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

10 Don ADDINGTON; John BOSTIC; Mark
BURMAN; Afshin IRANPOUR; Roger
11 VELEZ; and Steve WARGOCKI,

12 Plaintiffs,

13 vs.

14 US AIRLINE PILOTS ASSOCIATION,
US AIRWAYS, INC.,

15 Defendants,

Case No. 2:08-cv-1633-PHX-NVW
(Consolidated)

**DEFENDANT USAPA'S
MEMORANDUM IN OPPOSITION
TO PLAINTIFFS' MOTION TO
COMPEL USAPA OFFICERS TO
APPEAR FOR TRIAL**

16 Don ADDINGTON; John BOSTIC; Mark
BURMAN; Afshin IRANPOUR; Roger
17 VELEZ; and Steve WARGOCKI,

18 Plaintiffs,

19 vs.

20 Steven H. BRADFORD, Paul J. DIORIO,
Robert A. FREAR, Mark. W. KING,
Douglas L. MOWERY, and John A.
STEPHAN,

21 Defendants.

Case No. 2:08-cv-1728-PHX-NVW

1 Defendant, US Airline Pilots Association (“USAPA”), by its undersigned
2 attorneys, submits this memorandum in opposition to Plaintiffs’ Motion for Order
3 Compelling USAPA Officers to Appear for Trial.

4 Plaintiffs seek an order compelling the appearance of Stephen Bradford, Mark
5 King, Mike Cleary, Scott Theuer, Robert Davison, Randy Mowrey, and Doug Mowery
6 at trial on April 28, 2009. For the following reasons, Plaintiffs’ motion should be
7 denied.

8 1. The Court Requires That Trial Witnesses Be Subpoenaed

9 Pursuant to Section E(3) of the Joint Pretrial Orders, the Court required the
10 parties to certify that “[e]ach party understands that it is responsible for ensuring that the
11 witnesses it wishes to call to testify are subpoenaed.” (Dkt. Nos. 356, 358). Now,
12 however, the Plaintiffs seek to avoid their obligation to subpoena witnesses, and instead
13 attempt to compel the appearance of witnesses by a method that was not sought by
14 Plaintiffs, not agreed to by the parties, not ordered by this Court, and not sanctioned by
15 Fed. R. Civ. P. 45. The Court did not offer to assist the Plaintiffs in compelling the
16 appearance of their witnesses. Rather the Court required both parties to ensure that any
17 witnesses are subpoenaed. Thus, there is no basis for Plaintiffs’ motion.

18 Plaintiffs’ reliance on a non-binding district court case, *Fausto v. Credigy*
19 *Services Corp.*, 2009 WL 701012 (N.D. Cal. Mar. 11, 2009) does not overcome their
20 obligation in this case to subpoena any witnesses that they may wish to call. Further,
21 *Fausto* is distinguishable on the grounds that, in that case, the witness sought to be
22

1 compelled to appear at trial (Williams) was a corporate officer of the defendant Credigy,
2 “and was one of Fed. R. Civ. P. 30(b)(6) corporate representatives for Credigy’s
3 depositions.” *Id.* at *1. Based on the witness’ status as corporate officer and 30(b)(6)
4 representative, the court in *Fausto* concluded that “the subpoena requirement of Rule 45
5 does not apply to Williams.” *Id.* None of the witnesses sought to be compelled to
6 appear by Plaintiffs were 30(b)(6) representatives on behalf of USAPA.

7 2. The Court Cannot Compel The Appearance Of
8 Witnesses Who Are Not Officers Of USAPA

9 The only case cited by the Plaintiffs, *Fausto v. Credigy Services Corp.*, 2009 WL
10 701012 (N.D. Cal. Mar. 11, 2009) stands for the proposition that the subpoena
11 requirement of Rule 45 does not apply to a witness who is an officer of a party and who
12 appeared as a Rule 30(b)(6) deposition witness. This is consistent with Rule
13 45(c)(3)(A)(ii), which provides that the court must quash or modify a subpoena that
14 “requires a person who is neither a party nor a party’s officer to travel more than 100
15 miles from where that person resides, is employed, or regularly transacts business in
16 person.” However, neither *Fausto* nor Rule 45 provides authority for the court to
17 compel the appearance of witnesses who are not officers of a party.

18 On April 14th, counsel for Plaintiffs asked USAPA counsel whether USAPA
19 would accept service of subpoenas on behalf of Stephen Bradford, Mark King, Scott
20 Theuer, Randy Mowrey, Robert Davison, Doug Mowery, and Mike Cleary. (Granath
21 Decl., Attachment 1). In response, counsel for USAPA advised Plaintiffs’ counsel that
22 USAPA would accept trial subpoenas for current officers of USAPA (President Mike

1 Cleary, and Vice-President Randy Mowrey),¹ provided that travel and witness fees
2 accompany the subpoenas. (Granath Decl., Attachment 3). USAPA did not agree – and
3 was not obligated to agree – to accept subpoenas on behalf of Stephen Bradford or Mark
4 King, who, as of April 18, 2009, are no longer officers of USAPA, or Scott Theuer,
5 Robert Davison, or Doug Mowery, who are not officers of USAPA.

