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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE DISTRICT OF ARIZONA**

10 Don ADDINGTON, *et al.*,
11 *Plaintiffs,*
12
13 vs.
14 US AIRLINE PILOTS ASSN., and
US AIRWAYS, INC.,
15 *Defendants.*

CONSOLIDATED CASES NO.
2:08-CV-1633-PHX-NVW;
2:08-CV-1728-PHX-NVW

16 Don ADDINGTON, *et al.*,
17 *Plaintiffs,*
18 vs.
19 Steven H. BRADFORD, *et al.*,
20 *Defendants.*

**PLAINTIFFS' MOTION FOR
PROTECTIVE ORDER DIRECTING
DEFENDANT'S COUNSEL TO RESPECT
ER 4.2 AND ABSTAIN FROM EX PARTE
CONTACT WITH MEMBERS OF THE
WEST PILOT CLASS**

21 Plaintiffs Don ADDINGTON, John BOSTIC, Mark BURMAN, Afshin
22 IRANPOUR, Roger VELEZ, and Steve WARGOCKI, on behalf of the West
23 Pilot Class, regretfully file *Plaintiffs' Motion for Protective Order Directing*
24 *Defendant's Counsel to Respect ER 4.2 and Abstain from Ex Parte Contact*
25 *With Members of the West Pilot Class* (doc. 272). This motion is necessary
26 because a member of the Seham law firm, attorney George Diamantopoulos,
27 contacted West Pilot Ted Phipps to question him about the subject matter of
28

1 this litigation. This motion is supported by the Memorandum of Points and
2 Authorities that follows.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. FACTUAL BASIS FOR MOTION**

5 Ted C. Phipps is a West Pilot. Mr. Phipps authored an affidavit
6 concerning his attempt to represent the Phoenix based members of USAPA,
7 that was filed in this matter as document 64-5. George Diamantopoulos is an
8 associate attorney with the Seham law firm.¹ Although he was admitted to
9 the New York bar in 1991, he is neither admitted in Arizona nor has *pro hac*
10 *vice* status.

11 On Sunday March 22, 2009, Mr. Diamantopoulos placed a telephone call to
12 Mr. Phipps. This telephone call is described in detail in an email sent by Mr.
13 Phipps to Plaintiffs' counsel Katie Brown that states as follows:

14 An attorney by the name of George Diamantopoulos called me this
15 weekend to discuss the upcoming USAPA trial. The cell phone
16 communication was somewhat weak as he quickly stated the name
17 of his firm. Not understanding him, I said something to the effect,
18 "So you're working with the firm I did the affidavit with;" to which
19 he replied, 'yes, but I'm new to the case and have been asked to
20 interview witnesses." He clearly knew that I was under the
21 impression that I thought he was working with your firm and that
22 he represented the interests of the West pilots. At no time did he do
23 anything to correction this misconception. After talking to him for
24 about an hour he started to drop clues that lead me to believe he
25 was not who he represented himself to be. I asked him again for
26 the name of his firm and he restated that he was contracted to do
27 witness interviews. Sensing the vagueness of his response I asked,
28 "Did the Seham firm hire you?" to which he confessed, "yes." After
unveiling his true colors I told him that what he did was
inappropriate. I reminded him that everything I discussed is in the
affidavit and already a matter of record. He asked if he could call
back and I said, "Sure, I guess it doesn't matter now." After I hung
up I thought twice about allowing him to call back, so I quickly
redialed his number to tell not to call; however, he did not answer.

<< REDACTED >>

¹ <http://www.martindale.com/George-Diamantopoulos/443800-lawyer.htm>

1 I you have a moment, could you please email me a copy of the
2 affidavit that I signed.

3 (Ted Phipps Email (Mar. 23, 2009 8:43 AM) (Copy attached as Ex. A).)

4 On March 22, 2009, at 02:46 PM, Plaintiffs attorney Don Stevens sent
5 an email to Defendant's counsel informing them of these events and asking
6 them to "provide a detailed explanation." (Copy attached as Ex. B.) On
7 March 23, 2209, at 01:24 PM, when no explanation was forthcoming, Mr.
8 Stevens sent a second email informing them that Plaintiffs would be filing
9 this motion. (Copy attached as Ex. C.)

