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

<p>9 Don ADDINGTON, <i>et al.</i>, 10 Plaintiffs, 11 vs. 12 US AIRLINE PILOTS ASSN., <i>et al.</i>, 13 Defendants.</p>	<p>CASE NO. 2:08-CV-1633-PHX-NVW (Consolidated) PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO COMPEL USAPA OFFICERS TO APPEAR FOR TRIAL</p>
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<p>14 Don ADDINGTON, <i>et al.</i>, 15 Plaintiffs, 16 vs. 17 Steven H. BRADFORD, <i>et al.</i>, 18 Defendants.</p>	<p>Case No. 2:08-CV-1728-PHX-NVW</p>
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 20 Plaintiffs file this *Reply in Support of their Motion to Compel*
 21 *USAPA Officers to Appear for Trial* (doc. 345). Although the Rules do not
 22 provide subpoena power for the Court to compel USAPA Officers to
 23 appear for trial, the Court can accomplish the same end through its
 24 “inherent powers that are governed not by rule or statute but by the
 25 control necessarily vested in courts to manage their own affairs so as to
 26 achieve the orderly and expeditious disposition of cases.” *Unigard Sec.*
 27 *Ins. Co. v. Lakewood Engineering & Mfg. Corp.*, 982 F.2d 363, 368 (9th
 28 Cir. 1992) (internal quotation marks omitted). Indeed, recent

1 amendments to Rule 16 essentially codify these inherent powers. The
2 Court, therefore, can direct USAPA to have persons who were its officers
3 at relevant times appear and, in the event they do not, impose
4 appropriate sanctions on USAPA.

5 **I. THE COURT'S INHERENT POWERS AND RULE 16 ALLOW IT TO ORDER**
6 **USAPA TO PRODUCE ITS RELEVANT OFFICERS.**

7 "Inherent authority remains the means by which [federal] judges
8 deal with circumstances not proscribed or specifically addressed by rule or
9 statute, but which must be addressed to promote the just, speedy, and
10 inexpensive determination of every action." *G. Heileman Brewing Co. v.*
11 *Joseph Oat Corp.*, 871 F.2d 648, 652-53 (7th Cir. 1989); *see generally*
12 *Brockton Sav. Bank v. Peat, Marwick, Mitchell & Co.*, 771 F.2d 5, 11 (1st
13 Cir. 1985) (explaining that "the rules of civil procedure do not completely
14 describe and limit the power of district courts").

15 This inherent power takes many forms. See Fed.R.Civ.P. 83(b)
16 (providing that judges may regulate practice in any manner
17 consistent with federal law and applicable rules). By way of
18 illustration, **a district court may use its inherent power to
compel represented clients to attend pretrial settlement
conferences**, even though such a practice is not specifically
authorized in the Civil Rules.

19 Of course, a district court's inherent powers are not infinite.
20 There are at least four limiting principles. First, inherent
21 powers must be used in a way reasonably suited to the
22 enhancement of the court's processes, including the orderly and
23 expeditious disposition of pending cases. Second, inherent
24 powers cannot be exercised in a manner that contradicts an
applicable statute or rule. Third, the use of inherent powers
must comport with procedural fairness. And, finally, inherent
powers must be exercised with restraint and discretion.

25 *In re Atlantic Pipe Corp.*, 304 F.3d 135, 143 (1st Cir. 2002) (citations and
26 quotation marks omitted, emphasis added).

27 With its 1993 amendments, Rule 16(c)(1) more specifically addresses
28 the court's power to compel action by a party's officers or representatives.

1 The comments explain that in the context of a settlement proceeding, the
2 court can order participation by “an officer of a corporate party.” Fed. R.
3 Civ. P. 16 adv. cmt. n. 1993 amendment subdivision (c). The Rule also
4 provides that “the court may consider and take appropriate action ...
5 adopting special procedures for managing potentially difficult or
6 protracted actions that may involve complex issues, multiple parties,
7 difficult legal questions, or unusual proof problems ... [and] facilitating in
8 other ways the just, speedy, and inexpensive disposition of the action.”
9 *Id.* 16(c)(2)(L) & (P).

10 The language quoted above from Rule 16 indicates that there is
11 considerable overlap between the powers provided by that language and
12 the court’s traditional inherent powers. This does not limit the court’s
13 powers because “inherent power of a court can be invoked even if
14 procedural rules exist which sanction the same conduct.” *Chambers v.*
15 *NASCO, Inc.*, 501 U.S. 32, 49 (1991).

16 Hence, subject to the limits recognized in *Atlantic Pipe (supra)* the
17 Court has broad powers to compel the parties here to take reasonable
18 steps to facilitate a fair decision on the merits.

19 **II. THE COURT SHOULD COMPEL USAPA TO PRODUCE ITS RELEVANT** 20 **OFFICERS AT TRIAL OR RISK SANCTIONS.**

21 At least one court has held that a federal court can use its “inherent
22 powers” to compel a party witness’ “attendance at and participation in
23 trial” where it “is essential to a fair adjudication of th[e] action.” *Clark v.*
24 *Wilkin*, 2008 WL 648542, *1 (D. Utah 2008).

