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

10 Don ADDINGTON, *et al.*,
Plaintiffs,
11 vs.
12 US AIRLINE PILOTS ASSN., *et al.*,
13 Defendants.

CASE NO. 2:08-CV-1633-PHX-NVW
(Consolidated)
**PLAINTIFFS' BRIEF ON THE COURT'S
AUTHORITY TO ORDER STEPHEN
BRADFORD TO APPEAR FOR TRIAL**

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

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

19
20 Plaintiffs file this brief, pursuant to the Court's minute entry of April
21 22, 2009, to provide authority that the Court can, and should, compel Mr.
22 Bradford to attend the trial and provide live testimony. The Court should
23 do so because the central issue in this case is Mr. Bradford's personal
24 motivation for the actions at issue and because, under the widely-recognized
25 majority rule, an officer of a party can be compelled to give live trial
26 testimony regardless that he is served beyond the Rule 45 100-mile limit. In
27 the event the Court declines to compel Mr. Bradford's attendance and
28 Defendant refuses to produce him, the Court should order all of the key

1 documents authored by Mr. Bradford admitted into evidence and should
2 allow Plaintiffs to argue that the jury should draw an adverse inference
3 from his absence. This brief is supported by the Memorandum of Points and
4 Authorities that follows.

5 Memorandum of Points and Authorities

6 The majority rule is that “Rule 45(c)(3)(A)(ii) expands a district court's
7 subpoena power under Rule 45(b)(2)” to *allow* the subpoena “for trial of
8 witnesses who are a party or an officer of a party.” *In re Vioxx Products*
9 *Liability Litigation*, 438 F.Supp.2d 664, 666 (E.D.La. 2006). “Rules 45(b)(2)
10 and 45(c)(3)(A)(ii) ... are generally interpreted as authorizing compelled
11 attendance at trial by means of a subpoena served on a party or an officer of
12 a party outside the district where the issuing court is located and beyond
13 Rule 45(b)(2)(B)'s 100-mile limit.” 23 No. 9 *Federal Litigator* 13, 13 (2008).

14 Referring to *In re Edelman*, 295 F.3d 171, 178 (2d Cir. 2002), a Utah
15 district court explained why the majority view treats a party or an officer of
16 a party differently than an ordinary witness:

17 The majority view is supported by the Second Circuit's observation
18 that “[t]he purpose of the 100 mile exception is to protect such
19 witnesses from being subjected to excessive discovery burdens in
20 litigation in which they have little or no interest.” Parties to a suit
21 have great interest in its outcome; therefore, the purpose behind
22 the 100 mile rule does not apply to them. Further, other parties
23 and the Court have an interest in the appearance of parties at
24 trial, which is a further reason the 100 mile limitation should not
25 apply to parties.

26 *Clark v. Wilkin*, 2008 WL 648542, 1 (D. Utah 2008).

27 It would completely gut the rule and defeat the policy basis for
28 compelling testimony by an officer of a party if a party could evade having
its officers subpoenaed by taking them out of office on the eve of the trial.
Yet, that is precisely what Defendant here is attempting to do.

1 “On April 14th, ... counsel for USAPA advised Plaintiffs’ counsel that
2 USAPA would accept trial subpoenas for current officers of USAPA.”
3 *Response*, 3:17-22 (Apr. 22, 2009) (doc. 371). Indeed, on April 14, 2009, Mr.
4 Bradford was USAPA’s President. (*Id.*) USAPA claims now that on April
5 18—a mere 10 days before trial—it replaced Mr. Bradford as President. The
6 motive for replacing Mr. Bradford at this time is suspect because according
7 to the USAPA Constitution § 7(A), “[t]he term of office for National Officers
8 ... shall commence on the first day of July.”

9 Moreover, USAPA replaced Mr. Bradford nine days after it learned
10 that it had to re-run the election for his replacement. As the attached
11 decision by the USAPA Appeals Board shows, on April 9, 2009, the Board
12 recommended that USAPA re-run the election for President because,
13 USAPA improperly excluded Captain Schouppaul, a West Pilot, from the
14 ballot. (See Ex. A, attached.) The re-run election itself will not close until
15 May 12, 2009. (See Ex. B., attached.)

16 Even if the Court were to accept that Mr. Bradford is no longer
17 USAPA’s President, this should not be dispositive because his testimony is
18 important because of the role that he personally played when he was
19 President. In a related context, a witness was subject to a subpoena as a
20 party’s officer regardless that he was no longer serving in that position at
21 the time of the trial. *In re Vioxx Products Liability Litigation*, 438
22 F.Supp.2d at 664 (“Prior to serving in his current capacity, Mr. Anstice
23 served as Merck's President of Human Health for the United States. As part
24 of his responsibilities as Merck's President of Human Health for the United
25 States, Mr. Anstice was responsible for the marketing activities and
26 commercial operations of Merck during the time Vioxx was being developed
27 and marketed.”).

28

1 Under the majority rule, a federal court can use its inherent powers to
2 compel a party witness' "attendance at and participation in trial" where it
3 "is essential to a fair adjudication of th[e] action." *Clark*, 2008 WL 648542
4 at 2.

5 [T]he court's inherent power enables the court to order that he
6 appear. He is subject to the jurisdiction of the court, and the
7 litigation requires that he be present. Merits based sanctions
8 might be imposed if he fails to appear, since his absence could
9 affect the presentation of the merits of the case.

10 *Id.*

11 This is surely a proper occasion for the Court to exercise this inherent
12 power because this is a claim of breach of the bad-faith component of a
13 union's duty of fair representation. In such matters, the central issue is the
14 subjective motivation of the union's officials. "Whereas the arbitrariness
15 analysis looks to the objective adequacy of the Union's conduct, the
16 discrimination and bad faith analyses look to the subjective motivation of
17 the Union officials." *Simo v. Union of Needletrades, Indus. & Textile*
18 *Employees, Southwest Dist. Council*, 322 F.3d 602, 618 (9th Cir. 2003). In
19 this case, because Mr. Bradford was the founder and chief proponent of
20 USAPA, his subjective motivation is highly material.¹

21 In conclusion, the Court has ample discretion under the widely-
22 recognized majority rule to compel Mr. Bradford to attend the trial and
23 should do so in this instance in the interest of justice. Should USAPA refuse
24 to produce Mr. Bradford, the Court can and should admit the key documents
25 that he authored and allow Plaintiffs to argue a negative inference to the
26 jury.

27 ¹ Defendant cannot be heard to otherwise complain about procedure. Mr.
28 Bradford was personally served on April 16, 2009. The subpoena for Mr. Bradford was
properly electronically signed. If USAPA requires that Plaintiffs pay Mr. Bradford's
travel expenses, we will promptly do so.

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Dated this 23rd day of April, 2009

POLSINELLI SHUGHART PC

By: /s/
Andrew S. Jacob
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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 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