10 II. LEGAL ARGUMENT

11 A. Attorneys in this Court are Subject to Arizona ERs 4.1, 4.2 and 5.1.

12 The conduct of attorneys in this Court is governed by the Arizona Rules of
13 Professional Responsibility. L.R. Civ. 83.2(e). In Arizona, there is a "no
14 contact" rule: "In representing a client, a lawyer shall not communicate about
15 the subject of the representation with a party the lawyer knows to be
16 represented by another lawyer in the matter, unless the lawyer has the
17 consent of the other lawyer or is authorized by law to do so." Ariz. E.R. 4.2.
18 There is also a duty to not mislead third parties: "In the course of
19 representing a client a lawyer shall not knowingly ... make a false statement
20 of material fact or law to a third person...." Ariz. E.R. 4.1(a). Finally, a
21 partner is responsible to ensure that an associate complies with these rules:

22 (c) A lawyer shall be responsible for another lawyer's violation of
the Rules of Professional Conduct if:

23 (1) the lawyer orders or, with knowledge of the specific conduct,
24 ratifies the conduct involved; or

25 (2) the lawyer is a partner or has comparable managerial
26 authority in the law firm in which the other lawyer practices, or
27 has direct supervisory authority over the other lawyer, and
28 knows of the conduct at a time when its consequences can be
avoided or mitigated but fails to take reasonable remedial action.

Ariz. E.R. 5.1(c).

1 **B. Mr. Phipps is Represented for Purposes of ER 4.2.**

2 After a class has been certified, all class members are treated as
3 represented for purposes of the “no contact” rule. *See, e.g., Fulco v. Cont’l*
4 *Cablevision, Inc.*, 789 F. Supp. 45, 47 (D. Mass. 1992) (“After the class has
5 been certified, defendants’ counsel must treat the unnamed class members as
6 ‘represented by’ the class counsel...”); *Bower v. Bunker Hill Co.*, 689 F. Supp.
7 1032, 1033 (E.D. Wash. 1985) (“defense counsel may not communicate with
8 any class member with respect to matters which are the subject of [the]
9 litigation without prior consent of class counsel or [the] court.”); *Manual for*
10 *Complex Litig.* (4th ed.) § 21.33, at 300 (2004) (“Once a class is certified, the
11 rules governing communications apply as though each class member is a
12 client of class counsel.”); *Restatement (3d) of the Law Governing Lawyers* §
13 99 cmt. 1 (2000) (“considered clients of the lawyer for the class.”). In addition
14 to being represented on the basis of class membership, eighteen West Pilots
15 are represented as defendants in a related litigation filed by USAPA last year
16 in North Carolina.

17 **C. ERs 4.1 and 4.2 were Violated.**

18 Mr. Diamantopoulos violated ER 4.2 by contacting Mr. Phipps to discuss
19 his affidavit and trial testimony. He violated ER 4.1 by misrepresenting that
20 he was an attorney for Plaintiffs. It appears that Mr. Seham and/or others
21 responsible for associates at the Seham law firm violated ER 5.1 by directing
22 these actions. Any further contact by the Seham law firm or anyone acting
23 on their behalf, whether an attorney or not, *see* Ariz. ER 8.4(a), is
24 unacceptable.

25 **D. This Court Has Authority to Sanction.**

26 The local rules provide that this Court can respond to violation of the
27 Rules of Professional Responsibility in a number of ways. L.R. Civ. 83.1(f)(2).
28

1 Reserving the right to seek additional sanctions later, Plaintiffs at this time
2 ask that the Court order Defendant's counsel:

3 (1) to regard all members of the West Pilot class as represented by
4 counsel for purposes of the E.R. 4.2 no contact rule;

5 (2) to abstain from *ex parte* contact with all members of the West
6 Pilot class for the duration of this litigation;

7 and

8 (3) to immediately and fully disclose to Plaintiffs and this Court
9 all *ex parte* communications they, or others acting on their
10 behalf, have had with members of the West Pilot class since
11 the class was certified on March 10, 2009, including full
12 production of any and all notes and memoranda based on such
13 communications.

14 **III. CONCLUSION**

15 Because Defendant's counsel overtly violated ER 4.2, Plaintiffs ask the
16 Court to enter an order as set out above and in the proposed form of order
17 filed herewith.

18 Dated this 23d day of March, 2009.

19 **Polsinelli Shughart, P.C.**

20 */s/ Andrew S. Jacob*
21 By: _____
22 Marty Harper
23 Kelly Flood
24 Andrew S. Jacob
25 Security Title Plaza
26 3636 N. Central Ave., Suite 1200
27 Phoenix, AZ 85012
28 *Attorneys for Plaintiffs*

CERTIFICATE OF SERVICE

I hereby certify that on March 23d, 2009, I electronically transmitted the
foregoing document to the U.S. District Court Clerk's Office by using the
CM/ECF System for filing and transmittal of a Notice of Electronic Filing.

s/ Andrew S. Jacob