among those who benefit from the litigation. Thus, when courts discuss this doctrine they often do not distinguish fees from other kinds of litigation expenses or "costs":

> The common benefit theory permits successful individuals who have benefited fellow members of a class to compel those members to share the costs of obtaining the benefits they have received. In the ordinary common benefit case involving a union, reimbursement from the union treasury serves to shift the cost of litigation from the individual litigating member to the union's dues-paying membership as a whole.

Ackley v. Western Conference of Teamsters, 958 F. 2d 1463, 1479 (9th Cir. 1992) (emphasis added).

There is no logical reason to spread some litigation expenses but not others—no reason in this context to distinguish fees from nontaxable costs. To do so—to award fees but not nontaxable costs—would give unions incentive to increase such costs during the course of litigation to discourage plaintiffs. Moreover, it is entirely equitable to make a liberal award in the context of a DFR claim such as this where the real parties in interest are two groups of union members. Both pilot groups paid USAPA's fees and costs in all three *Addington* matters because they were paid from mandatory dues and agency fees that are assessed against both groups. In contrast, absent a common benefit award here, only the West Pilots would be paying Plaintiffs' fees and costs because they are paid from funds contributed by West Pilots to Leonidas. This would be on top of the fact that the West Pilots paid their pro rata share of all of USAPA's fees and costs in all three *Addington* matters, regardless whether USAPA's fees and costs were reasonable, or the costs were taxable or nontaxable. It is entirely equitable, therefore, to have all pilots—East and West—share the burden of the fees and all costs of both sides by making a common benefit award against USAPA.

Not only is it equitable for the Court to include nontaxable costs in its common benefit award, but such action is supported by controlling authority. The Supreme Court, for example, has long held that "allowance of counsel fees and other expenses entailed by litigation, but not included in the ordinary taxable costs regulated by statute, is 'part of the historic equity jurisdiction of the federal courts.'" *Vaughan v. Atkinson*, 369 U.S. 527, 530 (1962) (quoting *Sprague v. Ticonic Bank*, 307 U. S. 161, 164 (1939) (emphasis added). As a matter of equity and fairness then, the Court should included reasonable nontaxable litigation expenses in its common benefit award here. Only then will the members of both pilot groups equally bear the burden of funding this nearly eight-year long course of litigation.

VIII. Fees For Preparing Application For Fees And Costs

As noted in Plaintiffs' initial motion, "The law is well established that, when fees are available to the prevailing party, that party may also be awarded fees on fees, i.e., the reasonable expenses incurred in the recovery of its original costs and fees." *Brown v. Sullivan*, 916 F. 2d 492, 497 (9th Cir. 1990). Courts award reasonable fees incurred preparing a memorandum and related exhibits in support of a valid fee claim because "it would be inconsistent to dilute a fees award by refusing to compensate attorneys for the time they reasonably spent in establishing their rightful claim to the fee." *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 981 (9th Cir.2008). Plaintiffs, thus, are entitled to fees incurred preparing this fee claim, and a supplemental declaration of Marty Harper is included with this Reply. The Court should include those fees in the common benefit award here.

IX. CONCLUSION

The Court award Plaintiffs their reasonable attorneys' fees and related non-taxable costs in *Addington I, II,* and *III*. The total requested and supported by Plaintiffs' memoranda, the Declarations of Marty Harper, and all supporting documents is $3,635,481.85.

Respectfully submitted this 22nd day of January, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2016, I electronically filed the foregoing with the Clerk of the Court and electronically served a copy of the same upon all parties by using the CM/ECF system. In addition, I transmitted the foregoing via email and US Mail Service to the following:

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