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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
VELEZ; and Steve WARGOCKI,

11 Plaintiffs,

12 vs.

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

14 Defendants,

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

ROBERT DAVISON'S
NOTICE OF MOTION, MOTION, AND
MEMORANDUM IN SUPPORT OF
MOTION TO QUASH SUBPOENA

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

17 Plaintiffs,

18 vs.

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

21 Defendants.

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

1 **NOTICE**

2 PLEASE TAKE NOTICE that Robert Davison, by and through his undersigned
3 attorneys, requests that this Court issue an order pursuant to Fed. R. Civ. P. 45,
4 quashing the subpoena that the Plaintiffs attempted to serve on him.

5 **MOTION**

6 Pursuant to Fed. R. Civ. P. 45(a)(3)(A) (failure to sign subpoena), 45(b)(1)
7 (failure to tender attendance and mileage fees), and 45(b)(2) (service outside the
8 jurisdiction of the Court), Robert Davison hereby moves to quash the subpoena that the
9 Plaintiffs attempted to serve on him.

10 **MEMORANDUM OF POINTS AND**
11 **AUTHORITIES IN SUPPORT OF MOTION**

12 Plaintiffs have attempted to serve a subpoena on Robert Davison in order to
13 compel him to appear at the trial of this action on April 28, 2009. However, as
14 explained below, this subpoena is invalid as a matter of law and must be quashed.

15 **A. Standard on Motion to Quash.**

16 A subpoena recipient may move to quash a subpoena in the court from which the
17 subpoena was issued. *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 729 n.3 (8th
18 Cir. 2002). The court may quash the subpoena if it finds the subpoena to be
19 objectionable. *Stock v. Integrated Health Plan, Inc.*, 241 F.R.D. 618 (S.D. Ill. 2007)
20 (court has wide discretion as to what is objectionable).

21 **B. Duty to Avoid Causing Undue Burden.**

22 An attorney issuing a subpoena has a duty to avoid causing undue burden or

1 expense on the recipient. *Northwestern Memorial Hospital v. Ashcroft*, 362 F.3d 923,
2 938 (7th Cir. 2004); *FDIC v. Garner*, 126 F.3d 1138, 1145 (9th Cir. 1997); *Liberty*
3 *Mutual Insurance Company v. Diamante*, 194 F.R.D. 20, 23 (D. Mass. 2000) (good
4 faith is not sufficient, but rather the issue is whether the issuing party took reasonable
5 steps to avoid imposing undue burden or expense on the persons subject to subpoena).

6 If compliance with a subpoena would cause undue burden or expense, the court
7 issuing a subpoena should shift some or all of the cost to the party issuing the subpoena
8 or otherwise provide for reasonable compensation. The compensation may include
9 wages lost because of the improperly issued subpoena, and may also include attorney's
10 fees. *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792, 814 (9th Cir. 2003).

11 **C. Grounds for Quashing Subpoena.**

12 Robert Davison submits that the subpoena should be quashed for the following
13 reasons:

14 **1) Failure to Tender Attendance and Mileage Fees.**

15 The subpoena that the Plaintiffs attempted to serve on Robert Davison (See Doc.
16 # 330) is not valid because it was not served with the required fees for one day's
17 attendance and the mileage allowed by law. (Davison Decl. ¶ 3).

18 Rule 45(b)(1) provides that "[s]erving a subpoena requires delivering a copy to
19 the named person and, if the subpoena requires that person's attendance, tendering the
20 fees for 1 day's attendance and the mileage allowed by law."

21 The required attendance fee is set forth in 28 U.S.C. § 1821(b). When travel is by
22

1 “common carrier,” the witness “shall be paid for the actual expenses of travel on the basis of
2 the means of transportation reasonably utilized and the distance necessarily traveled to and
3 from such witness’s residence by the shortest practical route in going to and returning from the
4 place of attendance.” 28 U.S.C. § 1821(c)(1).