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

Id.

1 Other courts have used Rule 16 combined with their inherent power
2 to compel parties to participate in summary trials and to compel party
3 officers or similar representatives to attend settlement proceedings. *See*
4 *Covington v. Patriot Motorcycles Corp.*, 2008 WL 1971388 (D. Ariz. May
5 2, 2008). In *Covington*, Judge Martone explained, “Federal judges have
6 the inherent authority to enforce Rule 16 settlement conference orders ‘to
7 preserve the efficiency, and more importantly the integrity, of the judicial
8 process.” *Id.* at *1 (quoting *G. Heileman Brewing Co. v. Joseph Oat*
9 *Corp.*, 871 F.2d 648, 652 (7th Cir. 1989).

10 There is no logical reason, if Rule 16 and inherent powers allow
11 courts to compel parties to attend trials and party officials to attend
12 settlement proceedings, that they do not allow courts to compel party
13 officials to attend trials. The question then is whether the circumstances
14 here justify such exercise of power. There is ample justification here,
15 considering the circumstances under which Mr. Bradford would evade
16 appearing at this trial.

17 Before considering how Mr. Bradford would evade appearing,
18 Plaintiffs remind the Court of his importance to this case. This case
19 claims bad-faith unfair representation. As such, it will turn on whether
20 USAPA acted with an improper motive. In such matters, the central
21 issue is “the subjective motivation of the Union officials.” *Simo v. Union*
22 *of Needletrades, Indus. & Textile Employees, Southwest Dist. Council*,
23 322 F.3d 602, 618 (9th Cir. 2003). In this case, the key union official was
24 Mr. Bradford, the founder, chief proponent, and first president of USAPA.
25 His subjective motivation, therefore, is highly material.

26 USAPA makes a proverbial mockery of this case by refusing to
27 produce Mr. Bradford because he ought to be treated as both a party and
28 an officer of a party. In dismissing the claim brought individually against

1 Mr. Bradford in case No. 2:08-CV-1728-PHX-NVW, the Court recognized
2 that it had personal jurisdiction over Mr. Bradford. *Order* 4:27-28 (Dec.
3 24, 2008) (doc. 118). The claim was preempted because, in essence, Mr.
4 Bradford was the union. Now, on the eve of trial, USAPA wants him
5 treated as a non-party.

6 It almost defies belief that USAPA thinks it can get away with its
7 plan. On April 14, 2009, “counsel for USAPA advised Plaintiffs’ counsel
8 that USAPA would accept trial subpoenas for current officers of USAPA,”
9 and Mr. Bradford was USAPA’s President. *Response*, 3:17-22 (Apr. 22,
10 2009) (doc. 371). USAPA’s constitution provides that “[t]he term of office
11 for National Officers ... shall commence on the first day of July.” USAPA
12 Const. § 7(A). Although an election had just been held for president,
13 therefore, Plaintiffs had no reason to question that Mr. Bradford still was
14 and would be President through the end of the trial.

15 USAPA claims, however, that on April 18—a mere 10 days before
16 trial—Mr. Cleary replaced Mr. Bradford as President. Not only was this
17 premature, occurring nearly three months before Mr. Cleary’s term ought
18 to have begun but it is highly suspect. Indeed, USAPA admits that Mr.
19 Cleary’s election is invalid. USAPA has known since April 9 that it must
20 re-run this election because it improperly excluded a West Pilot from the
21 ballot.

22 The attached decision by the USAPA Appeals Board shows that, on
23 April 9, 2009, it recommended USAPA re-run the election because it
24 improperly excluded Captain Schouppaul, a West Pilot, from the ballot.
25 (See Ex. A, attached.) The re-run election has started but will not close
26 until May 12, 2009. (See Ex. B., attached.) Plaintiffs surely need not
27 comment further. The Court must disregard these crude efforts and treat
28 Mr. Bradford as USAPA President for purposes of deciding this motion.

1 The Court's decision on whether to exercise its inherent and Rule 16
2 powers to compel USAPA to produce Mr. Bradford should rest on two
3 considerations: (1) his importance to the action and (2) USAPA's improper
4 efforts to distance Mr. Bradford from the trial. Based on such
5 considerations, the Court should find that it is necessary and proper for it
6 to order USAPA to produce Mr. Bradford at trial and impose sanctions if
7 USAPA fails to comply.

8 **III. CONCLUSION**

9 The Court has both inherent and Rule 16 powers to order USAPA to
10 produce MR. Bradford for trial. The relevant considerations mandate
11 that it do so. Should USAPA fail to comply, the Court can and should
12 impose the following sanctions: (1) allow Plaintiffs to admit documents
13 authored by Mr. Bradford; (2) deny Defendant all opportunity to admit
14 any such documents; (3) deny Defendant all opportunity to admit other
15 evidence that Mr. Bradford could testify to directly; and (4) allow
16 Plaintiffs to argue a negative inference from Mr. Bradford's absence to the
17 jury.

18 Dated this 26th day of April, 2009

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20
21 By: /s/
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26 **CERTIFICATE OF SERVICE**

27 I hereby certify that on April 26, 2009, I electronically transmitted
28 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