6 3. Plaintiffs’ Motion Cannot Excuse Their Failure
7 to Comply With Fed. R. Civ. P. 45

8 Plaintiffs’ motion cannot excuse their failure to comply with Rule 45. In
9 attempting to serve subpoenas on Stephen Bradford, Robert Davison, and Doug
10 Mowery, Plaintiffs have failed to comply with Rule 45 in three respects:

11 1. Failure to Sign Subpoena

12 Rule 45(a)(3)(A) provides that “[a]n attorney also may issue and sign a subpoena
13 as an officer of a court in which the attorney is authorized to practice.” An attorney
14 issuing a subpoena in federal court is acting as an officer of the court. *Highland Tank &*
15 *Manufacturing Co. v. PS Intern, Inc.*, 227 F.R.D. 374, 380 (W.D. Pa. 2005) (subpoena
16 issued by an attorney has the same force and effect as one issued by the clerk); *U.S. v.*
17 *Santiago-Lugo*, 904 F. Supp. 43, 46 (D.P.R. 1995). To be effective, the subpoena must
18 be signed by the issuing attorney. *Atlantic Inv. Management, LLC v. Millennium Fund*
19 *I, Ltd.*, 212 F.R.D. 395, 397 (N.D. Ill. 2002). No waiver of the signature requirement

20
21 ¹ USAPA recently conducted internal elections, which resulted in four new officers (President
22 Mike Cleary, Vice President Randy Mowrey, Executive Vice President Dave Ciabattoni, and
Secretary-Treasurer Rob Streble) taking office effective April 18, 2009.

1 has occurred. *See id.*

2 The subpoenas issued by Plaintiffs' counsel for service on Bradford, Randy
3 Mowrey, Davison, Theuer, Cleary, and Doug Mowery were not signed by Plaintiffs'
4 counsel. Therefore, pursuant to Rule 45(a)(3)(A), these subpoenas are invalid and
5 should be quashed.

6 2. Failure to Tender Attendance and Mileage Fees

7 The subpoenas that the Plaintiffs attempted to serve on Stephen Bradford, Robert
8 Davison, and Doug Mowery are not valid because they were not served with the
9 required fees for one day's attendance and the mileage allowed by law.

10 Rule 45(b)(1) provides that "[s]erving a subpoena requires delivering a copy to
11 the named person and, if the subpoena requires that person's attendance, tendering the
12 fees for 1 day's attendance and the mileage allowed by law."² Failure to simultaneously
13 tender witness fees and mileage allowances invalidates the service. *CF&I Corp. v.*
14 *Mitsui & Co., Inc.*, 713 F.2d 494, 496 (9th Cir. 1983) ("the plain meaning of Rule 45(c)
15 requires simultaneous tendering of witness fees and the reasonably estimated mileage
16 allowed by law with service of a subpoena"); *First Card v. Rory Dean Hunt*, 238 F.3d
17 1098, 1100 (9th Cir. 2001) (noting that bankruptcy court quashed subpoena that was not
18 served with the witness fee and mileage); *San Francisco Bay Area Rapid Transit*

19 _____
20 ² The required attendance fee is set forth in 28 U.S.C. § 1821(b). When travel is by "common
21 carrier," the witness "shall be paid for the actual expenses of travel on the basis of the means of
22 transportation reasonably utilized and the distance necessarily traveled to and from such
witness's residence by the shortest practical route in going to and returning from the place of
attendance." 28 U.S.C. § 1821(c)(1).

1 *District v. Spencer*, 2006 U.S. Dist. LEXIS 73140, *2-3 (N.D.Cal. Sept. 25, 2006)
2 (granting motion to quash because subpoenas were not accompanied by tender of
3 witness fees); *Kwong Mei Lan Mirana v. Battery Tai-Shing Corp.*, 2009 U.S. Dist.
4 LEXIS 12212, *3-4 (N.D.Cal. Feb. 5, 2009) (granting motion to quash because of
5 failure to tender witness fees with the subpoenas); *In re Hunt*, 238 F.3d 1098, 1100 (9th
6 Cir. 2001) (subpoena quashed because service of subpoena was not accompanied by
7 tender of witness fees and mileage); *In re Dennis*, 330 F.3d 696, 704-05 (5th Cir. 2003)
8 (Rule 45(b)(1) requires simultaneous tendering of witness fees and the reasonable
9 estimated mileage allowed by law with service of a subpoena; mileage may not be
10 precise, only reasonable estimate).

11 3. Service Outside the Jurisdiction of the Court

12 The subpoenas that the Plaintiffs attempted to serve on Stephen Bradford, Robert
13 Davison, and Doug Mowery were served outside the Court's subpoena power. Rule
14 45(b)(2)(B) permits a subpoena to be served outside the district of the issuing court "but
15 within 100 miles of the place specified for the ... trial...." Service on Bradford,
16 Davison, and Doug Mowery was attempted at their residences in Pennsylvania and
17 Florida, which are not within 100 miles of the place specified for the trial. There is no
18 federal statute that would allow an exception to this rule under Rule 45(b)(2)(D).

1 **Conclusion**

2 USAPA respectfully requests that the Court issue an order denying Plaintiffs'
3 Motion for Order Compelling USAPA Officers to Appear for Trial.

4 Respectfully Submitted,

5 Dated: April 22, 2009

6 By: /s/ Nicholas P. Granath, Esq.

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17 *Attorneys for Defendant*
18 *US Airline Pilots Association*

1 **CERTIFICATE OF SERVICE**

2 This is to certify that on the date indicated herein below true and accurate copies
3 of the foregoing documents and their attachments, *to wit*,

- 4 • Defendant USAPA’s Memorandum in Opposition to Plaintiffs’ Motion to Compel
5 USAPA Officers to Appear for Trial;
- Certificate of Service

6 were electronically filed with the Clerk of Court using the CM/ECF system, which
7 will send notification of such filing to all admitted counsel who have registered with
8 the ECF system, including but not limited, to:

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10 Further, I certify that paper hard copies shall be provided to The Honorable Neil
11 V. Wake, District Court Judge, 401 W. Washington Street, SPC 52, Phoenix, AZ 85003.

12 On April 22, 2009, by:

13 */s/ Nicholas Paul Granath, Esq.*