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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)

**DOUG MOWERY'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 Doug Mowery, 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), Doug Mowery 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 Doug Mowery 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 (8<sup>th</sup>  
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 (7<sup>th</sup> Cir. 2004); *FDIC v. Garner*, 126 F.3d 1138, 1145 (9<sup>th</sup> 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 (9<sup>th</sup> Cir. 2003).

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

12 Doug Mowery 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 Doug Mowery (See Doc. #  
16 365) is not valid because it was not served with the required fees for one day's  
17 attendance and the mileage allowed by law. (Mowery 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 (9<sup>th</sup>  
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 (9<sup>th</sup> 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 (9<sup>th</sup> Cir. 2001) (subpoena quashed because service not  
17 accompanied by witness fee and mileage); *In re Dennis*, 330 F.3d 696, 704-05 (5<sup>th</sup> 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 Doug Mowery was served  
3 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 Mowery was attempted in Florida (on his wife), which it cannot  
7 be disputed is not within 100 miles of the place specified for the trial, Phoenix Arizona.  
8 (Mowery Decl. ¶ 3). Here, Mowery is neither a party nor an officer. (Mowery Decl. ¶  
9 2). Here, there is no federal statute that would allow an exception to this rule under  
10 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. Mowery was not  
4 signed by Plaintiffs' counsel. See, Doc. # 365. And Mr. Mowery 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 (10<sup>th</sup>  
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 Doug Mowery is invalid and should be quashed. It is respectfully  
16 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 • Doug Mowery’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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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.**