5 Failure to simultaneously tender witness fees and mileage allowances invalidates
6 the service as a matter of law. *CF&I Corp. v. Mitsui & Co., Inc.*, 713 F.2d 494, 496 (9th
7 Cir. 1983) (“the plain meaning of Rule 45(c) requires simultaneous tendering of witness
8 fees and the reasonably estimated mileage allowed by law with service of a subpoena”);
9 *First Card v. Rory Dean Hunt*, 238 F.3d 1098, 1100 (9th Cir. 2001) (noting that
10 bankruptcy court quashed subpoena that was not served with the witness fee and
11 mileage); *San Francisco Bay Area Rapid Transit District v. Spencer*, 2006 U.S. Dist.
12 LEXIS 73140, *2-3 (N.D.Cal. Sept. 25, 2006) (granting motion to quash because
13 subpoenas were not accompanied by tender of witness fees); *Kwong Mei Lan Mirana v.*
14 *Battery Tai-Shing Corp.*, 2009 U.S. Dist. LEXIS 12212, *3-4 (N.D.Cal. Feb. 5, 2009)
15 (granting motion to quash because of failure to tender witness fees with the subpoenas);
16 *In re Hunt*, 238 F.3d 1098, 1100 (9th Cir. 2001) (subpoena quashed because service not
17 accompanied by witness fee and mileage); *In re Dennis*, 330 F.3d 696, 704-05 (5th Cir.
18 2003) (Rule 45(b)(1) requires simultaneous tendering of witness fees and the reasonable
19 estimated mileage allowed by law with service of a subpoena; mileage may not be
20 precise, only reasonable estimate).

1 **2) Service Outside the Jurisdiction of the Court.**

2 The subpoena that the Plaintiffs attempted to serve on Robert Davison was
3 served outside the issuing court's (i.e. this Court's) subpoena power.

4 Rule 45(b)(2)(B) permits a subpoena to be served outside the district of the
5 issuing court "but within 100 miles of the place specified for the ... trial...."

6 Here, service on Davison was attempted in Pennsylvania (on his wife), which it
7 cannot be disputed is not within 100 miles of the place specified for the trial, Phoenix
8 Arizona. (Mowery Decl. ¶ 3). Here, Davison is neither a party nor an officer. (Davison
9 Decl. ¶ 2). Here, there is no federal statute that would allow an exception to this rule
10 under Rule 45(b)(2)(D).

11 Under these facts, this Court is *required* to quash or modify under Rule
12 45(c)(3)(A): "When Required. On timely motion, the issuing court must quash or
13 modify a subpoena that ... (ii) requires a person who is neither a party nor a party's
14 officer to travel more than 100 miles from where that person resides ..."

15 **3) Failure to Sign Subpoena.**

16 Rule 45(a)(3)(A) provides that "[a]n attorney also may issue and sign a subpoena
17 as an officer of a court in which the attorney is authorized to practice." An attorney
18 issuing a subpoena in federal court is acting as an officer of the court. *Highland Tank &*
19 *Manufacturing Co. v. PS Intern, Inc.*, 227 F.R.D. 374, 380 (W.D. Pa. 2005) (subpoena
20 issued by an attorney has the same force and effect as one issued by the clerk); *U.S. v.*
21 *Santiago-Lugo*, 904 F. Supp. 43, 46 (D.P.R. 1995). To be effective, however, the
22

1 subpoena must be signed by the issuing attorney. *Atlantic Inv. Management, LLC v.*
2 *Millennium Fund I, Ltd.*, 212 F.R.D. 395, 397 (N.D. Ill. 2002).

3 The subpoena issued by Plaintiffs' counsel for service on Mr. Davison was not
4 signed by Plaintiffs' counsel. See, Doc. # 330. And Mr. Davison did nothing to waive
5 the signature requirement. Therefore, pursuant to Rule 45(a)(3)(A), the subpoena is
6 invalid and should be quashed.

7 **4) Lack of Subject Matter Jurisdiction.**

8 The subpoena is also invalid because, as argued by the Defendant in this action,
9 this Court lacks subject matter jurisdiction over the claim. In order to issue a valid,
10 enforceable subpoena, the subpoena must be issued by a court that has subject matter
11 jurisdiction over the action. *Olcott vs. Delaware Flood Co.*, 76 F.3d 1538, 1552 (10th
12 Cir. 1996).

13 **CONCLUSION**

14 Due to Plaintiffs' failure to comply with Rule 45, the subpoena that the Plaintiffs
15 attempted to serve on Robert Davison is invalid and should be quashed. It is
16 respectfully requested that the Court issue an order quashing the subpoena.

1 Respectfully Submitted,

2 Dated: April 22, 2009

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

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14 *Attorneys for Defendant*
15 *US Airline Pilots Association,*
16 *And Witnesses, Stephen Bradford, Robert*
Davison, and Doug Mowery.

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 • Robert Davison’s Notice of Motion, Motion, and Memorandum in Support of
5 Motion to Quash Subpoena;
• 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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Kelly J. Flood	Katie Brown	
KFlood@Polsinelli.com	KVBrown@Polsinelli.com	

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.**